VANDERBILT LAW SCHOOL
APR 17 1968
LIBRARY

VANDERBILT LAW SCHOOL
APR 17 1968
LIBRARY

New Zealand
Law Journal

Incorporating "Butterworth's Fortnightly Notes."

VOLUME V.

March 5, 1929, to February 18, 1930.

VANDERBILT LAW SCHOOL
72302
APR 17 1968
LIBRARY

Published by

BUTTERWORTH & CO. (Australia) LTD.

49-51 BALLANCE STREET, WELLINGTON,

N.Z.

New Zealand Law Journal. Volume V.

TABLE OF CONTENTS.

A

Accountancy, Value of Training in 263
Administrative Law 412
Adultery, Proof of 401
Affidavits, Fees on 347
Anglo-German Convention 367
Anonymous Juries 265
Appeals to Privy Council 204
Assignment of Choses in Action—"Senior Counsel" 170
of Part of Debt, Effect of 256
Attorney-General, The New 254
Auckland District Law Society: Annual Meeting 16
Audit of Trust Accounts 138
Australian Notes—Wilfred Blacket, K.C. 126, 157, 189, 221, 253, 283, 316, 348, 397

B

Bacon, Sir Nicholas 296
Barrister, Profession of in New Zealand—A. H. Johnstone 83
Bench and Bar, 13, 27, 111, 125, 143, 158, 206, 222, 238, 270, 301, 332, 349, 378, 398, 415
Bicycle in Law 414
Bills Before Parliament, 207, 224, 239, 255, 271, 288, 303, 319, 335
Bureaucracy, The Rise of 350
Burnard v. Lysnar 249

C

Campbell's "Lives" 398
Canterbury College Law Students' Society 112, 176
Chance, The Element of 209
Change of Christian Name 170
Chief Justice, The New 122
The Office of 113
Choses in Action, Assignment of—Senior Counsel 170
Christian Name, Change of 170
Closing Year, The 353
Cold Courts 271
Collection of Moneys Paid into Magistrates' Courts 174
Colonial Service, Law and the 145
Commercial Contracts 219
Documents 281
Company, The Formation of a 376
Company Law, Private—W. M. Hamilton .. 370
Consolidation of Statutes 330, 349
Correspondence—
re Batchelor 141
Collection of Moneys Paid into Magistrates' Courts 174
Crown Witnesses 315
District Courts 223
Divorce or Dissolution? 141, 156
Effect of Assignment of Part of Debt 256
Fees on Affidavits 347
Lawyers as Custodians of the Law 256
Legal Education 192
Native Trustee and Solicitors' Fees 128
Privilege of Communications between Solicitor and Client 32
Quashing of Special Orders 236, 302
Rulings of New Zealand Law Society 174
Solicitors in Employ of Government Departments 32
Court of Appeal—
Divisions for 1930 376
Sittings for 1930 347
Court of Arbitration Sittings .. 112, 142, 204, 286
Courts, Cold 271
Courts and Court-houses—A. T. Donnelly .. 88
Crown in Business—R. L. Ziman 62
Departments and Crown Proceedings 415
Witnesses 315
Crime and Morality—W. E. Leicester, LL.B. .. 200

D

"Dangerous Driving," Offence of—S. A. Wiren, B.A., LL.B. 154
Defences, Reserved 415
Desertion by a Husband—R. H. Mackay .. 185
Despotism, The New 321
Discovery Against the Crown .. 200, 222, 289
District Courts 223
Divorce or Dissolution? 141, 156
Drafting of Legislation 286
Drunkenness—T. E. Maunsell, S.M. 393
Duty of Official Assignees in Bankruptcy—C. H. Weston, LL.B. 232

E

Elective Judiciary, An—P. J. O'Regan 72
Element of Chance 209
English Cases, Recent 216
Etiquette of the Legal Profession—Sir John Findlay, K.C. 54
Exemption from Military Service 193

F

Family Protection Act, 1908—Part II: A. C. Stephens, LL.M. 12, 24, 120, 136
Findlay, Sir John, K.C.M.G., K.C. 368
Fire, Liability for 273
Forensic Fables—
"The Beginner Who Thought He Would Do It Himself" 414
"The Callow Youth, The Brief in the Divorce Court, and the Weeping Lady" 270
"The Careful Lawyer Who Could Not Make Up His Mind" 334
"The Deaf Reporter, The Diligent Young Counsel, and The Glorious Win" 207
"The Elderly Junior Who Had Nothing to Complain of" 223
"The Experienced Judge Who Explained to the Jury The Law Relating to Contributory Negligence" 318
"Mr. Justice Heavyside and the Faithful Clerk" 175
"The Nervous Youth Who Did His Best in The Circumstances" 383
"The Prudent Judge and the Stout Usher" .. 351
"The Silk Who Knew How to Make a Good Show" 287
Formation of a Company 376

G

Germany, Procedure in 272
Great Seal, The 352
Guilty Without Indictment 282

H

Hall, Sir Edward Marshall 382
Hamilton District Law Society—Annual Meeting 109
Husband, Desertion by a—R. H. Mackay .. 185

I

Insurance, Third Party 347

J

Judge, The Good 301
Judge Sitting After Age for Retirement 237
Judicial Appointments 399
Ignorance 140
Slang 153
Judiciary, An Elective—P. J. O'Regan 72
Juries, Anonymous 265
Jurors, Peremptory Challenge of 337

K

King's Counsel 240
Swearing in of New 377

L

Land Transfer Act Fees 396
Land Transfer Mortgages—C. R. Fell, LL.B. .. 264
Land Transfer System 252
Last Word, The 396
Law, Administrative 412
Law and the Colonial Service 145
Laws, Some Queer 333
Law Lords and Their Privileges 158
Law Lordship, Promotion to 319
Law Practitioners Amendment Bill, 284, 319, 369, 373
Law Reports 301, 317
Law Society, Powers and Functions of—G. M. Spence 91
Lawyers as Custodians of the Law 256
Legal Conference, 1929—
Papers:
"Courts and Court-houses"—A. T. Donnelly 88
"Crown in Business: Considered from the Constitutional and Legal Viewpoints"—R. L. Ziman 62
"Elective Judiciary"—P. J. O'Regan .. 72
"Etiquette of the Legal Profession"—Sir John Findlay, K.C. 54
"Functions of the Law Society"—G. M. Spence 91
"Legal Education"—Hon. T. K. Sidey (Attorney-General) 48
"Profession of a Barrister in New Zealand"—A. H. Johnstone 83
"University and the Profession"—Professor J. Adamson 75
Remits:
Actions by and Against the Crown 68
Customary Hire Purchase Agreements .. 100
Legal Holidays 98
No Solicitor under Twenty-five to Practise .. 99
Number of Members of Council of New Zealand Law Society 99
Protection of Mortgagees' Interests Under Fire Insurance Policies 103
Solicitors' Guarantee Fund 57
Statements to Police 80
Taking of Evidence in Maintenance and By-Law Cases 78
Voluntary Removal of Name from Roll .. 99
General:
Civic Reception 46
Discussion on Papers 103
Forthcoming Conference (Editorial) .. 17
Governor-General's Address 61
Preliminary Arrangements 14
Presentation to Conference Secretary .. 107
Programme of Functions and Business .. 28
Second Annual Conference (Editorial) .. 33
Social Functions 108
Votes of Thanks 108
Legal Conference, 1930—
Preliminary Arrangements 394
Legal Conferences 234
Legal Conference Resolutions 169
Legal Education 192
—Hon. T. K. Sidey 48
Legal Education! 120
Legal Literature—
"Analysis of Pollock's Law of Torts," 4th Edn.—J. K. Mannooch 111
"Anson's Principles of the English Law of Contract," 17th Edn.—J. C. Miles and J. L. Brierly 192
"Butterworth's Index to the New Zealand Statutes, 1928"—J. D. Willis 175
"Changes in Company Law"—P. J. Sykes .. 416
"County Court Precedents of Claims"—His Honour Judge McCleary 304
"Crime: The Autobiography of a Crook"—Eddie Guerin 16
"Federal Bankruptcy Law and Practice"—D. C. Robertson and J. B. Tait 159
"Richard Burdon Haldane—An Autobiography" 208
"Justice of the Peace and Local Government Review Annual, 1928"—Albert Lieck .. 144
"Kelly's Draftsman," 7th Edn.—J. A. Reid 384
"Kerr on Fraud and Mistake," 6th Edn.—S. E. Williams 240
"Lord Reading"—C. J. C. Street 144
"Lotteries and the Law"—C. F. Schoolbred .. 111
"Magistrate's Court Practice"—H. Jenner Wily 128
"New Zealand Justices Handbook," 2nd Edn.—W. G. Riddell, S.M. 159
"Paterson's Licensing Acts," 39th Edn.—H. B. Hemming and S. E. Major 352
"Questioned Documents," 2nd Edn.—A. S. Osborn 336
"Redman's Law of Landlord and Tenant," Supplement to 8th Edn.—J. C. Arnold and G. E. Hart 159
"Salmond's Law of Torts," 7th Edn.—W. T. S. Stallybrass 31
"Sim's Divorce and Matrimonial Causes Act and Rules," 4th Edn.—W. J. Sim, LL.B. .. 175
"Stone's Justices' Manual," 61st Edn.—F. B. Dingle 192
"Supplement to Butterworth's Annotations of N.Z. Statutes, 1929" 415
"Willis's Workmen's Compensation Acts," 26th Edn.—W. A. Willis 384
Legal Profession, Etiquette of—Sir John Findlay, K.C. 54
Legal Rights of Pedestrians.. 385

Legislation—
Drafting of 286
of the Day 31
Summary of 380
Tendencies in 345
Legislative Interference 288
Letterheads, The Firm's 345
Liability for Fire 273
Libel, Reasonable Inference in Actions of .. 161
Lie, the Right to 410
Literature and the Law 250
London Letter—
15th January, 1929 30
30th January, 1929 110
14th February, 1929 125
26th February, 1929 141
13th March, 1929 156
27th March, 1929 173
24th April, 1929 188
8th May, 1929 205
22nd May, 1929 219
5th June, 1929 236
19th June, 1929 251
4th July, 1929 269
17th July, 1929 281
1st August, 1929 300
14th August, 1929 314
28th August, 1929 331
12th September, 1929 346
23rd October, 1929 371
6th November, 1929 395
Lord Campbell's "Lives" 398
Lord Chancellor, The New 238
Lord Halsbury—His Life and Times 26, 123, 139, 155, 171, 186, 203, 218, 234
Lotteries 169
Lysnar, Burnard v. 249

M

Magistrates' Courts, Collection of Moneys Paid into 174
Magistrates and the Press 334
and Wigs 235
Methods, Modern 379
Military Service, Exemption from 193
Modern Legal Abuses 223
Methods 379
Myers, Hon. M. 122

N

Name, The Prisoner's 392
Native Trustee and Solicitors' Fees 128
New Books and Publications, 16, 112, 128, 144, 160, 176, 208, 224, 272, 304, 320, 336, 352, 384, 400
New Despotism, The 321
New Zealand Law Society—
Annual Meeting 109
Proceedings of Council—July 5th, 1929 .. 202
—October 4th, 1929 .. 299
—December 3rd, 1929 .. 369
Rulings of 174

O

Offence of "Dangerous Driving"—S. A. Wiren, B.A., LL.B. 154
Office of Chief Justice 113
Official Assignees in Bankruptcy, Duty of—C. H. Weston, LL.B. 232
Official Memoranda 334
Onus of Proof—H. F. von Haast, M.A., LL.B. .. 408

P

Pedestrians, Legal Rights of 385
Peremptory Challenge of Jurors 337
Police Powers and Procedure .. 129, 138, 152, 168
Statements to 237
Pollock, Chief Baron 378
Powers and Functions of the Law Society—G. M. Spence 91
Prisoner's Name, The 392
Private Company Law—W. M. Hamilton.. .. 370
Privilege of Communications between Solicitor and Client 32
of Solicitors 177
Privy Council, Appeals to 204
New Zealand Appeals 317
Right of Appeal to 241
Probation 254
Procedure in Germany 272
Profession—
Etiquette of—Sir John Findlay, K.C. 54
of a Barrister in New Zealand—A. H. Johnstone 83
of the Law 344
The University and the—Professor J. Adamson 75
Professional Discipline—H. F. von Haast, M.A., LL.B. 297, 312, 329
Promotion to Law Lordship 319
Proof, Onus of—H. F. von Haast, M.A., LL.B. .. 408

Q

Quashing of Special Orders 236, 302
Queer Laws, Some 333

R

Rating and Valuation Act 416
Reading the Correspondence 240
Reasonable Inference in Actions of Libel 161
Recent English Cases 216
Redward, E. Y. 142
Reserved Defences 415
Retrospection, A—W. E. Leicester, LL.B. .. 410
Ridley, J.'s Lapse 318
Right of Appeal to Privy Council 241
Right to Interview Witnesses 305
Right to Lie 410
Rise of Bureaucracy 350
Rules and Regulations, 112, 141, 158, 174, 206, 224, 239, 271, 283, 299, 311, 336, 349, 383, 399, 408
Rulings of New Zealand Law Society 174
Rural Intermediate Credit 190, 400

S

Sheriffs' Fees 416
Short Form, A 317
Silence in Court 332
Skerrett. Sir Charles, K.C.M.G. 1, 8, 378
Slang, Judicial 153
Solicitors in Employ of Government Departments 32
Privilege of 177
Solicitors' Fidelity Guarantee Fund, 257, 266, 284, 319, 369, 373
Solicitor's Lien for Costs 367
Southland District Law Society—Annual Meeting 109
Statements to Police 237

Statutes, Consolidation of 330, 349
Success at the Bar 287
Summary of Legislation 380
Supreme Court Sittings for 1931 352
Swearing in of New K.C. 377

T

Tampering with Witnesses—W. E. Leicester, LL.B. 280
Taranaki District Law Society—
Annual Meeting 127
Second Annual Conference 186
Tendencies in Legislation 345
Tenterden, Lord 202
Testator's Family Maintenance 251
Third Party Insurance 347
Three Days a Law Officer 220
Trust Accounts—Audit of 138

U

University and the Profession—Professor J. Adamson 75

V

Verdict-Getting Remark 23
Vexatious Delay for Witnesses 332

W

Wellington District Law Society: Annual Meeting 15
Wellington Law Students' Society 160, 256, 272, 304
"Wife-Beating" 225
Witnesses, Crown 315
Right to Interview 305
Tampering with—W. E. Leicester, LL.B. 280
Vexatious Delay for 332
Word, The Last 396

Y

Year, The Closing 353

TABLE OF CASES REPORTED.

A

A. & B.: Brown v. 364
Ah Dong v. Skinner 131
A. J. Allen, Ltd. v. Ship "Oreti" 407
Algar: Tasker v. 358
Allen, In re 342
Amburys Ltd. v. Boddie 363
Anderson: Harman v. In re Harman 386
Andrews v. Green 362
Archibald v. Union Steamship Co. of N.Z. Ltd. .. 392
Attorney-General (ex Relatione Gould) v. City of Christchurch 162
Attorney-General v. Dunedin Arcade Co. Ltd. .. 194
Attorney-General: Government Life Insurance Commissioner v. 322
Auckland City Corporation v. Dawson 212
Auckland City Corporation v. Harrison 365
Auckland City Corporation v. Hawthorne .. 6
Ayling v. Wellington City Corporation 263

B

Ball v. Scott Timber Co. Ltd. and Others .. 243
Baster v. Commercial Union Assurance Co. Ltd... 277
Bedgood's Will, In re 19
Bernstone and Edginton v. Waihopai River Board and Southland County 310
Black v. McFarlane 308
Blackburn v. Ledger 328
Blair v. Martin 44
Boddie: Amburys Ltd. v. 363
Booth v. Booth and Weir 292
Bovett v. Pearce: In re Pearce 391
Brewster and More v. Commissioner of Stamp Duties 38
Brodrick v. Genge and Public Trustee 19
Brown v. A. & B. 364
Brown v. E. G. Laurie Ltd. (in liquidation) .. 404
Burnard v. Lysnar 242
Busbridge: Nelson City Corporation v. 403
Byrnes: Clutha Development Ltd. v. 343

C

Cantwell v. Wairarapa Farmers' Co-operative Association 164
Cantwell v. Wairarapa Farmers' Co-op. Assn. (No. 2) 165
Chambers: Mount Burnett Ltd. (In Liquidation v.) 41
Chapman: Gough v. 262
Chestnut v. Seaton 388
Chevis: Union Steamship Co. of N.Z. Ltd. v. .. 259
Christchurch Trust Board, Second Church of Christ Scientist v. Symes 292
Christie v. Will 151
City of Christchurch: Attorney-General (ex Relatione Gould) v. 162
Clutha Development Ltd. v. Byrnes 343
Coastal Shipping Co. Ltd. v. Wanganui Herald Newspaper Co. Ltd. 114
Colonial Sugar Co. Ltd. v. Valuer-General .. 149
Commercial Union Assurance Co. Ltd.: Baster v. 277
Commissioner of Stamp Duties: Finch v. .. 18
Commissioner of Stamp Duties: More and Brewster v. 38
Congregational Church Trustees: Thames Borough v. 21
Cooper v. Symes 325
Cornfoot and others, in re: Ex parte Goulter .. 179
Cosslett, Ex parte: In re Odd 20
Cummings and Others: Jones v. 150

D

Dawson: Auckland City Corporation v. 212
Dealy: Wellington City Council v. 115
C. Dickinson & Co. Ltd.: Herdman v. 148
C. Dickinson & Co. Ltd.: Herdman v. 258
C. Dickinson & Co. Ltd.: v. Herdman 322
Donovan: Kiernan v. 402
Duncan: Hammond v. 388
Dunedin Arcade Co. Ltd.: Attorney-General v... 194
Dunedin, Etc., Hairdressers' and Tobacconists' Assistants' Board, In re 245
Dombroski, In re 359

E

Eastbourne Borough v. Wellington City Corporation 18
Eclipse Dairy Co. Ltd. v. Thompson 166
Edginton and Bernstone v. Waihopai River Board and Southland County 310
Eltham Co-operative Dairy Factory Co. Ltd.: Johnson v. 247

F

Feilding Club (Incptd.) v. Perry 210
Feilding Club: Perry v. 42
Finch v. Commissioner of Stamp Duties 18
Flood v. Lower Hutt Borough 290
Flux: Gardiner v. 148
Flynn: Otaraia Dairy Co. Ltd. v. 389
Foote: Official Assignee v. 306
Forrest and New Lynn Town Board: Green v. .. 199
Foster, In re 213
Francis & Taylor Ltd.: Mercantile Finance Corporation Ltd. v. 275

G

G. and S.: S. v. 229
Gardiner v. Flux 148
General Trust Board of the Diocese of Auckland: Holy Trinity (Otahuhu) Parish Trust Board v. 45
Genge and Public Trustee: Brodrick v. 19
Gough v. Chapman 262
Gould (ex Relatione) Attorney-General v. City of Christchurch 162
Goulter, Ex parte: In re Cornfoot and Others .. 179
Government Life Insurance Commissioner v. Attorney-General 322
Green: Andrews v. 362
Green v. New Lynn Town Board and Forrest .. 199
Grey: Official Assignee v., In re Martini 43
Griber v. Prendeville 261
Guillard Blue Metal Quarry Co. Ltd.: Walker v. .. 22
Guthrie: Hindmarsh v. 341

H

Hamilton: R. Harding & Co. Ltd. (In liquidation) v. 146
Hamilton Borough Council: Willcocks v. .. 360
Hamilton v. Yates 403
Hammond v. Duncan 388
Hancock & Co. Ltd. and Reilly: Ross & Glendining Ltd. and Others v. 4
Handley v. Thames County Council 232
R. Harding & Co. Ltd. (In liquidation) v. Hamilton 146
Harman, In re: Harman v. Anderson 386
Harrison: Auckland City Corporation v. .. 365
Harris v. Richardson 274
Hawke's Bay Electric Power Board and Napier Borough, In re 293
Hawthorne: Auckland City Corporation v. .. 6
Hefferman v. O'Neill and Smith 279
Herdman v. C. Dickinson & Co. Ltd. 148
Herdman v. C. Dickinson & Co. Ltd. 258
Herdman: C. Dickinson & Co. Ltd. v. 322
Hickson: Smith v. 355
Hill v. Waipa Railway and Collieries Ltd. .. 119
Hills, In re 195
Hindmarsh v. Guthrie 341
Holt, ex parte: In re MacPhail 117
Holy Trinity (Otahuhu) Parish Trust Board v. General Trust Board of the Diocese of Auckland 45
Horton v. Public Trustee 37
Hugh and G. K. Neill Ltd.: Lightfoot v. .. 197
Hulme: Southern Mines Development Ltd. v. .. 406
Hutton v. Stonex Brothers 366
J. C. Hutton (N.Z.) Ltd.: Muir v. 22

I

Irvine and Miller: Nixon v. 325

J

James v. Mabin 35
James v. Mabin 130
James: Samuel Vaile & Son Ltd. v. 211
James v. The Standard Fire Insurance Co. Ltd. and Samuel Vaile & Sons, Limited 3
James: Waimairi County v. 36
Johnson v. Eltham Co-operative Dairy Factory Co. Ltd. 247
Johnston and Stokes: Reynolds v. 291
Jones v. Cummings and Others 150

K

Kauri Timber Co. Ltd.: Thames Borough and Thames County v. 26
Kekler v. Magan 327
Kerr, In re 260
Kiernan v. Donovan 402
Kirkland v. Merrett and Lucas 387

L

Laurenson, In re 198
E. G. Laurie Ltd. (in liquidation): Brown v. .. 404
Leatham v. The Petone Central Bowling Club .. 7
Ledger: Blackburn v. 328
Lethbridge v. Otago Land Board 230
D. Levin Ltd.: H. R. Munns & Co. Ltd. v. .. 227
Leyland Motors Ltd. v. Napier Harbour Board .. 356
Lightfoot v. Hugh and G. K. Neill Ltd. 197
Lower Hutt Borough: Flood v. 290
Lucas and Merrett: Kirkland v. 387
Lyndon, In re 359
Lynsar: Burnard v. 242

M

Mabin: James v. 35
Mabin: James v. 130
MacFarlane: Black v. 308
MacPhail, In re: Ex parte Holt 117
McCarthy: Samoan Guardian Newspaper Co. Ltd. 163
McConnell v. McCormick 246
McCormick: McConnell v. 246
McGiven v. McGiven 214
McGregor: Michalick v. 23
McMillin, In re 131
Magan: Kekler v. 327
Martin: Blair v. 44
Martini, In re: Official Assignee v. Grey 43
Matheson v. Schneideman 178
Mercantile Finance Corporation Ltd. v. Francis & Taylor Ltd. 275
Merrett and Lucas: Kirkland v. 387
Michalick v. McGregor 23
Miller and Irvine: Nixon v. 325
Moi You Fong v. Arthur Skinner 131
More and Brewster v. Commissioner of Stamp Duties 38
Morris: Wilson v. 343
Morris Motors (1926) Limited v. Morris Motors Limited 162
Mount Albert Borough: Taylor v. 404

Mount Burnett Ltd. (In liquidation) v. Chambers 41
Muir v. J. C. Hutton (N.Z.) Ltd. 22
H. R. Munns & Co. Ltd. v. D. Levin Ltd. 227

N

Napier Borough v. Napier Harbour Board .. 387
Napier Harbour Board and Faulknor, In re .. 258
Napier Harbour Board: Leyland Motors Ltd. v. 356
Napier Harbour Board: Napier Borough v. .. 387
Napier Harbour Board v. New Zealand Trawling and Fish Supply Co. Ltd. 146
National Mortgage and Agency Co. of N.Z. Ltd. v. Tait 118
Neil v. Rogerson 196
G. K. Neill Ltd., and Hugh: Lightfoot v. .. 197
Nelson City Corporation v. Busbridge 403
New Lynn Town Board and Forrest: Green v. .. 199
New Zealand Fruit Export Control Board: J. A. Redpath and Sons, Ltd. v. 117
New Zealand Trawling and Fish Supply Co. Ltd.: Napier Harbour Board v. 146
Nixon v. Millar and Irvine 325

O

Odd, In re: Ex parte Cosslett 20
Official Assignee v. Foote 306
Official Assignee v. Grey: In re Martini 43
O'Neill and Smith: Hefferman v... 279
Otago Land Board: Lethbridge v. 230
Otaraia Dairy Co. Ltd. v. Flynn 389
Overall v. The Victoria Insurance Co. Ltd. .. 4

P

Paape: Petersen v. 323
Panapa Waihopi, In re 324
Pearce, In re: Bovett v. Pearce 391
Perry v. Feilding Club 42
Perry: Feilding Club (Incptd.) v. 210
Petersen v. Paape 323
Petone Central Bowling Club: Leatham v. .. 7
Phelan: Turkington v. 339
Polson, In re: Polson v. Polson 229
Power: Rex v. 34
Prendeville: Griber v. 261
Public Trustee and Genge: Brodrick v. 19
Public Trustee: Horton v. 37
Public Trustee: Sheehan v. 295
Public Trustee v. Winter: in re Winter 361

Q

Quinlan v. Wellington City Corporation 39

R

Rayner v. The King 338
J. A. Redpath and Sons Ltd. v. New Zealand Fruit Export Control Board 117
Reid v. Wanganui-Rangitikei Electric Power Board 213
Reilly and Hancock and Co. Ltd.: Ross & Glendining Ltd. and Others v... 4
Rex v. Power 34
Rex: Rayner v. 338
Reynolds v. Stokes and Johnston 291
Richardson: Harris v. 274
Richter, In re 40
Rogerson: Neil v. 196
Ross & Glendinning Ltd. and Others v. Hancock and Co. Ltd. and Reilly 4
Roxburgh v. Roxburgh 340

S

S. v. S. and G. 229
Samoan Guardian Newspaper Co. Ltd. v. McCarthy 163
Samson: White v. 277
Samuel Vaile & Son Ltd. v. James.. 211
Samuel Vaile & Sons Ltd. and Standard Fire Insurance Co. Ltd.: James v... 3
Scales v. Young 354
Schneideman: Matheson v. 178
Scott Timber Co. Ltd. and Others: Ball v. .. 243
Seaton: Chestnut v. 388
Second Church of Christ Scientist, Christchurch Trust Board v. Symes 292
Sheehan v. The Public Trustee 295
Shepherd v. Sunderland 134
Ship "Oreti": A. J. Allen Ltd. v. 407
Silich: Subritzsky v. 291
Singer, In re 135
Skinner: Ah Dong v. 131
Arthur Skinner: Moi You Fong v. 131
Skokolic, In re 215
Smith v. Hickson 355
Smith v. Tiller 294
Southern Mines Development Ltd. v. Hulme .. 406
Southland County and Waihopai River Board: Edginton and Bernstone v. 310
Southland Woollen Mills Ltd., In re 2
Southland Woollen Mills Ltd. (in liquidation) In re 278
Standard Fire Insurance Co. Ltd. and Samuel Vaile & Sons, Limited: James v. 3
Stonex Brothers: Hutton v. 366
Stokes and Johnston: Reynolds v. 291
Subritzsky v. Silich 291
Sunderland: Shepherd v. 134
Symes: Cooper v. 325
Symes: Second Church of Christ (Scientist) Christchurch Trust Board v. 292

T

Tait: National Mortgage and Agency Co. of N.Z. Ltd. v. 118
Takapuna Women's Progressive League (Incptd.) In re 405
Tamasese's Application, In re 20
Taranaki Publishing Co. Ltd.: Tunbridge v. .. 181
Tasker v. Algar 358
Taylor v. Mount Albert Borough 404
Thames Borough v. Congregational Church Trustees 21
Thames Borough and Thames County v. Kauri Timber Co. Ltd. 296
Thames County Council: Handley v. 232
Thames County and Thames Borough v. Kauri Timber Co. Ltd. 296
Thomas v. Thomas 326
Thompson: Eclipse Dairy Co. Ltd. v. 166
Thompson v. Wakapuaka Drainage Board .. 226
Tiller: Smith v. 294
Tunbridge v. Taranaki Publishing Co. Ltd. .. 181
Turkington v. Phelan 339

U

Union Steamship Co. of N.Z. Ltd.: Archibald v... 392
Union Steamship Co. of N.Z. v. Chevis 259

V

Valuer-General: Colonial Sugar Co. Ltd. v. .. 149
Victoria Insurance Co. Ltd.: Overall v. 4

W

Waihopi Panapa, In re 324
Waihopai River Board and Southland County: Edginton and Bernstone v. 310
Waimairi County v. James 36
Waipa Railway and Colleries Ltd.: Hill v. .. 119
Wairarapa Farmers' Co-operative Association: Cantwell v. 164
Wairarapa Farmers' Co-op. Assn. (No. 2): Cantwell v. 165
Wakapuaka Drainage Board: Thompson v. .. 226
Walker v. Guillard Blue Metal Quarry Co. Ltd. .. 22
Wanganui Herald Newspaper Co. Ltd.: Coastal Shipping Co. Ltd. v. 114
Wanganui-Rangitikei Electric Power Board: Reid v. 213
Weir and Booth: Booth v. 292
Wellington City Corporation: Ayling v. 263
Wellington City Corporation v. Dealy 115
Wellington City Corporation: Eastbourne Borough v. 18
Wellington City Corporation: Quinlan v. .. 39
Whangarei Daily News Ltd., In re 167
White v. Samson 277
Will: Christie v. 151
Willcocks v. Hamilton Borough Council 360
Wilson v. Morris 343
Winsley Brothers v. Woodfield Importing Co. .. 183
Winter, In re: Public Trustee v. Winter 361
Woodfield Importing Co.: Winsley Brothers v. .. 183
Woolcott v. Woolcott 386

Y

Yates: Hamilton v. 403
Young: Scales v. 354

Z

Zwies, In re 306

DIGEST OF CASES REPORTED.

ABATTOIR.

Slaughtering of stock—"Available for slaughter of stock"—No evidence that stock not slaughtered or delivered with reasonable promptitude—Evidence not establishing material damage through deterioriation of stock by handling—Sufficient chilling accommodation not on occasions available—Abattoir not ceasing to be available when unable to render services additional to those of slaughtering or because not providing means of carrying out highest ideals of practice—Auckland City Abattoir Act, 1924, S. 3.

Auckland City Corporation v. Harrison .. 365

ADMINISTRATION.

Trustee—Commission—Incidence—Commission of executor or administrator a testamentary expense payable out of capital—Incidence of commission granted to trustees in discretion of Court subject to directions of will—Trustees allowed percentage commission on capital and percentage on income—Incidence accordingly as between capital and income—Originating summons proper procedure for determination of incidence of commission—Application for future commission to be made by petition—Administration Act, 1908, Section 20—Code of Civil Procedure R. 538 (1)—Administration Rules, 1913, Rule 8.

In re Kerr 260

And see Probate and Administration.

ARBITRATION.

Arbitrator—Removal—Agreement by Borough Council to take electricity from Power Board and not to generate electricity except in special circumstances—Provision for reference of dispute to arbitration—Power Board appointing as arbitrator electrical engineer who had acted as adviser to Board and assisted in preparation of agreement—Engineer not an "indifferent person" and not fit or competent to act as arbitrator—Application by summons for removal of arbitrator not irregular—Party entitled to apply for removal before reference entered upon—Arbitration Act, 1908, Section 7.

In re Hawke's Bay Electric Power Board and Napier Borough 293

And see Industrial Union.

BANKRUPTCY.

(1) Adjudication—Non-compliance with bankruptcy notice—Notice based on default judgment in Magistrates' Court—Rehearing subsequently granted—On rehearing judgment given for larger amount—Original judgment and bankruptcy notice founded thereon vacated.

In re Odd: Ex parte Cosslett 20

(2) Chose in action—Deaths by Accident Compensation Act—Bankrupt's Right to damages under Act not passing to Official Assignee.

In re Richter 40

(3) Creditor's petition—Bankruptcy notice—Bankruptcy notice served after expiry of one month from date of issue—Notice by debtor of intention to oppose adjudication on ground that bankruptcy notice not served in time and on further ground that petitioner had underestimated value of security—No available act of bankruptcy—Irregularity not waived by notice of intention to oppose adjudication—Bankruptcy Act, 1908, Section 39—Bankruptcy Amendment Act, 1927, Section 2 (2).

In re McPhail: Ex parte Holt 117

(4) Creditor's petition for adjudication—Arrangement by debtor with creditors—Petitioning creditor not party to arrangement—Evidence insufficient to justify Court in dismissing petition on ground of debtor having no assets—

Conduct of petitioning creditor not amounting to abuse of procedure of Court in bankruptcy—Arrangement with creditors not *per se* "sufficient cause" for dismissing petition—Bankruptcy Act, 1908, Section 37 (3).

In re Allan 342

(5) Discharge—Motion for a declaration that bankrupt's public examination passed—Public examination commenced and several transactions questioned but investigation not able to be completed without expense owing to way in which accounts kept—Examination adjourned *sine die*—Lapse of over two years without any further questions being put—Creditors not entitled to hold examination unfinished for indefinite time without indicating matters on which information required—Duty of bankrupt to supply proper information at his own expense—Course to be adopted—Bankruptcy Act, 1908, Section 124 (7).

In re Hills 195

(6) Voluntary settlement—Property purchased in husband's name—Deposit paid out of monies advanced by wife's mother—Balance paid chiefly out of husband's earnings—Moneys derived from letting of rooms not produce of wife's labour—Wife disbursing husband's moneys as his agent—Transfer of property by husband to wife before tendering for building contracts on his own account—Husband unable at date of transfer to pay debts without recourse to property comprised in transfer—Transfer void as a voluntary settlement—Bankruptcy Act, 1908, S. 75.

Official Assignee v. Foote 306

And see Undue Influence.

BARRISTER AND SOLICITOR.

Costs—Taxation—Fee charged for services as barrister by Barrister and solicitor not acting as solicitor in particular transaction not taxable—Law Practitioners Act, 1908, Sections 26, 28, 29, 30.

In re Singer 135

And see Solicitor.

BILLS OF EXCHANGE.

See Practice 2.

BYLAW.

(1) County Council—Licensing of hawkers—By-law imposing half-yearly license fee of five pounds—Object to restrain hawking and protect rate-paying shopkeepers—Amount of fee unreasonable—By-law unreasonable and void—Counties Act, 1920, S. 109, 2nd Schedule, Pars. 17, 18 and 19.

Hamilton v. Yates 403

(2) Motor-traffic—Reasonableness—By-law relating to licensing of motor-omnibuses—Definition of "Motor-omnibus" sufficiently wide to include service cars—Provisions as to construction of motor-omnibuses obviously inapplicable to service cars—By-law not enforced by borough officers—Definition too wide and by-law unreasonable—By-law quashed in part.

Willcocks v. Hamilton Borough Council .. 360

CHARITABLE TRUST.

Cy-pres doctrine—Funds held upon trust for erection of Church in accordance with provisions of trust deed—Church not being erected in accordance with provisions of trust deed—Not impossible to carry out provision of trust deed—Mere inexpediency—Some provisions not mere matters of detail—Cy-pres doctrine not applicable—Possible remedy under Section 15 of Religious, Educational and Charitable Trusts Amendment Act, 1908, and Section 5 of Amendment Act of 1928.

Holy Trinity (Otahuhu) Parish Trust Board v. General Trust Board of the Diocese of Auckland 45

CHATTELS TRANSFER ACT.

See Conversion.

CHOSE IN ACTION.

See Bankruptcy—Chose in Action.

CLUB.

Suspension of member—"Natural justice"—Member notified of charges made against him and requested to attend meeting of committee to show cause why he should not be suspended under named rule—Evidence of misconduct given before committee at previous meeting—Evidence not taken in member's presence—No right of cross-examination afforded member—Member attending meeting and giving explanation—Explanation not accepted by committee—Member suspended—Sufficient opportunity of making defence afforded member—Rules of natural justice not violated—No evidence of bias or predetermination of charge—Refusal of Court to interfere.

Feilding Club (Incptd.) v. Perry .. 42, 210

COLLISION.

See Negligence.

COMPANY.

(1) Agency — Borrowing Powers — Authority of director—Company composed of two members acquiring business of motor agent—Both members directors—Conduct of business left to one director—Agreement of directors *inter se* to borrow from named company only—Managing director forging documents and obtaining without authority advances from company other than that authorised — Directors empowered under articles to delegate borrowing powers to one director—No such delegation in fact—Lender advancing money without knowledge of contents of memorandum or articles or making enquiries as to authority of director—Lender not entitled to assume that transaction within director's authority—Company not liable to repay moneys lent.

Mercantile Finance Corporation Ltd. v. Francis & Taylor Ltd. 275

(2) Articles—Contract—Restraint of Trade—Co-operative Dairy Company—Articles purporting to require shareholder to supply milk to company from one cow for every share held—Obligation to supply determinable only on sale of land, termination or sale of lease, or on shareholder satisfying directors of inability to supply and on shareholder paying double the value of each share held—Obligation unlimited in point of space—Quaere as to severability of condition as to payment of double value of shares—Remaining conditions invalid as unreasonable restraint of trade even if such condition severable—Articles *ultra vires*—Dairy Industry Amendment Act, 1924, S. 2.

Otaraia Dairy Co. Ltd. v. Flynn 389

(3) Contract—Restraint of trade—Co-operative dairy company—Article providing that member not supplying all milk during whole season to company not entitled to any payments above ordinary monthly payments—Article *ultra vires* —No evidence of contract between company and member on basis of article—Onus of proof of contract on company—*Semble* that reasonable contract as to supply by members of milk to company under penalty of forfeiting part of price not invalid as being in restraint of trade.

Johnson v. Eltham Co-operative Dairy Factory Co. Ltd... 247

(4) Mining company—Calls—Whether contract one for payment of balance unpaid on shares by calls or by instalments—Whether company a mining company—*Ultra vires* and not substratum proper test—Companies Act, 1908, Ss. 352-361.

Southern Mines Development Ltd. v. Hulme 406

(5) Mortgages—Registration—Agreement by company—"Where thereunto required by bank" to convey transfer or assign all freehold and leasehold property and all other property both present and future including the undertaking and all called or uncalled capital—Provision that any conveyance transfer or assignment to be by way of mortgage for securing immediate payment and to contain immediate power of sale and usual powers—Agreement to mortgage not registered—Documents of title to freehold and leasehold property deposited with bank—Documents handed to guarantors on payment of guarantee —Agreement an equitable mortgage and not merely an agreement to give security in future —Agreement severable in so far as it related to different species of property—Agreement as applying to freehold and leasehold land not a mortgage requiring registration under Companies Act—Legal mortgage of specific property contemplated—Guarantors entitled to retain documents as against liquidator—Companies Act, 1908, Section 130.

Mount Burnett Ltd. (in liquidation) v. Chambers 41

(6) Liquidation — Set-off — Claim for Calls by liquidator of company—Monies due to shareholder in respect of bills signed by shareholder for accommodation of company while a going concern and for services rendered to company as accountant—Claim of set-off by shareholder —Informal arrangement when bills signed that any moneys paid by shareholder on bills should be credited to shares—Similar arrangement as to moneys becoming due for services rendered to company—No debts payable *in praesenti* to shareholder—Agreements to set-off *in futuro*— Not sufficient to constitute set-off—No evidence of set-off or of any transaction equivalent to payment—No inference of set-off drawn from failure of receiver appointed by a debenture-holder to require payment of calls by shareholder —Moneys paid not advances on account of shares—Companies Act, 1908, Sections 66, 68 ; Table A, Art. 16.

R. Harding and Co. Ltd. (in liquidation) v. Hamilton 146

(7) Winding-up—Application for removal of names from list of contributories on ground of misrepresentation — No prompt repudiation of shares or prompt application for removal of name from share register after discovery of misrepresentation—Notice of intention to defend action for calls in Magistrates' Court not amounting to a repudiation—No proceedings for rescission instituted before winding-up— Notice of intention to defend action for calls in Magistrates' Court not amounting to proceeding for rescission—Removal of names from list refused.

In re Southland Woollen Mills Ltd. (in liquidation) 278

(8) Winding-up—Just and equitable Failure to commence business within one year from incorporation—Principles upon which Court exercises discretion—Company formed to establish woollen mills—Proposal after four years to erect and work worsted mills—Farmer shareholders strongly opposed—Town shareholders in favour—Majority in favour of winding up— —Directors nevertheless entering into contract to purchase plant for worsted mill—Danger of deadlock—Delay not sufficiently and satisfactorily explained—Quaere whether substratum gone—Just and equitable in circumstances that company be wound up—Companies Act, 1908, Sections 177 (b) (e), 185.

In re Southland Woollen Mills Ltd. 2

(9) Winding-up—Petition by certain creditors and contributories to have company wound-up by Court—Resolution for voluntary winding-up passed after presentation of petition—No evidence that general body of creditors or contributories desired winding-up by Court—No evidence that petitioning creditors would be prejudiced by voluntary winding-up—Winding-up order refused—Companies Act 1908, Sections 185, 228, 229 and 233.

In re Whangarei Daily News Ltd. 167

See Wages Protection and Contractors' Liens.

CONTRACT.

(1) Construction—Agreement to pay royalty on price realised on all sales of kauri gum less percentage of freight and commission—Royalty to be paid before gum consigned from town where land situated—Provision that licensee was to have use of drying ground on land and that all

gum to be consigned be weighed and branded in presence of owner—Evidence that gum usually sold in nearest market cleaned—Licensee paying first royalties on value of cleaned gum—Royalty held payable on price payable for gum when cleaned and not when uncleaned.
Subritzsky v. Silich 291

(2) Statute of Frauds—Sufficiency of memorandum—Offer to purchase signed by defendant and accepted by vendor—Prior promise by vendor to instal gas cooker and paint house in event of defendant buying house—No reference to such promise in written offer—Promise merely collateral undertaking and not term of contract of sale—Not condition precedent—Memorandum of contract sufficient.
Kekler v. Magan 327

(3) Statute of Frauds—Written contract to supply electricity the consumer undertaking to pay fixed minimum sum annually for current—Contract not to be performed within the year—Prior oral agreement for reduction of annual payment if poles supplied by consumer—Poles subsequently supplied by consumer—Claim for reasonable price of poles as goods sold and delivered—Attempt to make statute of Frauds an instrument of fraud.
Reid v. Wanganui-Rangitikei Electric Power Board 213

(4) Vendor and purchaser—Specific performance—Damages—Contract by defendant to purchase hotel from vendors—Contract providing that vendors should purchase a certain property subject to existing mortgages from a named company and credit the equity towards the purchase price of hotel—Company not a party to contract and refusing to sell property on terms stated in contract—No implied term that vendors' obligation to buy property from company conditional on consent of company—Contract unenforceable—Vendors not entitled either to specific performance or damages.
Andrews v. Green 362

Novation—see Mortgage 1.
Restraint of trade—see Company 2 & 3.

CONVERSION.

Partnership—Bill of sale—Launch owned by three partners—Mortgage by two partners of their shares to third partner—Launch seized by grantee for alleged default in payment of interest and sold by auction to grantee's agent—No default at time of sale—Possession of grantee before sale lawful—Sale to grantee's agent invalid—Sale changing neither possession nor ownership of launch—No conversion—Assignment of share in "vessel" not an instrument for purposes of Chattels Transfer Act—Launch a "vessel"—Chattels Transfer Act, 1924, Section 2, 50.
Blackburn v. Ledger 328

COUNTY COUNCIL.

See By-law 1.
Municipal Corporation 1.
Road
Town Planning.

CRIMES.

See Mental Defectives.

CROWN SUITS.

Practice—Discovery—Suppliant in suit against Crown commenced by petition of right not entitled to discovery from Crown—Observations as to practice of Crown as to discovery—Crown Suits Act, 1908, Ss. 27, 34—Rule 161 of Code of Civil Procedure.
Rayner v. The King 338

DAMAGES.

See Misrepresentation.

DEATHS BY ACCIDENT COMPENSATION.

Damages paid into Court—Apportionment between widow and children of deceased—Basis of division—Deaths by Accident Compensation Act, 1908, Ss. 5 and 6—Public Trust Office Amendment Act, 1913, S. 13 (2).
Kiernan v. Donovan 402

DEFAMATION.

Practice—New trial—Damages—Words spoken on privileged occasion—Qualified privilege——Evidence of malice—Direction to jury that failure to apologise element for consideration but not evidence of express malice—No misdirection—No substantial wrong to defendant as otherwide ample evidence of malice—Damages excessive—Limited publication and prompt admission of error—Probability that malice rather than slander considered by jury—Exemplary or punitive damages—Damages not such as twelve men could reasonably have awarded—New trial ordered limited to issue of damages.
Matheson v. Schneideman 178
And see Libel.

DESTITUTE PERSONS.

See Divorce 6.

DIVORCE.

(1) Adultery—Petition and cross petition—Both parties guilty of adultery—Petitioner's act of adultery committed after filing of petition subsequent to respondent's adultery and after respondent had left matrimonial home—Quaere as to power of Court to grant two decrees *nisi* between same parties—Two decrees unnecessary—Decree granted to petitioner and refused to respondent—Divorce and Matrimonial Causes Act, 1928, S. 26.
Booth v. Booth and Weir 292

(2) Adultery—Proof—Admissions of respondent—Uncorroborated admissions received with circumspection, caution and distrust but if clear. distinct, unequivocal and *bona fide* and no ground for suspecting collusion sufficient proof of adultery—No absolute rule of law that such admissions not sufficient proof of adultery—No absolute rule of law that decree ought not to be granted on uncorroborated evidence of petitioner.
Woolcott v. Woolcott 386

(3) Custody of children—Decree *nisi* granted on ground of husband's adultery—Welfare of children paramount consideration—Innocent party entitled to custody except under exceptional circumstances—Rule that husband should in ordinary circumstances have custody of male child not applicable where husband guilty of adultery—Exceptional circumstances justifying younger child being left with husband—Custody of elder child given to wife.

Thomas v. Thomas 326

(4) Custody of child—Welfare of child paramount consideration—Decree *nisi* obtained by husband —Husband applying for custody of illegitimate child adopted by parties—Wife guilty party in divorce proceedings—Wife living in adultery with Co-respondent—Semble husband living in adultery—Separation agreement giving custody of child to husband—Husband in arrear with payments of Maintenance provided for by deed of separation and neglecting to pay maintenance under subsequent separation order—Child in custody of mother of co-respondent—Wife given custody conditionally on child remaining with respondent's mother and on child not being taken to live with wife while living unmarried with co-respondent.

S. v. S. and G... 229

(5) Maintenance—Petition for divorce on ground of Separation for more than three years under agreement—Failure by petitioner to pay maintenance under agreement—Failure not " wilful and persistent " but due to poverty—Decree *nisi* granted and not withheld until agreement reached between parties as to payment of arrears of maintenance and future maintenance—Decree not to be made absolute until order made for permanent maintenance of respondent and child—Divorce and Matrimonial Causes Act, 1928, S. 33.

Roxburgh v. Roxburgh 340

(6) Permanent Maintenance—Destitute persons—Registration in Magistrates' Court of Supreme Court's order for permanent maintenance—No Jurisdiction in Magistrates' Court to vary order or cancel arrears due under order—Destitute Persons Act, 1910, Ss. 39, 61 ; Amendment Act, 1926, S. 8—Divorce and Matrimonial Causes Act, 1928, S. 41.

Wilson v. Morris 343

(7) Restitution of conjugal rights—Wife leaving matrimonial home—Conducting friendly correspondence with husband and inducing him to believe that she intended to return—Sudden demand by wife that husband agree to separation —Husband immediately replying demanding her return—Proceedings for restitution of conjugal rights commenced five days after demand calculated to have reached wife—Demand sufficient—Opportunity for compliance with demand reasonable in circumstances—Rule 7, Divorce Rules.

McGiven v. McGiven 214

DRAINAGE.

See Land Drainage
Municipal Corporation 2.

EXECUTOR AND ADMINISTRATOR.

See Administration
Probate and Administration.

FAMILY PROTECTION.

(1) Application by husband for provision under will of wife—Husband a poor working man at date of marriage and wife comparatively wealthy—Husband after marriage ceasing to work and living on his wife's means—Wife not encouraging husband to live in idleness—Husband able to earn own livelihood—No provision made for husband in will—Beneficiaries with one exception not financially better off than applicant—Applicant not entitled to provision under will of wife—Bounty given in lifetime by wife not affording any moral claim to provision after death.

Jones v. Cummings and Others 150

(2) Application by widow for further provision out of estate—Application for extension of time —Application not made for seven years after testator's death—Residuary beneficiary not aware that her interest under will valueless until farm sold five years after testator's death —Further delay of two years not satisfactorily accounted for—Extension of time not granted where delay long and inexcusable unless refusal to grant extension would result in manifest injustice—Widow in good health and able to earn living—No manifest injustice—Testator's intention when making will irrelevant—No manifest breach by testator of moral obligation to make provision for support of wife—Extension of time refused—Family Protection Act, 1908, Section 33—Family Protection Amendmdnt Act, 1921-22, Section 2.

Sheehan v. The Public Trustee 295

FRAUD.

See Misrepresentation.

FRUIT CONTROL ACT.

Notice of intention to assume control—Failure to publish notice in New Zealand Gazette a bar to exercise of control—Statute providing for publication of notice in any " Newspaper or Newspapers " in accordance with such conditions as might be prescribed—Order-in-Council requiring publication in New Zealand Gazette *intra vires* and valid—Gazette a newspaper—Fruit Control Act, 1924, Section 8 (3), Section 36 (d).

J. A. Redpath and Sons Ltd. v. New Zealand Fruit Export Control Board 117

GAS.

See Municipal Corporation (3).

GIFT.

See Revenue 1.

HARBOURS.

Dues—Bunker coal for trawlers brought on to wharf and loaded direct into trawler by employees of trawling company—Fish from trawler

landed direct into vehicles by company's employees and taken away—Gear forming part of equipment of trawlers landed on to or shipped from wharves—Board entitled to levy dues on such goods—Not within exemption of " vessel employed in fishing . . . and not conveying goods for hire "—Harbours Act, 1923, Sections 5, 78 (1e), 226 (12).

Napier Harbour Board v. New Zealand Trawling and Fish Supply Co. Ltd. 146

And see Rating 1.

HUSBAND AND WIFE.

See Bankruptcy 6.
Negligence 4.

INDUSTRIAL UNION.

Industrial conciliation and arbitration — Certiorari—Preference to unionists—Order of Court of Arbitration amending award to provide for compulsory unionism and dismissal of non-unionist employees—Ultra vires—Union agreeing to amendment of award as to holidays on Employers agreeing to Amendment as to compulsory unionism—Failure of consideration for union's agreement—Whole order quashed—Quaere as to power of Supreme Court to quash portion of order of Court of Arbitration—Industrial Conciliation and Arbitration Act, 1925, Sections 2, 92, 97.

In re Dunedin, etc., Hairdressers' and Tobacconists' Assistants' Board 245

INJUNCTION.

Defendant converting to his own use in connection with milk round glass bottles owned by plaintiff —Defendant claiming a right to use bottles—Plaintiff entitled to injunction without proof of actual pecuniary damage—Form of injunction.

Amburys Ltd. v. Boddie 363

And See Nuisance 1.
Rating 5.

INSURANCE.

(1) House Agent—Duty of agent appointed to collect rents and pay rates and insurances to notify insurance company when premises become vacant—Usage—Condition of policy providing for cesser of insurance if premises " unoccupied " for more than thirty days—Premises formerly occupied by tenant vacated six weeks before fire—Nobody living on premises during such period—Premises occasionally visited by owner to effect repairs and neighbour instructed to look after same—Premises " unoccupied "within meaning of condition.

James v. The Standard Fire Insurance Co. Ltd. and Samuel Vaile & Sons, Limited .. 3

(2) Life and accident policy—Policy not covering death or disablement to insured " While engaged in motor-cycling "—Insured killed while riding in a side-car attached to motor-cycle—Insurer not liable under policy—No ambiguity in terms of policy—Court not entitled to create ambiguity by departing from ordinary meaning of words—Rule of construction *contra proferentem* not applicable.

Baster v. Commercial Union Assurance Co. Ltd. 277

(3) Lapse for non-payment of premium—Estoppel —Waiver—Novation—Sale of land accompanied by transfer of policy—Policy issued from Wanganui office though premises in Auckland—Premium for current year not paid—Purchaser's solicitor upon making enquiry informed by clerk of insurance company that policy in force—Transfer of policy approved by manager at Auckland—Acceptance of assignment operating as a novation—Company estopped by approval of transfer, apart from clerk's representation, from treating policy as lapsed.

Overall v. The Victoria Insurance Co. Ltd. .. 4

LANDS ACT.

Land Acts—Lease—Renewal—Lease of small grazing-run—Board taking definite steps towards renewal of lease— Not entitled subsequently to recommend subdivision by Minister and to refuse to renew lease—Land Act, 1908, Sections 218, 219, 220, 221—Land Act, 1924, Sections 234, 235, 237, 240, 241.

Lethbridge v. Otago Land Board 230

LAND AGENT.

See Principal and Agent.

LAND DRAINAGE.

Drainage Board no power to order occupiers of land on banks of drains vested in or under management of Board to remove obstructions likely to cause damage to property in drainage district—Power to order occupier to remove obstructions limited to drains other than those vested in or under management of Board—Duty of Board to clear and maintain drains under its management —Clause in statute to be construed with reference to context so as far as possible to make statute or series of statutes relating to a certain subject-matter consistent—Land Drainage Act, 1908, Sections 25, 50, 61, 62—Land Drainage Amendment Act, 1913, Section 7.

Thompson v. Wakapuaka Drainage Board .. 226

LANDLORD AND TENANT.

(1) Land Transfer Act — Implied Covenant — Memorandum of Lease Containing Covenants by Lessee to repair—Transfer of lease—Existing breach of covenant to repair at time of transfer—Transferee claiming damages for breach of covenant implied under Section 58 of Property Law Act, 1908—Covenant implied in transfer of lease under Land Transfer Act—Liability of transferor not affected by act of transferee's carrying out repairs without notice to transferor and before required by lessor.

Smith v. Tiller 294

(2) Lease—Provision for ascertainment of annual ground rent by two valuers or their umpire in case of disagreement—Submission to arbitration within meaning of Arbitration Act, 1908, although no prior dispute between parties as to value to be determined—Ground rent to be an even annual sum equal to five per centum on

value of land at time of valuation "without taking into account any buildings thereon"—Basis of valuation—Existence of lease not factor for consideration—Unimproved value of land and not value of lessor's interest to be determined.

In re Napier Harbour Board and Faulkner .. 258

(3) Option to purchase freehold—Provision for lessee giving prior to expiration of term one month's notice in writing of desire to purchase—Lessor to transfer land on or before expiry of notice on payment of sum stipulated and arrears of rent owing up to date of payment—Notice must expire before end of term—Notice given three days before expiry of term not effectual.

Gardiner v. Flux 148

(4) Partnership—Practice—Claim for rent for premises demised to one of two partners personally before commencement of partnership—Premises subsequently used for business of firm—No evidence that person to whom premises let acted as agent for firm—Acts of other partner recognising landlord not sufficient to substitute partners as tenants—Other partner not liable for rent—Defendants having common solicitor and common counsel—Plaintiff ordered to pay half costs of defendants.

Hefferman v. O'Neill and Smith 279

And See Nuisance.

LAND TRANSFER ACT.

See Landlord and Tenant 1.
Mortgage.

LIBEL.

Practice—Samoa—Appeal from High Court of Western Samoa—No Regulations prescribing procedure—Appeal determined on same principles as appeal from Magistrate—Attempted arrest of Native Chief by Commissioner of Police for holding meeting in "Disturbed Area"—Arrest resisted—Commissioner ignorant of understanding between Natives and the Administrator of Samoa—Conversation by Commissioner through interpreter with Native Chief expressing regret that arrest resisted—Newspaper report of conversation stating that arrest declared by Commissioner to be a mistake—Newspaper printed in English and published for European population—Accuracy of report tested by what was said in English not by language of interpreter—Words defamatory as tending to show that Commissioner unfit for office—Samoa Act, 1923, Section 27.

Samoan Guardian Newspaper Co. Ltd. v. McCarthy 163

LICENSING.

Alteration of boundaries of electoral districts—Part of No-license district merged in new district in which granting of licenses not prohibited throughout area containing more than half of the population—Application to Licensing Committee of new district for publican's license in respect of premises in part of No-license district so merged which were licensed before No-license carried in that district—Applicant not entitled to license—Licensing Act 1908, Sections 27, 52, 128—Licensing Amendment Act, 1910, Sections 4, 5, 6, 11, 12, 30.

Scales v. Young. 354

(2) Offences—Licensee convicted of selling liquor on licensed premises during closing hours—Pleas of *autrefois convict* to two further informations alleging exposure of liquor for sale and opening of licensed premises for sale of liquor—Offences separate and independent—Conviction on first information not a bar to conviction in others.

Smith v. Hickson 355

(3) Prohibition order—Person charged with being found drunk in a public place and with assault—Plea of guilty to both charges—Prohibition order made on charge of assault in addition to conviction and fine—No jurisdiction to make such order—Plea of guilty and silence of counsel when order made not equivalent to a personal application for order—Conviction severable—Amended by omitting part as to prohibition order—Power of Court to order Justices to pay costs—In circumstances Justices not ordered to pay costs—Licensing Act, 1908, Section 212—Justices of the Peace Act, 1927, Section 328—Inferior Courts Procedure Act, 1909, Section 7.

In re Laurenson 198

(4) Publican's License—Sales off premises—Order taken by agent of licensee at Timaru and forwarded to licensee at Dunedin and accepted there—Liquor of description ordered selected packed and marked on licensed premises—Delivery by carrier to purchaser in Timaru—Finding of Magistrate that order accepted on licensed premises—Facts on which finding based not before Appellate Court—Quaere whether contract made on premises if acceptance posted—Appeal on point of law only—Appellate Court bound by finding of Magistrate and complete executory contract therefore made on licensed premises—Sale lawful—Licensing Act, 1908, Section 195.

Petersen v. Paape 323

LIEN.

See Ship.
Wages Protection and Contractors' Liens.

LOCAL GOVERNMENT.

Municipal Corporation—Transport Board—Power of local authority to remove member or members of Board appointed by it and appoint "Another and others"—No power to remove member without appointing another member in substitution—Removal of six members and subsequent re-appointment of same members *ultra vires*—*Status quo* remaining and original appointments unaffected—Plaintiffs claiming right to elect members in place of members removed—Question of interference with public right—Attorney-General necessary party to proceedings—

Supreme Court without jurisdiction in proceedings by reason of special statute empowering Magistrates' Court to determine whether member "Incapable of holding his office" and taking away jurisdiction of Supreme Court —Auckland Transport Board Act, 1928, Ss. 6, 10, 11, 14, 76.

Turkington v. Phelan 339

MASTER AND SERVANT.

Negligence—Duty of Master to provide reasonably safe premises—Workman injured by fall from platform—Platform erected as bridge over pit in machine room used at date of accident as means of access to paper room—Workman having alternative route—Platform not intended for such purpose—Platform reasonably safe for purposes intended—No duty to make safe for any other purpose—Alterations made subsequent to accident not evidence of breach of duty —Plaintiff negligent in encountering risk with knowledge of danger—Consent to run risk—Maxim *volenti non fit injuria* applied—Matters to be considered in determining whether maxim applies.

Tunbridge v. Taranaki Publishing Co. Ltd. 181

And see Police Force.

MENTAL DEFECTIVES.

Criminal law—Sentence—Prisoner represented by counsel pleading guilty to indictment—Remanded for sentence—Minister of Justice Directing Removal of Prisoner to institution to be detained for a period for observation—Prisoner reported insane and returned to prison on expiry of period of observation—Impossibility of sentencing insane prisoner—Proper course in circumstances for Minister to order removal of prisoner to institution—Crimes Act, 1908 Section 428—Mental Defectives Act, 1911, Sections 37, 38.

In re Skokolic 215

MINING.

Application for special claim—Claim opposed—Preliminary inquiry before warden to ascertain whether expenses of survey should be incurred —Application adjourned for survey and costs awarded applicant—Warden's decision not appealable—Not a "Final order, judgment or other decision" of warden—Mining Act, 1926, Ss. 172 (b), 366.

Clutha Development Ltd. v. Byrnes .. 343

MISREPRESENTATION.

Fraud—Damages—Fraudulent misrepresentation by vendor as to area of land subject to floods—Measure of damages.

Chestnut v. Seaton 388

MONEYLENDER.

Reopening Transaction—Claim for relief on ground that transaction harsh and unconscionable—Loan of certain sum in consideration of payment of premium—Premium unreasonable in circumstances—"Money-lender" including for purpose of re-opening transactions person lending moneys in a single transaction at a rate exceeding ten per cent.—Action commenced within a year of closing of transaction—Not too late in circumstances of case—Money-lenders Act, 1908, Sections 2, 3.

Cantwell v. Wairarapa Farmers' Co-operative Association 164

MORTGAGE.

(1) Novation—Transfer of land subject to mortgage—Purchaser executing memorandum of extension of mortgage—Original mortgagor not party to extension—Purchaser personally liable under covenants of mortgage—Land Transfer Act, 1915, S. 104.

White v. Samson 277

(2) Overdue—Mortgagee unable to be found—Not known whether alive or dead—Mortgagor desirous of discharging mortgage—Proper course application by Public Trustee for order under Section 87 of Public Trust Office Act, 1908—No power to make such order on originating summons—Amount of interest payable to discharge mortgage—Mortgage not providing for payment of interest—Interest payable after due date either as damages for detention of mortgage debt or pursuant to equitable rule that money bears interest after date of payment—Six per cent. allowed from due date until amount deposited in bank to meet mortgagees' claims—Thereafter interest earned allowed—Public Trust Office Act, 1908, Section 87—Property Law Act, 1908, Section 75.

Neil v. Rogerson 196

(3) Transfer of land subject to first and second mortgages — Transferor mortgagor under second mortgage—Second mortgage subsequently extended under Mortgages Extension Act, 1919, on application of transferor and transferees—Further application by transferees for extension under Mortgages Final Extension Act, 1924—Transferor not a party to application—Extension granted conditional on observance of provisions of memorandum of agreement signed by counsel for parties—Memorandum providing that mortgagors should do certain clearing and burning—Provision that mortgagors should perform their covenants under first and second mortgages "with respect to any covenants where there has been a breach" except covenant for repayment of principal prior to extended date—Mortgagee's rights against original mortgagor expressly reserved—Transferees not personally liable to mortgagee for repayment of mortgage debt.

In re Cornfoot and Others: Ex parte Goulter 179

And see Principal and Surety 1.

MOTOR-OMNIBUS.

See Motor Vehicles.

MOTOR VEHICLES.

Motor-omnibus traffic—"Carrying on motor-omnibus service" without license — Offence committed if service carried on on isolated occasion—Not necessary to prove regularity or continuity—Motor-omnibus Traffic Act, 1926, Sections 2 and 5.

Reynolds v. Stokes and Johnston 291

And see By-law.

MUNICIPAL CORPORATIONS.

(1) County—Bridge—Damage to bridge—Action to recover cost of repair and reconstruction—Part of bridge within borough and remainder within county—No damage to part of bridge within borough—Part of bridge damaged vested in Crown—County no title to sue—No interference with statutory rights and powers conferred on county—Crown proper plaintiff—Municipal Corporations Act, 1920, S. 172—Public Works Act, 1928, S. 110, 111—Counties Act, 1920, S. 115.

Thames Borough and Thames County v. Kauri Timber Co. Ltd. 296

(2) Drainage—Trespass—Town Board constructing drains on private land without proper notice to owner or occupier and without obtaining permission of owner or occupier to drains constructed above ground—General notice in newspaper of intention to construct drains not sufficient—Subsequent suggestions by owner as to work to be carried out to minimise inconvenience resulting from operations of Board—Suggestions carried out—No estoppel or waiver—Portion of land subsequently taken under Public Works Act—Basis of Assessment of Damages—Municipal Corporations Act, 1920, Section 219: Public Works Act, 1928, Sections 34, 80; Town Boards Act, 1908, Section 33.

Green v. New Lynn Town Board and Forrest 199

(3) Gas—Electricity—No power to surcharge overdue accounts for gas or electricity supplied—Municipal Corporations Act, 1920, Ss. 275, 277, 281.

Nelson City Corporation v. Busbridge .. 403

(4) Public Works—Building permit—Mandamus—Injunction—Refusal by Council to grant building permit on ground that it had determined to acquire whole land for public purposes—No active steps to take land for more than year—Notice of intention to take whole land for "Tramway and electrical purposes"—Subsequent notice of intention to take whole land for construction of elevators and machinery for passenger traffic—Objection by owner—Whole land not required for purposes of work—Injunction granted—Quaere whether scheme one for construction of a "tramway"—Corporation not entitled to refuse building permit on ground that lands required for public purposes—Mandamus to Corporation to hear and determine application for permit on proper grounds—Tramways Act, 1908—Municipal Corporations Act, 1920, Section 174 (4)n—Reserves, etc., and Public Bodies Empowering Act, 1912, Section 39.

Quinlan . Wellington City Corporation .. 39

(5) Reserve for public gardens and promenades—Buildings erected and further buildings proposed to be erected on land reserved—Trespass—User of land as public highway for over twenty years and maintenance and control of same by City Council during such period held not to make land a "Street"—User creating no rights in reserve—general Act not affecting special Act—Rights of public not affected by uninterrupted possession or acquiescence in user—Land Act, 1924, Section 13—Municipal Corporations Act, 1920 Section 171 (1).

Attorney-General (ex Relatione Gould) City of Christchurch 162

(6) Street—Misfeasance—Hole at side of street—Dedication of street accepted by Corporation and certificate of compliance with statutory requirements given before statutory requirements complied with—Transfers to plaintiff and others of allotments fronting on street registered—Semble Corporation liable for injuries to plaintiff sustained through falling into hole by whomsoever made if hole existed at time of dedication or made subsequently—Hole made by Corporation and extending into street under control of Corporation—Plaintiff falling into hole while walking in latter street—Hole not safeguarded or lighted where plaintiff fell in—Misfeasance—Corporation liable.

Flood v. Lower Hutt Borough 290

(7) Street widening—Betterment—Council acquiring land on one side only of a street—Claim for betterment to land on other side of street not directly opposite land taken—Such land not "Land fronting upon or having any frontage to the opposite side of the street"—"Street" and "opposite" ambiguous—More reasonable construction adopted—Words including only land fronting upon or having frontage to other side of street directly or immediately opposite land acquired.—Public Works Act, 1928, Section 79—Municipal Corporations Act, 1908, Sections 171, 193.

Auckland City Corporation v. Dawson .. 212

(8) Street widening—Power to take more land than required for street widening if deemed expedient—Land not fronting street taken in order to transfer to owner of adjoining land fronting street in exchange for land taken from him for purposes of street widening—Corporation *bona fide* believing it expedient to take land in connection with street widening scheme—No evidence that Corporation exercising powers in furtherance of ulterior objects or for purposes different from those specified in statute—Taking upheld—Municipal Corporations Act, 1920, Section 192—Public Works Act, 1908, Section 18.

Wellington City Corporation v. Dealy .. 115

And see Local Government
Street.

NATIVE LAND.

See Will 7.

NEGLIGENCE.

(1) Collision—Motor-vehicle going to wrong side of road to pass another proceeding in same direction—Cyclist proceeding in opposite direction

on proper side of road—Cyclist swerving towards wrong side of road to avoid collision—Duty of driver of motor-cycle overtaking and passing vehicle proceeding in same direction.

Griber v. Prendeville 261

(2) Collision — Motor-vehicle — Respondent's car rounding " blind " corner on approach to bridge on wrong side of road—Appellant's car approaching corner from opposite direction on correct side of bridge—Sudden emergency—Appellant swerving to wrong side of road to avoid collision—Respondent swerving to correct side—Collision—Respondent negligent—Act of appellant in sudden emergency created by respondent not amounting to negligence.

Hindmarsh v. Guthrie 341

(3) Collision—Pedestrian walking along left side of road twenty feet wide run down by motor-vehicle proceeding in same direction—Pedestrian aware of approach of overtaking vehicle—Pedestrian entitled to walk along carriage-way of road by day or night and entitled to exercise of reasonable care on part of drivers of vehicles—Accident due to failure of driver of vehicle to keep proper look-out—Pedestrian entitled to assume proper look-out being kept—No contributory negligence on part of pedestrian—Quaere whether any rule that pedestrians should keep to right of road exists in New Zealand.

Cooper v. Symes 325

(4) Motor-vehicle—Collision between two motor cars—Street intersection—" Off side " rule—" Off side " rule applying to intersections in country roads—Breach of rule conferring no civil right of action on party aggrieved—Breach of rule evidence of negligence if wilful or negligent and contributing to accident and accident one which regulation designed to prevent—Duties of drivers of vehicles approaching intersection—Main road driver travelling at excessive speed and failing to observe off-side rule—Driver on side road failing to slow up sufficiently when approaching intersection—Accident due to negligence of both drivers—Son entitled to recover notwithstanding negligent driving of father—Son not identified with father's negligence—Quaere as to the case of child of tender years—Claim against wife and husband—Wife owner of motor car—Husband and wife not sued jointly—Judgment against separate estate of wife—Quaere whether plaintiff entitled to judgment against husband separately.

Black v. McFarlane 308

And see Master and Servant.

NUISANCE.

(1) Interim injunction—Pollution of stream—Nuisance complained of existing twelve months before action brought—Only complaint four months before action brought—No evidence of substantial injury—Court not satisfied that plaintiff would suffer irreparable injury from delay consequent on refusal of injunction—Defendant consenting to inquiry at trial as to damages suffered between issue of writ and trial of action and to judgment being entered for such damages—Interim injunction refused.

Walker v. Guillard Blue Metal Quarry Co. Ltd. 22

(2) Liability of landlord for nuisance committed by tenant—Nuisance created by smoke and soot from chimney of hotel occupied by tenant—Covenant by tenant to use premises only as hotel for reception and accommodation of persons resorting thereto—Landlord impliedly requiring tenant to use facilities provided—Normal use of facilities—Nuisance the result of operations contemplated by lease—Landlord liable with tenant.

Ross & Glendinning Ltd. and Others v. Hancock and Co. Ltd. and Reilly 4

PARTNERSHIP.

See Conversion.
Landlord and Tenant 4.

PAYMENTS.

Appropriation of payments—Rule in Clayton's case not excluded—Guarantee of Current Account of two partners carrying on farm—Dissolution of partnership—One partner carrying on farm—Current Account continued—Requests by guarantors that company finance partners and after dissolution the partner carrying on the farm—Requests for time for payment of guarantee—Account showing large sum owing to company at date of dissolution—Subsequent credits sufficient to discharge sum owing at date of dissolution—No special circumstances preventing appropriation of credits to payment of debts in accordance with Clayton's case.

National Mortgage and Agency Co. of N.Z. Ltd. v. Tait 118

POLICE FORCE.

Summary dismissal by Commissioner of a police constable offending against Police Regulations—Constable previously, after inquiry by inspector, fined for offence and fine deducted from wages—Police officers servants of Crown holding office during pleasure of Crown—Commissioner absolute power of dismissal whenever in his opinion constable unfit to remain in the Force—Uncontrolled discretion—Constable not punished twice for same offence—Dismissal not " Punishment "—Contract of service unilateral—No right of action for wrongful dismissal by Commissioner—Police Force Act, 1908—Police Force Act, 1913, Sections 8, 9, 16 (3)—Police Force Amendment Act, 1924, Sections 4 (3).

Rex v. Power 34

PRACTICE.

Appeal—(see Libel; Will)

(1) (1) Appeal to Court of Appeal—Security—Appellant giving as security his own bond without sureties—Bond accepted by Registrar of Supreme Court—Bond held to be security—Undesirability of such form of security—Rule 22

of Court of Appeal Rules—Rule 595 of Code of Civil Procedure.

James v. Mabin 35

(2) Argument of question of law before trial—Action against solicitor claiming damages for negligence in connection with money-lending transactions entered into by plaintiff—Defence than plaintiff unregistered money-lender—No agreement between parties as to facts—Plaintiff's answers to interrogatories and entries in diary relied on as establishing facts on which defence founded—Possibility that solicitor estopped from raising defence or that defence waived—Insufficient indisputable facts to enable questions to be answered—Questions capable only of conditional determination—Argument of questions of law before trial refused—Code of Civil Procedure, Rules 154, 160.

Brown v. A. & B. 364

(3) Bill writ—Application for leave to defend—Sufficiency of affidavit in support—Drafts for goods sold accepted by purchaser but payment stopped—No evidence that goods rejected by purchaser—Only defence alleged in affidavit one of breach of warranty in diminution of price or matter of counterclaim—Quaere whether breach of warranty in diminution of price a defence to action on bill of exchange—No information in affidavit as to how much of claim disputed — Affidavit insufficient — Defendant a "One man company"—Debenture over all assets of company held by main shareholder matter for consideration—Duty to file straightforward affidavits—Motion for rescission of ex parte order—Matter at large—Neither Supreme Court nor Court of Appeal fettered by discretion of Judge in Chambers—Leave to defend granted on condition that amount of claim be paid into Court or security for same given—Code of Civil Procedure, Rule 495.

H. R. Munns & Co. Ltd. v. D. Levin Ltd. .. 227

Certiorari—(See Industrial Union).

(4) Costs—Abortive trial—Death of Judge after trial and before judgment—Second trial resulting in favour of plaintiff—Defendant unsuccessfully appealing to Court of Appeal—Plaintiff not entitled to recover from defendant costs of first trial.

Tasker v. Algar 358

(5) Costs—Amended statement of claim filed by plaintiff after statement of defence filed——Amended statement of defence filed—Plaintiff ordered to pay defendant's costs of original statement of defence—Rule 148 of Code.

Cantwell v. Wairarapa Farmers' Co-op. Assn. (No. 2) 165

(6) Costs — Co-defendants — Plaintiff reasonably joining both defendants and succeeding against one but failing against other—Costs payable by plaintiff to successful defendant included in costs recoverable by plaintiff from unsuccessful defendant—Discretion of Court—Code of Civil Procedure, Rule 555.

Kirkland v. Merrett and Lucas 387

(7) New trial—Judgment against weight of evidence—Appeal appropriate remedy where trial before Judge without jury—Discovery of fresh evidence—Evidence procurable before trial——Alleged unfair and improper practice of one defendant—Action claiming that defendant indebted to estate of deceased—Defendant failing to disclose payment made to him by deceased—Not shown that such payment was to be set-off against deceased's debt to defendant—Fact that plaintiff not given opportunity of cross-examination as to set-off not ground for new trial—New trial refused—Administration action—Costs—Defendant trustees refusing to furnish proper information ordered to pay costs of unsuccessful plaintiff.

Hammond v. Duncan 388

(See also Defamation).

(8) Order—Appeal from Magistrates' Court to Supreme Court—Informal application for leave to appeal to Court of Appeal—Leave refused in Chambers—Order refusing leave not sealed—Motion for review—Court order and not Judge's order — Sealing unnecessary — Order refusing leave not reviewable—Judicature Act, 1908, Section 67—Code of Civil Procedure, Rules 416 and 417.

Herdman v. C. Dickinson & Co. Ltd. .. 258

(9) Order—Appeal from Magistrates' Court to Supreme Court—Application for leave to appeal to Court of Appeal—Leave refused in Chambers—Order refusing leave not sealed—Motion to review—Court order and not a Judge's order—Order final though not sealed—No necessity for formal order or for sealing—Judicature Act, 1908, Section 67—Code of Civil Procedure, Rules 416 and 417.

C. Dickinson & Co. Ltd. v. Herdman .. 322

(10) Set-off of cross judgments—Judgments obtained by wife of defendant as trustee for defendant in separate actions set-off against plaintiff company's judgment—Judgments between substantially same parties—Rule applicable to independent actions—Quaere whether an assigned judgment not between substantially same parties may be set-off—Just and equitable to allow set-off—Discretion of Court—Appointment of Receiver of plaintiff company not preventing set-off—Rule 302 of Code.

Eclipse Dairy Co. Ltd. v. Thompson .. 166

(11) Striking out pleadings—Misrepresentation—Banker—Branch Manager—Alleged misrepresentations and advice by manager of bank as to financial position of company inducing plaintiff to sign guarantee—Money paid to bank to obtain release from liability under guarantee claimed as damages from manager—Fraud and negligent advice alternatively alleged—Question of law as to whether statement of claim disclosed any cause of action—Question raised before statement of defence filed—Facts necessary to support allegations in pleadings deemed proved unless admission to contrary—Claim struck out only where obvious that no reasonable cause of action—Not struck out merely because no express allegations that representations were in writing—Quaere whether all representations made were as to credit or ability of company

with a view to enabling company to obtain credit—Possibility that negligent advice might be proved—Lord Tenterden's Act, 19 Geo. IV., c. 14, Sec. 6.

James v. Mabin 130

(12) Trial—Jury—Worker injured in course of employment—Employer ordered to pay compensation by Court of Arbitration—Claim by employer for indemnity against allegedly negligent third party—Claim not one for damages—Sole issue question whether defendant negligent—Notice of desire for trial by jury not given before commencement of sittings—Action not "More conveniently tried before a jury"—Workers Compensation Act, 1922, Section 50—Rules 254, 255, 257 (a) Code of Civil Procedure.

Union Steamship Co. of N.Z. v. Chevis .. 259

Costs—see Landlord and Tenant 4.
Licensing 3.
Wages Protection and Contractors' Liens 2

Crown Suits—see Crown Suits.
Injunction—see Injunction.
Mandamus—see Municipal Corporation 3.

PRINCIPAL AND AGENT.

(1) House agent—Usage—Agent to collect rents from mortgaged premises and to pay interest insurance and rates thereon during absence of principal from New Zealand—Return of principal to New Zealand—Premises becoming vacant—Insurer's sanction to non-occupancy not obtained as required by policy—Premises destroyed by fire—Insurers denying liability but making *ex gratia* payment of part sum insured to mortgagee—Principal claiming damages from agent—Alleged breach of duty to notify insurers based on usage—Evidence of three house agents as to their own practice insufficient to establish usage—Necessity for proof of usage to obtain insurer's sanction or new policy, and not merely of usage to notify—Agent's authority terminated by principal's return to New Zealand—Semble agent's only authority at relevant times thereafter held on facts to be to sell or exchange property.

Samuel Vaile & Son Ltd. v. James 211

(2) Land agent—Commission—Written authority to sell hotel at certain price—Commission payable "Should a sale be effected"—Agent obtaining offer to purchase at lower price providing for payment to agent of deposit "on acceptance of offer"—Agent agreeing to accept less commission—Offer accepted—Deposit not paid by purchaser—Refusal of purchaser to complete—Vendor declining to enforce contract—Duty of agent to obtain payment of deposit—Failure to perform duty—Agent not entitled to commission.

Herdman v. C. Dickinson & Co. Ltd... .. 148

And see—Company 1.
Insurance 1.
Solicitor 1.

PRINCIPAL AND SURETY.

Mortgage—Covenant by several persons to pay principal and interest, one covenantor joining as surety only—Provision that mortgagee must without consent of surety give time for payment without releasing surety—Agreement without consent of surety increasing rate of interest—Subsequent agreement without consent of surety reducing interest—Surety discharged.

Brodrick v. Genge and Public Trustee .. 19

Time given to principal debtor—Surety ratifying arrangement by conduct—Surety not discharged.

Burnard v. Lysnar 242

PROBATE AND ADMINISTRATION.

(1) Executor — Costs — Executor not disclosing existence of codicil on application for probate of will—Pecuniary legatee under codicil lodging caveat—Executor having honest doubts as to validity of codicil and intentionally omitting reference to codicil with view to having question of its validity determined—Duty to disclose all testamentary documents—No misconduct in circumstances—Caveator's costs ordered to be paid out of estate—Order making executor personally liable for caveator's costs if residue insufficient refused.

In re Zwies 306

(2) Renunciation by executor—Will providing for appointment of third person in lieu of any executor renouncing probate—Events subsequent to renunciation showing that for benefit of estate co-executor renouncing should accept probate—Motion for retraction of renunciation — Order made.

In re Foster 213

And see Administration.

PUBLIC WORKS.

See Municipal Corporation.

RATING.

(1) Adoption in district of system of rating on unimproved value in lieu of system of rating on capital value—New valuation roll necessary—Rates levied on basis of unimproved value as shown in valuation roll prepared before adoption of system of rating on unimproved value irrecoverable—Injunction restraining recovery of rate—Rating Act, 1925, Ss. 6, 47.

Taylor v. Mount Albert Borough 404

(2) Exemption—"Harbour works under the control and management of any Harbour Board"—Reclaimed land on which offices erected solely for use of Board within exemption—Quarry owned by Harbour Board used to supply stone for harbour works not within exemption—Rating Act, 1925, S. 2—Harbours Act, 1923, S. 5.

Napier Borough v. Napier Harbour Board .. 387

(3) Exemptions—"Lands occupied by Churches"—Building owned by one religious denomination and used as Church by that denomination and another—Partially destroyed by fire—Not repaired or used as Church during rating year in question—Attempts to sell to other denomination during year and subsequent sale—Building not a "Church" within meaning of exemption — Use determining character of premises—Sacerdotal character abandoned—

Quaere whether "occupied" means "used and occupied"—Rating Act, 1925, Section 2.

Thames Borough v. Congregational Church Trustees 21

(4) Exemption—Land used "for purposes of public plantations."—Not confined to trees planted by hand—Land held and used for propagation of trees and on which beech trees were growing from seed falling from neighbouring trees held to be within exemption—Rating Act, 1925, Section 2 (1).

Eastbourne Borough v. Wellington City Corporation 18

(5) Refund of Rates—Unoccupied "dwellinghouse or other building"—Definition including buildings substantially dwellings though also used as shops—No right to refund where unoccupied dwelling not separately assessed—Concurrence of owner in joint assessment of several premises—No right subsequently to demand separate assessments—Conclusiveness of valuation roll and rate book—Rating Act, 1925.

Auckland City Corporation v. Hawthorne .. 6

(6) River Board — Injunction — Laches — Invalid rate—Injunction to restrain rating authorities from proceeding with summonses issued to recover rates—Right to injunction notwithstanding statutory provision that invalidity of rate not to prevent recovery thereof—Failure to take proceedings for three months after knowledge of invalidity of rate not constituting acquiescence—No laches—Rating authorities not induced to alter position by conduct of plaintiffs—Fact that large proportion of rates collected no ground for refusal of injunction—Rating Act, 1925, Sections 4, 66—River Boards Act, 1908, Sections 87, 101.

Edginton and Bernstone v. Waihopai River Board and Southland County 310

RELIGIOUS EDUCATIONAL AND CHARITABLE TRUSTS.

Fund raised by voluntary contribution—Impracticable to carry out objects for which fund raised—Application to Court for approval of scheme—Procedure for obtaining approval prescribed in Part IV of Act—Application under Part III irregular—Application dismissed—Religious Charitable and Educational Trusts Act, 1908, Sections 32, 33.

In re Takapuna Women's Progressive League (Incptd.) 405

REVENUE.

(1) Death duties—Estate duty—Expenditure by deceased in alterations and repairs to family home belonging to deceased's wife—Not referable to any intent to make a gift or improve value of estate of wife—No gift—Death Duties Act, 1921, Sections 5, 38, 39.

Finch v. Commissioner of Stamp Duties .. 18

(2) Income tax—Refund—Life insurance company—Debenture tax—Provision for refund to holder of local or public authority debentures where tax payable exceeds tax payable if interest from debentures "had formed part of his taxable income"—"Taxable income" meaning ordinary taxable income—Life insurance company entitled to benefits of provision notwithstanding partial exemption of such companies from tax expressly excluding tax payable in respect of income derived from debentures—Land and Income Tax Act, 1923, Sections 96, 99 (2), 118, 119.

Government Life Insurance Commissioner v. Attorney-General 322

(3) Stamp duty—Partition—Consideration paid by way of equality—Tenants in common in equal shares—Payment of all moneys realised from portion of lands and mortgages to one tenant in common with consent of co-tenant—Subsequent transfer of remaining lands and mortgages in such manner as to equalise distribution—Transfer dutiable under Stamp Duties Act, 1923, Section 102 (1).

More and Brewster v. Commissioner of Stamp Duties 38

RIVER BOARD.

See Rating

ROAD.

Road-closing—County Council—Closing of road under control of Council—Decision of Council to close road final—*Bona fide* decision of Council that way as convenient as the road closed left or provided to lands in vicinity also final—Public Works Act, 1908, Sections 106, 130, 131.

Handley v. Thames County Council .. 232

SALE OF GOODS.

Implied condition that goods of merchantable quality—Sale of new machine to be imported from abroad "ex wharf Oamaru"—Sale by description—Machine on arrival found to be damaged—Refusal by buyer to take delivery—Test of merchantable quality whether machine reasonably capable of doing work for which new machines of that kind designed—Machine as delivered not capable of doing such work though damage to machine capable of repair at small cost—Machine not of merchantable quality—Magistrate's finding of merchantable quality not binding on Supreme Court when wrong test applied—Sale of Goods Act, 1908, Sections 13 (1), 16.

Winsley Brothers v. Woodfield Importing Co. 183

SAMOA.

Mandate—Powers of mandatory—Enactment providing for transfer to prison in New Zealand of persons sentenced in Samoa to imprisonment for six months *intra vires* New Zealand Legislature—Habeas Corpus Act (Eng.) 1679, Section 12—Foreign Jurisdiction Act, 1890, (Eng.) Section 7—Samoa Act, 1921, Section 210.

In re Tamasese's Application 20

SET-OFF.

See Company 5.
Practice 10.

SHIP.

Maritime lien—Claim for lien for moneys advanced to master for wages and for moneys paid to Harbour Board for berthage and dock dues—No lien in respect of moneys paid to Harbour Board—Moneys advanced to master in reliance not on ship but on managing agents or owner of ship—No lien on ship for such advances.

A. J. Allen Ltd. v. Ship "Oreti" 407

SHIPPING.

Seaworthiness—Danger of sea—Goods damaged owing to leak in hull of ship—Leak due to corrosion of steel plates from inside — Loss caused by unseaworthiness and not by a danger of sea—Unseaworthiness proximate and efficient cause—Absolute warranty of seaworthiness at common law—Warranty not affected by Sea Carriage of Goods Act, 1922—Sea Carriage of Goods Act, 1922, Sections 3, 4.

Coastal Shipping Co. Ltd. v. Wanganui Herald Newspaper Co. Ltd. 114

SHOPS AND OFFICES.

Hours for closing of shops—Automatic vending machine—Machine attached to telegraph pole in public street at distance from owner's shop—Photographic films sold from machine after closing hours—Machine not a "shop"—"Building or place" in which goods kept, exposed, or offered for sale—*Ejusdem generis* rule applied—"Place" including only areas capable of physical occupation by occupier—Provisions of Act relating to "Hawkers and other persons" selling goods by retail otherwise than in a shop applicable only to itinerant traders—Shops and Offices Act 1921-22, Sections 2, 36.

Lightfoot v. Hugh and G. K. Neill Ltd. .. 197

SLAUGHTERING

See Abattoir.

SOLICITOR.

(1) Principal and agent—Sale by clerk of firm of solicitors to client of firm of second mortgage owned by clerk—Interest not disclosed—Interest in conflict with duty—Obligation of clerk to whom matter delegated same as that of solicitor—Sale set aside.

Blair v. Martin 44

(2) Settled account—Re-opening—Application by Official Assignee to re-open accounts stated between a bankrupt and his solicitor—Fiduciary relationship between parties to settled accounts—Sufficient cause shown for re-opening accounts—Accounts inaccurate—Lump sum charges included—Necessity for agreement as to charge containing sufficient information to enable Court to consider whether agreement fair and reasonable—Items in settled accounts not sufficient—No independent advice—Matters taken into consideration by Court in determining whether accounts should be re-opened or merely surcharged and falsified—Accounts re-opened—Law Practitioners Act, 1908, Section 26.

In re Martini: Official Assignee v. Grey .. 43

And see Barrister and Solicitor.

SPECIFIC PERFORMANCE.

See Contract 4.
Vendor and Purchaser 2.

STREET.

Dedication—Way created by lessee as arcade—Owner not in occupation except for fractional part of day between surrender of lease and granting of new lease—Intention to dedicate question of fact—No presumption of dedication from user by public as against owner—User of way by public as of right not established—Evidence consistent with mere permission or license.

Attorney-General v. Dunedin Arcade Co. Ltd. 194

See Municipal Corporation, 5, 6, and 7.

SUMMARY CONVICTION.

Appeal—Appeal from conviction by Magistrate after pleading guilty—Quaere whether any appeal lies from plea of guilty—Counsel entitled to plead guilty on behalf of accused person charged with offence which may be tried summarily—Appeal dismissed.

Ah Dong v. Skinner. Moi You Fong v. Arthur Skinner 131

TOWN PLANNING.

County—Refusal by County Council to issue permit to build shop—Council purporting to act under powers conferred upon "Local Authorities" pending the preparation and approval of a "town planning" scheme — "Town planning" applicable to boroughs and cities as distinct from "regional planning" applicable to rural areas—Section applicable only to local authorities charged with a town planning scheme—Not applicable to county councils—Town Planning Act, 1926, Section 34.

Waimairi County v. James 36

TRADEMARKS.

Passing-off—Company incorporated in England under name of "Morris Motors (1926) Limited" selling "Morris" motor cars to wholesalers in New Zealand—No agents or registered office in New Zealand—Company incorporated in New Zealand trading in used "Morris" cars under name of "Morris Motors Ltd"—Injunction granted restraining New Zealand Company from trading under such name—Name "calculated to deceive"—Probability of confusion sufficient—Not necessary to prove actual confusion—Evidence that appropriation wilful—Foreign company having market in New Zealand entitled to protection against having trade name and reputation appropriated by New Zealand trader.

Morris Motors (1926) Limited v. Morris Motors Limited 162

TRUST AND TRUSTEES.

Religious educational and charitable trusts—Powers of trust board—No power to mortgage freehold property—Power to "sell" not including power to mortgage—Mortgage by trust board sanctioned by Court under its general jurisdiction—Religious Educational and Charitable Trusts Act, 1908, Sections 7, 9, 13.

Second Church of Christ Scientist, Christchurch Trust Board v. Symes 292

And see Administration
Charitable Trust.

UNDUE INFLUENCE.

Sale by bankrupt with consent of Official Assignee of life interest in capital sum—Official Assignee not party to assignment—Ignorance of vendor—Pressure by creditors—Sale at undervalue—No independent advice—Act of vendor after knowledge that transaction of doubtful validity in effecting insurance on life in name of purchaser held not in circumstances to amount to affirmation—No acquiescence or laches owing to ignorance of facts until shortly before action brought—Title of plaintiff to sue—Transaction set aside.

Harris v. Richardson 274

VALUATION OF LAND.

"Unimproved value"—Lessee's interest—Special use to which land being put not taken into account—Principles of valuation stated by Supreme Court for guidance of Assessment Court—Further valuation by Assessment Court—Valuation on wrong principle—Special use to which land being but taken into consideration—Whether point that no evidence to justify assessment open to Supreme Court on appeal from valuation—Contents of case on appeal—"Consist of"—Statement of facts may be included—Case remitted to Assessment Court with directions as to maximum figure for valuation—Valuation of Land Act, 1925, Sections 29 (c) 30.

Colonial Sugar Co. Ltd. v. Valuer-General .. 149

VENDOR AND PURCHASER.

(1) Agreement for sale and purchase—Forfeiture—Purchaser in possession—Notice—Sufficiency of notice under Section 94 of Property Law Act, 1908 — Several breaches alleged — Particular terms broken not specified—Particular breach complained of specified in some cases but not in others—Statements that land not kept free from gorse and that buildings not kept in repair to satisfaction of vendor not sufficient specification of breaches—Not indicating with reasonable certainty what purchaser required to do—Notice grouping breaches sufficiently specified with breaches insufficiently specified bad—Notice bad also in requiring compensation as alternative to remedying of remediable breaches—Property Law Act, 1908, Section 94.

McConnell v. McCormick 246

(2) Specific performance—Whether time of essence of contract—Agreement by vendors to sell land to purchaser—Provision that possession to be taken by purchaser on certain date—Balance of purchase moneys to be paid on date fixed for completion—Express provision that time for performance of covenants by purchaser of essence of contract—Agreement by vendors to purchase land from purchaser also providing for payment of balance of purchase moneys on day fixed for completion and that vacant possession be given on that date—Transaction an exchange—Failure of vendors to give possession on date fixed although purchaser ready to complete and to give title to property in exchange—Time for taking possession expressly made of essence of contract—Implication that time for giving possession also of essence of contract—Provision that interest to be paid on purchase money not paid on date fixed for completion not sufficient to negative express provision that time for completion of essence of contract—Provision conferring additional remedies on vendors if default made by purchaser for fourteen days in payment of instalments or interest or in observance of covenants held not to restrict rights of purchaser or to give vendors time for performance of covenants.

Shepherd v. Sunderland 134

And see Contract 4.

WAGES PROTECTION AND CONTRACTORS' LIENS.

(1) Company liquidation—Architect claiming lien for fees due in respect of professional services—Architect a "contractor" and preparation of plans and specifications and superintendence of erection of building "work"—Semble leave of Court not required to action claiming lien against Company in liquidation — Proceedings commenced without leave of Court not void—Power of Court to grant leave *nunc pro tunc*—Wages Protection and Contractors' Liens Act, 1908, Ss. 48, 49—Companies Act, 1908, S. 244.

Brown v. E. G. Laurie Ltd. (in liquidation) .. 404

(2) Liens of sub-contractors—Several claims by sub-contractors and workers for charges on monies payable to contractor—Sum due to contractor paid into Court—All claims heard together—Claim of respondent sub-contractor for charge in respect of timber supplied contested on ground that timber not supplied under single contract—Magistrate allowing all claims—Appeal by one of claimants against Magistrate's decision as to charge of respondent—Claimant entitled to appeal—Respondent supplying timber under separate orders and not under continuous contract entitled to charge only in respect of claims arising within thirty days before notice of charge given—Wages Protection and Contractors Liens Act 1908, Sections 55, 56, 61, 62, 64, 66, 67, 68, 69, 80, 81—Magistrates Courts Act, 1928, Section 164.

Ball v. Scott Timber Co. Ltd. and Others .. 243

(3) Practice—Costs—Claim for lien brought in Supreme Court—Claim within jurisdiction of Magistrates' Court—Neither debt nor right to

lien disputed—Costs allowed only on Magistrates' Court scale.

Nixon v. Millar and Irvine 325

(4) Wages—Contract to build pier for Harbour Board—Assignments by contractor of moneys payable under contract—Notices of attachment for wages served on Board—Bankruptcy of contractor—Claims of workers for wages not affected by bankruptcy and entitled to priority over assignments—Moneys payable to contractor by Board dehors the contract and deposit accompanying contractor's tender not affected by assignments or charged in favour of workers—Working foreman of quarry, working foreman and acting engineer, and driver of motor-lorry held to be " Workers "—Worker giving certificate that wages paid to certain date entitled to claim under Act only for wages accruing subsequently—Order directing payment out of moneys payable " On completion of contract " held to include moneys payable on termination of contract by agreement—Wages Protection and Contractors' Liens Act, 1908, Sections 4, 5, 9, 10, 20.

Leyland Motors Ltd. v. Napier Harbour Board 356

WILL.

(1) Condition—Condition subsequent in general restraint of marriage—Void when annexed to gift of personalty—Void when annexed to devise of realty where intention of testator is to discourage marriage and not merely to make provision until marriage—*Semble* void even if intention is merely to make provision until marriage and not to discourage marriage.

In re Pearce: Bovett v. Pearce 391

(2) Construction—Acceleration—Bequest of income to wife during life or widowhood and " Immediately after the death or future marriage of my wife " bequest of capital and income to brothers and sisters named—Codicil revoking bequest of income to wife and directing payment of an annuity to her in lieu thereof—Acceleration of interests of brothers and sisters—Words " Immediately after the death or future marriage of my wife " construed as meaning from and after the determination of the estate by death or otherwise—Interests of brothers and sisters vested in possession at testator's death subject to annuity—Doctrine of acceleration applying to both real and personal estate.

In re Harman: Harman v. Anderson .. 386

(3) Construction—Forfeiture—Bequest of residue upon trust for son and daughter equally—Son's share to be held upon trust to pay income to son for life or until he attempts to deprive himself or is deprived by bankruptcy from personally receiving or being entitled to receive same, and then in trust for the children of such son—Provision that if son deprived of income from any cause whatever, or on death of such son, wife entitled to receive such income provided she maintains educates and brings up children—Share of child of son being made to vest on attaining twenty-one or being female attaining such age or marrying with the consent of her parent or guardian—Provision that decision of trustee as to whether son deprived of personal benefits to be final—Authority given by son authorising solicitor to pay income to wife—Notice of wife's authority to receive income subsequently given to trustees—Authorities to wife to receive income not assignments and therefore not sufficient to cause forfeiture of son's interest—Son subsequently adjudicated bankrupt—Interest of son held forfeited upon bankruptcy—Class of children entitled to take fixed at date of forfeiture and not postponed until death of son—Children born after forfeiture not entitled to share in capital or income—No provision in will extending class—Rule of convenience that class not capable of increase once any child of such class entitled to payment applied—Upon forfeiture son's wife entitled to income of shares of children subject to maintenance and education of children until vesting of share of each child.

In re McMillan 131

(4) Construction—Gift of residue upon trust to pay income to wife for life and after her death to " Such of my children as shall survive me and be alive at the death of my wife "—Interests of children contingent upon surviving widow—No intestacy as to capital—Gift of income without limit of time operating as disposition of capital.

In re Lyndon 359

(5) Construction—Incidence of debts—Devise of " Real property including interests in land "—Testatrix purchaser of land under agreement for sale and purchase — Incidence of unpaid purchase money—Residuary of estate not primarily liable—Devisee taking only testatrix's interest in land—Land " Charged with payment of sum of money by way of mortgage "—Statutory abolition of vendor's equitable lien not affecting equitable charge created by agreement—Property Law Act, 1908, Sections 9, 109.

In re Winter: Public Trustee v. Winter .. 361

(6) Construction—" Money "—Bequest to husband of the interest upon " All my money " until only child became twenty-one—Gift of " The whole of the money " to such child when he reached twenty one—Money held having regard to surrounding circumstances to comprise whole of personal estate of testatrix but not to include real estate—No assistance in construction from context — Quaere whether term " money " may in any circumstances include real estate—Appeal in *forma pauperis*—Costs.

Horton v. Public Trustee 37

(7) Construction—Native land—Devise to trustee upon trust for absolute and exclusive enjoyment of beneficiaries named—Subsequent provision that if any beneficiary should die without issue all his right title and interest which he had acquired under the will should vest in the children of a person named—Beneficiaries entitled to fee simple subject to executory devise in event of death without issue—Trustee not a bare trustee of fee simple for beneficiaries named—Succession orders in favour of such beneficiaries improperly made by Native Land Court—Native Land Court—Native Land Act, 1908, S. 148—Wills Act, 1837, 1 Vict. C. 26, Section 29.

In re Panapa Waihopi 324

(8) Construction—Provision for payment out of "nett income" from named property of fixed annual sums to two societies and for division of balance among four other beneficiaries—On sale of property interest from investment of proceeds to be similarly divided—No express gift of corpus—Gift of income amounting to gift of capital—Societies taking such proportion of capital as fixed annual sums bear to "nett income" of property or proceeds of sale—Other beneficiaries taking balance of capital—Power of Court to change word in will incorrectly used by testator for some other word.

In re Polson: Polson v. Polson 229

(9) Interpretation—Bequest of nett proceeds of sale and realisation of "Springbank" property—Sale prior to death of testator—Part of purchase price paid in cash and balance left on mortgage—Bequest Adeemed by sale.

In re Bedgood's Will 19

WORKERS COMPENSATION.

(1) Accident—Sudden death of worker while doing heavy work—Worker suffering from disease of heart of long standing—Dependent of worker entitled to compensation—Evidence of special strain not necessary—Test whether strain of work contributed to death of worker.

Muir v. J. C. Hutton (N.Z.) Ltd. 22

(2) Accident—Whether arising out of and in course of employment—Hernia not causing death—Previous hernia—Medical evidence showing condition consistent with recent or old hernia—Accident including any unexpected personal injury arising from physiological condition set up by ordinary course of work—Sudden strain not essential ingredient—Claimant failing to discharge onus of proof.

Ayling v. Wellington City Corporation .. 263

(3) Worker sustaining injuries to head and ankle as result of fall from viaduct—Subsequent insanity of worker resulting in suicide—Insanity held on evidence to be result of accident—Widow entitled to compensation in respect of death

Hill v. Waipa Railway and Colleries Ltd. .. 119

(4) Accident—Basis of assessment of compensation—Worker straining heart while lifting weight—Daily lifting of heavy weights for seventeen years in defendant's employment—Worker's heart originally weakened before entering into defendant's employment—Daily aggravation of condition—Compensation recoverable only for such disability as attributable to last strain—Workers' Compensation Act, 1922, Section 27.

Hutton v. Stonex Brothers 366

(5) Average weekly earnings—Worker employed by club at weekly wage during summer months—Independent contractor during rest of year—Weekly wage while employed by club held to be average weekly earnings—Workers' Compensation Act, 1922, Section 6 (1) and (2).

Leatham v. The Petone Central Bowling Club 7

(6) Certiorari—Agreement between employer as to compensation—Jurisdiction of Magistrate to approve—Jockey in employment of trainer injured while racing horse owned by third party—Agreement by jockey accepting *ex gratia* payment by trustees of Racing Conference in full satisfaction of claims against trustees, trainer, and owner—Magistrate assumed to have ascertained facts giving jurisdiction—Jockey's solicitor certifying agreement in order—"Trade or business" including operations of trainer of horses and in some circumstances racing of horses by horse-owner—Quaere as to effect of delay on motion for writ of certiorari—Writ of certiorari refused—Workers' Compensation Act, 1922, Sections 3, 18.

In re Dombroski 359

(7) Owner of land granting license to fell and remove dead timber with incidental rights not liable to pay compensation to bushman engaged by grantee of such license—Contract by owner of land with grantee a contract for grant of timber rights, not a contract for execution of any work—Worker's Compensation Act, 1922, Sections 13, 63.

Michalick v. McGregor 23

(8) Death by accident—Worker found crushed between two railway trucks close to place where working—Worker seen at his work very shortly before accident—No evidence as to reason for worker's going between trucks—Presumption of continuance in course of employment.

Archibald v. Union Steamship Co. of N.Z. Ltd. 392

(9) "Domestic service"—Handyman engaged to do work generally in and about residence—Work comprising gardening, odd jobs in and about house and going messages—Death by accident while cutting off branch of tree—Worker engaged in "domestic service"—Workers' Compensation Act, 1922, Section 3 (2).

Gough v. Chapman 262

(10) Worker—Gardener employed by doctor in private garden not a "worker"—Not engaged in any "trade or business" within meaning of Act—Workers' Compensation Act, 1922, Sections 2, 3 (2).

Christie v. Will 151

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"An advocate ought to know how to reconcile the interests of his clients with the eternal interests of truth and justice."

—Lord Chief Justice Cockburn

Vol. V. Tuesday, March 5, 1929. No. 1

Sir Charles Skerrett

In another part of the issue we publish a report of the tributes paid to the late Sir Charles Skerrett by Bench and Bar in the Supreme Courts at Wellington, Auckland and Christchurch, and this Journal wishes in its editorial column to associate itself with those tributes and with the eulogistic references made to the late Chief Justice by the Press throughout New Zealand. It is not on his services to the community as a Judge that posterity will assess the worth of Sir Charles Skerrett because his occupation of the office of Chief Justice was unfortunately for such a comparatively short period and for a great portion of that time he was engaged out of New Zealand on the Commission relating to Samoan affairs. It is on his long and distinguished career in the ranks of the Profession that his reputation rests, and the Profession, in mourning his death, mourned one who did as much as anyone else in New Zealand to establish in the public mind a correct view of the relationship in which the Profession stands to the public. Inside the Profession his influence was enormous and the confidence placed in him by all classes throughout New Zealand re-acted upon the Profession with very beneficial results.

During his short tenancy of the office of Chief Justice there appeared to be a marked tendency on the part of the Court of Appeal to deliver single judgments instead of several judgments. The delivery of too many of such judgments was bound to meet with criticism on the ground that the value of judgments of that Court is not so much in the result as in the record of the reasoning on which the decision was founded. Even where the Judges responsible arrive at the same conclusion by the same road the value of individual expression of the reasons is considerable, and where the same conclusion is reached by different processes the several judgment is necessary. It is known, however, that Sir Charles Skerrett was anxious that Court of Appeal judgments should not be unduly delayed. Delay in the past was no doubt due to dispersal of the Judges to their various provinces before discussion had resulted in determination. Subsequent correspondence and the exchange of draft judgments frequently led to delay and great inconvenience to the parties concerned. While some practitioners regretted the frequency of single Court judgments everyone admired the promptitude with which decisions were delivered under Sir Charles' regime.

From some of the language employed by Sir Charles in cases where he had to decide issues of fact, it would appear that he felt to some degree that because of necessary public implication, a Judge did not on issues involving preference of testimony enjoy the freedom of a jury. Had he lived he might, for this reason alone, have advocated a more frequent resort to juries than now obtains.

In commenting upon the qualities that enabled Sir Charles to reach his high position the Press of New Zealand have relied to a great extent upon articles which appeared in this Journal as correctly representing informed opinion, but the sincere acknowledgements of his pre-eminence at the Bar by such of his contemporaries as are themselves acknowledged leaders, are perhaps the best tribute to his memory. Those leaders, as much as Sir Charles, have guided a growing Profession in a young country that in their time has developed rapidly and seen many changes. They, as much as he, have seen that standards have been set and maintained. Sir Charles Skerrett's variety of interests and combination of qualities gave him an all round capacity that perhaps made his influence felt over a wider and more composite acquaintance, and it was the wide acquaintanceship and experience he thus gained that gave him his unique position. His sporting and social habits were recognised and in consequence he enjoyed the confidence of sportsmen and those socially inclined to a very unusual degree. Despite the great calls on the time of his extensive practice as both solicitor and barrister, he was called upon to preside at many social functions and to act as president of many social bodies. He was President of the Wellington Club, of the Wellesley Club, Vice-President of the Wellington Racing Club, Chairman of the Sports Protection League, Chairman of the Welfare League, Chairman of the New Zealand Football Association, and on many other bodies he had acted in an official position. He was valued by all such associations for his sane and courageous outlook on life. All lawyers had hoped to see him on the Bench with Sir John Salmond. The high abilities of each with their different training would, it was felt, of themselves have constituted in conjunction a tribunal of great strength. Sir Charles seemed destined to a great career on the Bench, and his friends and the public can only grieve that his life was not spared to this end.

Without perhaps being able to formulate the qualities required in a Judge, the public of New Zealand were satisfied the late Chief Justice possessed them in an eminent degree. If it is true that the ultimate and most important quality in a Judge is "the desire to understand human life as well as embalmed legal experience" we believe it correctly summarises the public estimate of Sir Charles Skerrett's qualifications.

Supreme Court.

MacGregor, J. November 27, 28; December 10, 1928. Dunedin.

IN RE SOUTHLAND WOOLLEN MILLS LTD.

Company—Winding Up—Just and Equitable Failure to Commence Business Within One Year from Incorporation—Principles upon which Court Exercises Discretion—Company Formed to Establish Woollen Mills—Proposal After Four Years to Erect and Work Worsted Mills—Farmer Shareholders Strongly Opposed—Town Shareholders in Favour—Majority in Favour of Winding Up—Directors Nevertheless Entering Into Contract to Purchase Plant for Worsted Mill—Danger of Deadlock—Delay Not Sufficiently and Satisfactorily Explained—Quaere Whether Substratum Gone—Just and Equitable in Circumstances that Company Be Wound Up. —Companies Act, 1908, Sections 177 (b) (e), 185.

Petition to have the above-named company wound up by the Court under the provisions of Section 177 of the Companies Act, 1908, on the grounds that the company had not commenced its business within a year from its incorporation, and that it was just and equitable that the company should be wound up. The facts appear in the report of the judgment.

Barrowclough for petitioners.
Adams and Smith for company.

MACGREGOR, J., said, quoting from **Buckley's Companies Acts,** 10th Edn., 313, 315, that the jurisdiction to wind up a company under Subsection (b) was discretionary, and was to be exercised only where that was a fair indication that there was no intention of carrying on the business—if the delay or suspension was satisfactorily accounted for an order might be refused. Again, the words "just and equitable" as used in Subsection (e) did not give the Court a loose discretion which could be exercised whenever it thought the speculation not a very successful one. The Court could not wind up a solvent company against the wishes of the majority of the shareholders, merely because the business had been carried on at a loss. There must be strong ground for exercising the power at the instance of a shareholder. The petitioners were four original shareholders of the company and it had to be remembered that in such a case, where the petitioner was a shareholder, the Court had a discretion as to whether it would make an order on his application: per James, L.J., in **In re Middlesborough Assembly Rooms Company,** 14 Ch. D. 104, 110. The question arising was, in the circumstances, whether His Honour should exercise the judicial discretion vested in the Court in favour of or against the compulsory winding up of the company.

His Honour came to the conclusion that he should order the company to be wound up by the Court. The company had clearly brought itself within the express terms of Section 177 (b). The company was incorporated on 15th September, 1924. Although it obtained a certificate to commence business on 10th October, 1924, it had not at the date of the hearing of the petition really commenced its business, although it took the first step in that direction by purchasing a leasehold site for a mill in Gore, in May, 1928. After the present proceedings were threatened the directors appeared to have also entered into a contract for the purchase of machinery for a worsted mill, and to have called for tenders for the construction of the mill buildings. His Honour was not satisfied that the delay of nearly four years in commencing business had been "sufficiently and satisfactorily" explained. None of the reasons given by the counsel for the directors for the lengthy period of inaction were convincing. The company was formed in September, 1924, with an issued capital of £100,000 to erect and work a woollen mill in Gore. At an early stage it was determined by the directors to make no forward move until £85,000 capital had been subscribed. That amount had not been reached, the total capital subscribed being about £70,000. Matters drifted on for some years in the hope of securing further capital, but without success. No calls were made for about two years. In March, 1927, a motion to go into voluntary liquidation was defeated. The directors appeared to have abandoned the original project to erect a woollen mill, and resolved to proceed instead with a worsted mill on a smaller capital basis. They did not seem to have taken the shareholders fully into their confidence as to that new proposal. The first step in that direction was the purchase by the directors of a leasehold site for a mill in Gore, in May, 1928. The dissentient shareholders, on 1st July, 1928, issued a circular to all shareholders asking them to vote "Yes" or "No" whether the company should be wound up or not and a majority of the shareholders on the register appeared to have replied in favour of winding up. The result of the referendum was communicated by letter to the directors, and they were then asked not to enter into any further commitments until the petition for winding-up had been disposed of by the Court. Nevertheless within a few days the directors entered into a contract for the supply of expensive machinery for the worsted mill then projected. The present petition was presented shortly afterwards.

His Honour thought that it was obvious that the original project of the company had been abandoned for lack of capital, and that a new scheme had been projected by the Gore directors against the wishes of a majority of the shareholders. Instead of erecting and working a woollen mill with available capital of not less than £85,000, they proposed to erect and work a worsted mill with a subscribed capital of approximately £70,000. That radical change of object amounted in fact, if not in law, to an abandonment of the "main or paramount object" of the company. In view of the wide terms of the Memorandum of Association, however, His Honour doubted whether that would amount in itself to a failure of the company's substratum: (see **In re German Date Coffee Co.,** 20 Ch. D. 169; **Cotman v. Brougham,** (1918) A.C. 514, 520, 521. It certainly was a relevant and material fact which must be taken into consideration in determining whether it was "just and equitable" to order the winding up of the company.

His Honour was, moreover, satisfied that the new project was against the wishes of a majority of shareholders. It appeared that the majority of the members of the company did not desire to go on with its business, after the long delay that had taken place. His Honour referred to the law as stated in **2 Palmer's Company Precedents,** 13th Edn. 48 The long delay was not satisfactorily accounted for, while the majority of the shareholders desired to have the company wound up. In other words, the "domestic forum" spoken of in the cases had been appealed to, with the result that it had decided against commencing or continuing the company's business. Under Section 185 of the Companies Act, 1908, the Court should, His Honour thought, be largely guided by that significant fact in a case like the present one. In ordinary circumstances a meeting of the contributories might well have been directed under that section, but as the wishes of the contributories had already been proved by sufficient evidence, His Honour thought there was no occasion to take any such further step.

The petitioners and the shareholders who supported them appeared to desire a winding up not only on the ground of long delay and lack of capital funds, but also on account of the directors' new proposal to start a worsted mill instead of a woollen mill. The original proposal was to erect a woollen mill in Gore, to manufacture wool produced in New Zealand. Many of the shareholders were small sheepfarmers throughout Otago and Southland, who took up shares on the faith of that scheme. It was now proposed to abandon that project and to erect instead a worsted mill, where "tops," imported into New Zealand from Britain or Australia should be woven into worsted goods. The local shareholders who produced wool naturally did not approve of that novel project, and some of them were defending actions for calls on that ground. There were two distinct bodies or factions of shareholders in this company: one faction consisting in the main of the directors and shareholders resident in or near Gore, who, it was claimed, were determined to establish a mill in that particular town at all costs, the other of one remaining director, and the general body of shareholders outside Gore, who were opposed to this new scheme altogether. They were apparently prepared to risk their money in a woollen mill at Gore in 1924, but had strong objections to investing fresh capital in a worsted mill at the same place in 1928. With the shareholders of the company divided into two nearly equal hostile camps, there was every prospect of an actual "deadlock" in the conduct of its business for the future.. It was obviously impossible to secure a sufficient statutory majority in favour of voluntary winding up. The petitioners accordingly asked the Court to intervene by way of a compulsory winding up, as in **Pirie v. Stewart,** 6 S.C. (5th Ser.) 847, in circumstances somewhat similar.

His Honour said that that aspect of the matter could not be ignored, and should be considered along with the general conduct of the company's affairs by the Gore directors, who controlled the destinies of the company. His Honour referred to

Loch v. John Blackwood Ltd., (1924) A.C. 783, and **Baird v. Lees**, (1924) S.C. 83, 92. Applying the principles adopted in those cases to the present case, His Honour found that the directors of the company: (a) had not even commenced the company's business after four years of its corporate existence; (b) that they had in the end abandoned the business which the company was originally formed to carry on; (c) that after nearly four years of delay they proposed to carry on another branch of business without consulting the shareholders on the subject, and (d) that they insisted on carrying out that new policy after a majority of the shareholders had voted against it and in favour of winding up the company. When directors of a limited company acted in such a way their conduct should be looked upon with some approach to suspicion. They must be judged by their actions rather than by their words. The latest conduct of the directors certainly did not tend to allay or remove that suspicion. Notwithstanding the receipt of a letter from the solicitor for the petitioners intimating that the majority of the shareholders were in favour of winding up the company, and that a petition was being filed for the purpose, and requesting the directors to refrain from any further action towards the establishment of the woollen mill until the petition was disposed of, the directors at once dispatched a telegram requesting an estimate for a complete plant, and within a few weeks thereafter accepted a tender for the supply of a complete plant for worsted machinery. They had also since advertised for tenders for the erection of the mill buildings in Gore. It was difficult to understand or account for such a precipitate course of action on the part of the directors in the circumstances. It did not demonstrate that the business of the company was being conducted by the directors "in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency." (See **Loch v. John Blackwood Ltd.** (*cit. sup.*) at p. 793). On the contrary it went far to convince His Honour that these conditions or some of them had been and were being deliberately and consistently violated by the directors.

His Honour held that in the circumstances there were sufficient grounds for exercising the statutory discretion, and for holding it to be just and equitable that the company should be wound up by the Court. His Honour referred to **In re Newbridge Steam Laundry Co.**, (1917) 1 I.R., 90, approved in **Loch v. John Blackwood Ltd.** (*cit. sup.*) as authority for the rule that Section 177 (e) should not be construed in a restricted way, but should be applied to all cases, which could not be brought under the preceding clauses, where, having regard to established principles of Courts of equity, justice and equity required that a company should be wound up.

Order made that the company be wound up by the Court.

Solicitors for petitioners: **Ramsay, Barrowclough and Haggitt**, Dunedin.

Solicitors for Company: **Smith and Dolamore**, Gore.

Blair, J. October 19, December 10, 18, 1928. Auckland.

JAMES v. THE STANDARD FIRE INSURANCE CO. LTD. AND SAMUEL VAILE & SONS, LIMITED.

Insurance—House Agent—Duty of Agent Appointed to Collect Rents and Pay Rates and Insurances to Notify Insurance Company When Premises Become Vacant—Usage—Condition of Policy Providing for Cesser of Insurance if Premises "unoccupied" for More than Thirty Days—Premises Formerly Occupied by Tenant Vacated Six Weeks Before Fire—Nobody Living on Premises During Such Period—Premises Occasionally Visited by Owner to Effect Repairs and Neighbour Instructed to Look After Same—Premises "Unoccupied" Within Meaning of Condition.

In this case there were two claims by the plaintiff in respect of the same fire, one against the Standard Insurance Company (referred to as "the insurers") based upon two policies of insurance covering the premises destroyed, and the other against Samuel Vaile & Sons, Ltd. (referred to as "the company") for damages for breach of duty. The facts as to the first claim were as follows: The premises were totally destroyed by fire on 26th March, 1928. Up to 8th February the premises had been occupied by a tenant but from that date until the fire nobody had lived in the house and it was actually unoccupied for about six weeks prior to the fire. Plaintiff himself visited the house during that time and did odd repairs. A neighbour was keeping an eye on it and plaintiff had made arrangements himself to paint the house and the paint arrived at the house the day after the fire. Nobody was at the premises when they were burned. Plaintiff himself had not slept in the premises nor had anyone else from the 8th January. No consent by the insurers to the premises remaining unoccupied had been obtained. The insurers repudiated liability on the policies under clause 9 of the conditions which provided that the insurance should cease to attach as regards the property affected unless the insured before the occurrence of any loss or damage obtained the sanction of the company, signified by endorsement on the policy by or on behalf of the company, if (*inter alia*) "the building insured or containing the insured property becomes unoccupied and so remains for a period of more than thirty days."

The facts as to the second claim were as follows: The defendant company, land and estate agents, acted as agents for owners of premises. The plaintiff left New Zealand in 1925 and he left the premises destroyed by the fire in the company's hands. He signed a letter addressed to them, but prepared by the manager of their rental department as follows: "I hereby appoint you my agents for my property Lake Road, Ellerslie during my absence from New Zealand. Please collect rent and pay out interest, insurances and rates when due and forward the balance from time to time to me as requested." The commission payable to the company was one week's rent for letting and 5% on rent collected. There was a tenant in the premises at the time, and he remained tenant until 8th February, 1928, some weeks after the plaintiff's return to New Zealand. While plaintiff was away and also after his return while the tenant was in the premises the company collected rents and accounted to the plaintiff. It reduced rent when such became necessary and did some minor repairs without consulting the plaintiff. The premises were, however, as shown by the facts stated in connection with the first claim, unoccupied for some weeks before the fire without the sanction of the insurers and the plaintiff claimed that the company in failing to notify the insurers that the premises had become vacant had been guilty of a breach of duty. Three well-known and experienced house and land agents all gave evidence that it was usual in the land agency business when collecting rents and looking after insurances to take steps to notify insurance companies when premises become vacant for such a period as to be likely to affect insurance. All of them knew of the common clause in insurance policies. Mr. Vaile, manager of the company, while denying that it was customary in the business to undertake any risk regarding insurances said that his clerk departed from instructions when making the arrangement he did with plaintiff. Mr. Vaile said that he always insisted upon a proper power of attorney and that in such case he transferred all insurances to the company whom his firm represented and with whom they had a standing arrangement to keep on foot the insurances of vacant premises.

Leary for plaintiff.
Richmond and Uren for Standard Insurance Company.
McVeagh for Samuel Vaile and Sons, Ltd.

BLAIR, J., said that it was clear that if the premises were "unoccupied" that condition was fatal to a claim on the policy unless the insurers' sanction had been obtained. Plaintiff contended that the premises were not "unoccupied" by reason of the fact that he was in charge, visited the premises and asked a neighbour to look after them. There was no doubt in His Honour's mind that, after the tenant left, the house was an empty house and that it was unoccupied in the sense intended by the policy. It was pointed out in argument that the policy was a stock form used for all sorts of premises such as shops, warehouses, outhouses, stables, or even the grandstand of a racecourse. That was true and it might be that occupancy of an outhouse or a grandstand differed from occupancy of a dwelling. Insurance companies commonly inserted on policies the words "occupied by owner as a dwelling" and so far as a stable or outbuilding was concerned they would no doubt use appropriate qualifying words. In the latter event the wording of the policy would qualify clause 9 above quoted. The fact that the common form of policy had a special provision about occupation was very well known and a wise man insuring premises let to tenants could protect himself by obtaining a policy to cover premises when unoccupied. It would not be possible for the Court successfully to attempt to lay down a definition of what did and what did not constitute unoccupied premises. His Honour was at present concerned with a vacant dwellinghouse the policy respecting which provided for a lapse of the policy after the premises were unoccupied for 30 days unless certain steps were taken. The only occupancy suggested was casual visits by the owner and it was clear that that did not take the premises out

of the category of "unoccupied." See **MacGillivray on Insurance Law**, 965; **Welford and Otter-Barry on Fire Insurance**, 2nd Edn. 217.

As to the second claim His Honour held that the evidence of Mr. Vaile lent colour to the suggestion that agents for owners looking after owners' premises did look upon it as their duty to get the sanction of insurance companies when premises became vacant. Mr. McVeagh quoted a number of authorities that no usage had been proved. Plaintiff claimed against the company that it had omitted to do something which agents, as they were appointed, always did as part of their ordinary duty as agents. His Honour found it proved that agents, when appointed as the company was, looked upon it as part of their duty to notify insurance companies when premises became vacant. That was necessary to keep insurances on foot, just as much as the payment of premiums was necessary. All agents apparently did it as a matter of routine when they were in charge of a property. If loss occurred from failure to perform the duty the agent was, in His Honour's opinion, liable. He could make special provision about it if he so desired, or he could, as the company itself did, take steps to provide against an employee's possible neglect. The company said that shortly after plaintiff's return the property was taken out of its hands as letting agent although it remained in its hands as selling agent. Plaintiff denied this and His Honour found that the alleged cancellation of plaintiff's instructions had not been established. His Honour held, therefore, that the company was guilty of a breach of contract and was liable in damages, which, in the circumstances of the case, His Honour held to amount to £115.

Solicitors for plaintiff: **Bamford, Brown and Leary**, Auckland.

Solicitors for Standard Insurance Co., Ltd.: **Gittos, Uren, Gregory and Bourke**, Auckland.

Solicitors for Samuel Vaile & Sons, Ltd.: **Russell, McVeagh, Bagnall and Macky**, Auckland.

Blair, J. December 12; 18, 1928.
Auckland.

ROSS & GLENDINNING LTD. AND OTHERS v. HANCOCK AND CO. LTD. AND REILLY.

Nuisance—Liability of Landlord for Nuisance Committed by Tenant—Nuisance Created by Smoke and Soot from Chimney of Hotel occupied by Tenant—Covenant by Tenant to Use Premises Only as Hotel for Reception and Accommodation of Persons Resorting thereto—Landlord Impliedly Requiring Tenant to Use Facilities Provided—Normal Use of Facilities—Nuisance the Result of Operations Contemplated by Lease—Landlord Liable with Tenant.

Motion for injunction to restrain a nuisance created by smoke and soot from a chimney of a hotel of which the defendant Reilly was the lessee and the defendant Hancock & Co. Ltd. the lessor. The fact that the chimney created the nuisance complained of was not disputed. The evidence showed that in January, 1926, some of the plaintiffs complained to the defendant company about the nuisance and there appeared to be no dispute that the defendant company was aware of the fact that the chimney created a nuisance. The lease under which Reilly held was granted on 1st June, 1927. Reilly had been lessee before that under a former lease, but the present lease was not executed pursuant to any right of renewal in such lease. Reilly's lease required him to use the premises for no other purposes than a hotel or public house and contained a covenant by him "to keep and use the said hotel and premises as and for an inn or public house for the reception and accommodation or entertainment of travellers guests and other persons resorting there." The premises let were equipped with the chimneys the use of which created a nuisance. Reilly used the facilities provided on the premises for cooking and hot water.

Reilly did not dispute the plaintiff's right to an injunction. The defendant company disputed the right to an injunction against it claiming that the chimney itself was not a nuisance. The company did not dispute that the use made of it was a nuisance, but said that was a matter for the tenant Reilly.

Towle for plaintiff.
Terry for defendant company.
McVeagh for defendant Reilly.

BLAIR, J., said that to comply with the covenant Reilly must supply, amongst other things, meals to travellers (Section 165 of the Licensing Act, 1908) and he would, therefore, require to use the cooking facilities in the premises. Reilly also provided hot water for his guests and the baths and basins were no doubt equipped to enable him so to do, and fuel was used to create that hot water. It might be taken, His Honour thought, that not only did the landlord when he let the premises know that Reilly would cook meals for his guests and provide hot water to wash them, but that the landlord also expected and demanded if not expressly then impliedly that Reilly do so.

Under these circumstances the landlord was equally liable with Reilly to an injunction to prevent the continuance of an admitted nuisance due to the normal carrying on of the hotel business as equipped. If the landlord were not equally liable with Reilly then upon the grant of the injunction Reilly might say that he would either leave the premises or stop cooking and providing hot water for guests. If Reilly vacated the premises the landlord could let them to someone else who would not be bound by the injunction, and the plaintiffs would have to commence proceedings *de novo* against the new tenant. If Reilly stayed on and starved his guests the landlord could say he was committing a breach of his lessee's covenants, and terminate the lease. From a common sense point of view the landlord should equally with the tenant be liable. His Honour referred to 21 **Halsbury**, p. 556, upon the question of liability of a landlord for a nuisance committed by the tenant. The defendant company was aware that the business of the hotel as normally conducted was before it was relet to Reilly a nuisance. It extracted from Reilly a covenant that he would use the premises for no other purpose than a hotel or public house and that he would keep and use the said hotel and premises as an inn or public house for the reception and accommodation or entertainment of travellers guests and other persons resorting thereto. The premises, as let, were the premises equipped with a chimney or chimneys the use of which created a nuisance to plaintiffs and in His Honour's view the landlord was equally liable with the tenant for such nuisance. The chimney itself was not a nuisance; it was the smoke and soot from it. If that smoke and soot were due to some improper use made by Reilly of the chimney then the position might well be different. But it was not seriously suggested that Reilly used some fuel that he should not use, or created an undue amount of smoke or soot. It was a normal mode of user which created the nuisance, not a special or negligent mode of user made by Reilly. His Honour distinguished **Rich v. Basterfield**, 4 C.B. 783, and referred to **Harris v. James and Henhouse**, 35 L.T. 240. The nuisance complained of being the result of operations contemplated by the lease His Honour was of opinion that the landlord was equally liable with the tenant.

Injunction granted against both defendants.

Solicitors for plaintiffs: **Towle and Cooper**, Auckland.

Solicitors for defendant company: **Nicholson, Gribbin, Rogerson and Nicholson**, Auckland.

Solicitors for defendant Reilly: **Russell, McVeagh, Bagnall and Macky**, Auckland.

Blair, J. September 7; December 6, 1928.
Hamilton.

OVERALL v. THE VICTORIA INSURANCE CO., LTD.

Insurance—Lapse for Non-Payment of Premium—Estoppel—Waiver—Novation—Sale of Land Accompanied by Transfer of Policy—Policy Issued from Wanganui Office Though Premises in Auckland—Premium for Current Year Not Paid—Purchaser's Solicitor Upon Making Enquiry Informed by Clerk of Insurance Company That Policy in Force—Transfer of Policy Approved by Manager at Auckland—Acceptance of Assignment Operating as a Novation—Company Estopped by Approval of Transfer, Apart from Clerk's Representation, from Treating Policy as Lapsed.

Claim for £480 on a policy of insurance issued by the defendant company covering a dwellinghouse and other premises at Mamaku. On 18th September, 1927, the house and outbuildings were totally destroyed by fire. The plaintiff had purchased the property some time in 1927 from one Warwick, who was in turn a purchaser from a mortgagee, Mrs. Warren. The policy in question was in the name of the mortgagee, Mrs.

Warren. The policy had been renewed up to 11th November, 1926, but the premium for the year ending 11th December, 1927, had not been paid. The defendant contended that the policy had lapsed for non-payment of the premium and that the mortgagee had no interest in the policy when she transferred it to the plaintiff. The want of interest was also based on non-payment of the premium. The plaintiff did not dispute that the premium was not paid but claimed either that the defendant company was estopped from setting up non-payment or that the defendant company by its conduct had treated the policy as subsisting and had waived its right to treat it as lapsed. The policy, although affecting a property in the Auckland District, was issued from the Wanganui office of the company, through its Marton branch. There was nothing on the policy to indicate where premiums were payable or that the office at which to deal was Wanganui. The evidence so far as the estoppel point was concerned was that the plaintiff's solicitors having ascertained the name of the office and the amount of the policy made enquiry from the clerk of the defendant company at its Auckland office and were informed of the amount of the premium and of the fact that the policy was a subsisting one. Relying on the correctness of that statement plaintiff, through his solicitors, completed the purchase and paid his proportion of the unexpired portion of the insurance. On 5th July following, plaintiff's solicitors sent the transfer to the Auckland office for noting, paying the fee (2/6) required by the company for doing this. The manager at Auckland although he knew the policy was not in the Auckland branch approved the transfer and on the 8th July the company returned the policy with the transfer noted. The evidence on the point that the company had elected to treat the policy as in force was that a month after the transaction had been completed and some weeks after the date when the transfer had been noted the defendant company sent to the Guardian Trust Executors Co., which was looking after Warwick's affairs, a note as to overdue premium. The company was then officially aware both that the policy had been transferred to the plaintiff and of his solicitors ; the reason for sending the note to the Guardian Trust Executors Co. was not known. Moreover a firm of solicitors in Marton who were agents for the defendant company and had previously issued the policy and from time to time collected the premiums took steps to collect the premium overdue. On 12th September, 1927, they wrote to the solicitor for Mr. Warwick, stating that as they had been unable to collect the premium on the fire policy from Robinson Bros., they would be pleased to hear whether his client would be prepared to pay the premium as they had been holding the mortgagee covered since 11th December last. They also asked for the policy for the purpose of getting the name of the new mortgagee endorsed. Warwick's solicitor apparently advised them of the position, for they subsequently wrote to the solicitors for the plaintiff at Rotorua, asking for the plaintiff's address so that they might communicate with him re the apportionment of the premium.

Hampson for plaintiff.

H. F. Johnston and De la Mare for defendant company.

BLAIR, J., said that the letters of the Marton agents were evidence that the policy, according to the branch of the defendant company which ought to have known most about the policy, had certainly not lapsed on the 11th December, 1926. The company wrote on 12th September stating that the mortgagee was held covered but on 8th August it had agreed to a transfer to the plaintiff of the mortgagee's rignts. Reliance was placed by the defendant on the condition endorsed on the policy as to waiver. That read as follows : " No provision or requirement of this policy requiring any matter or thing to be done or to be written or indorsed hereon shall be deemed waived by reason of any alleged notice or waiver which has not been expressly written or indorsed hereon ; nor shall the company be deemed to have waived any provision or condition of this policy or any forfeiture thereunder by any requirement proceeding or act on its part relating to the appraisement of any alleged loss unless such provision condition or forfeiture be expressly stated in writing to be waived by the company." The renewal of a policy was invariably made by a separate receipt for premium signed by an agent of a company and countersigned by the clerk who actually received the cash and handed over the receipt. If the above quoted waiver clause had any application to the renewal of a policy, it meant that no renewal was valid unless indorsed on the policy, a somewhat startling result. His Honour further stated that the plaintiff had contended : (a) that the acceptance of the assignment amounted to novation ; (b) that the company was by its acts estopped from saying the premium was not paid and (c) thath te company did in fact elect to treat the policy as subsisting, and had waived its right to treat it as lapsed. In support of the contention that the assent of the company amounted to novation a passage in **Porter's Laws of Insurance,** 8th Edn., was cited. It was one of the conditions of the policy that it lapsed if the property passed from the insured unless the sanction of the company signified by indorsement of the policy was obtained. That meant that unless the company agreed to insure the assignee no contract between insurer and assignee could arise, and it followed that if an assignment was assented to a new contract arose between assignee and insurer. A contract of insurance could arise by mere offer and acceptance without payment of premium : **Adie and Sons v. The Insurance Corporation,** 14 T.L.R. 544. The tendering to an insurance company of an assignment for its consent amounted to an offer by the assignee which offer was accepted by the insurance company sanctioning the assignment. The renewal being then a fresh contract between plaintiff and defendant, it was clear that Overall paid and the company accepted the 2/6 transfer fee as a consideration for something. Overall believed that the policy was a subsisting one. The company must be taken to be aware of the fact that the premium was not actually paid, yet they knowing this accepted a transfer fee. An insurance company knowing that a policy had lapsed for nonpayment of premium could not accept a transfer fee paid in the belief that the policy was subsisting, they necessarily knowing of the existence of that belief, and wait until a fire had occurred and then claim that the policy which they treated as subsisting was not subsisting. By accepting payment for the transfer they lulled Overall into believing that his premises were insured, and that remained the position until two days after the fire when the company through its Marton agents advised that the premium was not paid. His Honour thought that it was a fair inference to make that insurance companies were aware of the practice which had prevailed for so many years of the assignee of an insurance policy adjusting with his assignor for the unexpired portion of the premium. The assignee would not go to the expense and trouble of getting the company's assent to an assignment if the policy were not a subsisting policy. All that was relevant to the contention that the company's acceptance of the transfer amounted to a representation by the company that the policy was a subsisting one. His Honour did not think that because the Auckland office arrogated to itself the conduct of the transaction and noted the transfer, it was in any better position than the Wanganui office where the policy was issued. They were one and the same insurance company.

The company's action in accepting the assignment of the policy alone, without the statement made by the clerk that the premium had been paid, appeared to His Honour to be within the well-known rule enunciated in **Pickard v. Sears,** 6 A. & E. 473, 474, " that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position the former is concluded from averring against the latter a different state of things as existing at the same time." That rule had since been modified so far as the use of the word " wilfully " was concerned, and estoppel had been applied where a person made a false statement negligently without fraud and another acted upon it : See **Sarat Chunder Dey v. Copal Chander Lala,** 8 T.L.R. 732, 734. That Overall acted upon the belief that the policy was subsisting was free from doubt. He paid his transfer fee and he paid to the assignor the proportion of unexpired premium, and he took out no other insurance. It might also be taken that the company must have known he would so act, and they would surely know that having accepted Overall as transferee he would not insure elsewhere. The company's action if the doctrine of estoppel were not applied, meant that the company in effect prevented Overall insuring his property and now took advantage of its own act. His Honour thought, therefore, that the company having represented that the policy was subsisting was estopped from alleging nonpayment of premium.

A further point taken by plaintiff was that the company had by its conduct waived nonpayment of the premium and had been content to treat it as a simple debt, the risk being covered in the meantime. His Honour stated that it was not necessary to decide that point.

Solicitors for the plaintiff : **Hampson and Davys,** Rotorua.

Solicitors for the defendant : **De la Mare and Jackson,** Hamilton.

Blair, J. December 14; 18, 1928.
Auckland.

AUCKLAND CITY CORPORATION v. HAWTHORNE.

Rating—Refund of Rates—Unoccupied "Dwellinghouse or other Building"—Definition Including BuildingsS ubstantially Dwellings though also Used as Shops—No Right to Refund Where Unoccupied Dwelling Not Separately Assessed—Concurrence of Owner in Joint Assessment of Several Premises—No Right Subsequently to Demand Separate Assessments—Conclusiveness of Valuation Roll and Rate Book—Rating Act, 1925.

Appeal on case stated from the decision of a Magistrate holding that that respondent was entitled to a refund of half rates under Section 69 of the Rating Act, 1925. Respondent owned a property in Auckland whereon was built a block of five shops and dwellings. Each property had a shop front and living rooms behind and above. Each was self-contained and was separated by a brick partition wall with no internal means of communication with its neighbours. Owing to the contour of the land each of the premises were on a different level. It was not disputed that if a request had been made each premises would have been separately rated. Upon request of a ratepayer it was the practice of the Auckland City Council to assess premises separately but unless otherwise requested the practice was to assess as one. Respondent's practice was to let each of the premises on weekly or monthly tenancies. For the year 1927–28 there was one rating assessment for the whole block of buildings which was duly paid by the respondent. Respondent at no time had ever requested that the premises be separately assessed and had never objected to the joint assessment. One of the shops had been unlet for more than six months of the rating year, 1927–28, and respondent in respect thereof gave notice in writing as required by Section 69 of the Rating Act, 1925, demanding a refund of half rates. The appellant refused to make a refund because it claimed that there was no authority for altering the rate book or permitting the refund to be made. The further point was taken that the premises were not a dwellinghouse or other building within Section 69 (b). Respondent sued the appellant in the Magistrates' Court for a sum which it claimed was the fair proportion of rates in respect of that portion of the property. The appellant did not dispute that if the amount was capable of apportionment the amount claimed was a reasonable proportion. The Magistrate held that the premises were a "dwellinghouse or other building" within Section 69 (b); and he found also that Section 71 made provision for ascertaining the rateable value of any portion of a building; and that if there was difficulty it would have the result only of delaying and not defeating respondent's claim. His judgment virtually invited the appellant to make a proportionate assessment and the case was adjourned for the purpose. In order to bring the matter to a head the appellant agreed that the assessment claimed was fair and consented to judgment for that amount so that an appeal could be made.

Spence for appellant.

Goulding for respondent.

BLAIR, J., said that the Magistrate was right in holding that the premises were a "dwellinghouse or other building" within Section 69. Small shops were commonly of two kinds. one where the premises were what are called "lock-up" shops, the shopkeeper residing elsewhere than at the shop. The other kind were those comprising a shop with a dwelling as part of the same premises. The shopkeeper and his family lived on the premises. The premises in question were in the second category and the intention of the legislature was to give a partial exemption from rates in the case of unoccupied lettable premises of the nature of dwellings. That was, in His Honour's opinion, the construction intended by Williams, J., in **Mayor of Dunedin v. Baird,** 33 N.Z.L.R. 149. The word "dwellinghouse" was not defined in the Act and therefore one must give it its ordinary meaning. In the present case the dwelling portion wat the major portion from the area point of view and the premises were substantially dwellings with shop attached. In His Honour's opinion, if the premises were substantially dwellings, the fact that they also comprised a shop would not take them out of the category of premises entitled to the exemption or refund provided by the Section. It followed also that if a building comprised a number of separate dwellings, such as a set of flats, or if the premises were, as in the present case, a number of semi-detached dwellings, each flat or semi-detached dwelling was a dwelling and capable of separate assessment and the whole set of flats or the whole block of semi-detached dwellings, if rated as one premises, would also be a "dwellinghouse or other building" under Section 69. But to invoke Section 69 in the case of a set of flats or a block of semi-detached dwellings assessed as one premises the whole set of flats or the whole block as the case might be must be vacant and unoccupied.

The next question concerned the right to rebate on premises not separately rated. Division or separation for rating purposes could be made horizontally or vertically, or both. Floors and cellars could be separately rated and so could divisions of a building. If it were possible for a claim for division or separate assessment to be made where premises rated as one were only partially vacant, then that course could be followed with the cellars or floors or separate suites in buildings already rated as one premises. It did not appear to His Honour to alter the principle because as here it was plain that each part of the singly assessed premises was easily and naturally separable.

It was clear that if the premises in question could be now assessed respondent sued prematurely in the Magistrates' Court because no Magistrate had power in a civil case to make what must be an alteration in the rate book by reassessing the property. If the right of reassessment existed that right should have first been exercised and the demand been refused by the Council before respondent could have been sued. The Magistrate was conscious of that because he indicated that it would be necessary to have the assessment made under Section 71. But as the real and substantial question between the parties was as to respondent's right to reassessment the matter was fully argued.

Had the respondent, having concurred in a single assessment, now the right to ask for separate assessments of each of the properties previously the subject-matter of such single assessment? To answer that first involved an examination of the Rating Act. Auckland was rated on the annual value and His Honour therefore confined his remarks to that system. First a valuation roll had to be made (Section 7) and for that purpose the local authority appointed a valuer or valuers and he or they prepared a valuation list setting forth the rateable value of all rateable property and the owners or occupiers thereof. (Section 8). The occupier was by Section 67 primarily liable for rates and Section 11 provided for the owner to be treated as occupier when the property was let for a term of less than three months. That was the position in the present case, and therefore respondent was entered in the valuation list as both owner and occupier. Section 10 provided for the case of several occupiers of one property with different degrees of interest. Section 15 provided for the valuation list to be open for purposes of public inspection and notice was to be sent to every person on the list. (Section 16). By Section 18 *et seq* objections might be made by the local authority or owners or occupiers. That provision had some importance in that although the local body appointed the valuer it must, if it objected to his list, report to the Assessment Court like any other objector. Nowhere could His Honour find specific provision that every separate property must be separately listed, but Section 8 (4) required a list of all rateable property and it might, His Honour thought, be taken that if the valuer were to unite several separate properties as one it would not in strictness be making a list because that would be rather a list of names than a list of properties. But on the other hand when an owner treated properties which were susceptible of separate assessment as one property it was natural for a valuer to so list them. There might be properties which the owner knew, but the valuer had no means of knowing, were capable of separate assessment. It was clear His Honour thought that anyone who was entered as the occupier of several properties combined together could object that they should have been separately listed. And. respondent had she so desired could have done that. Mr. Goulding submitted that when the list was prepared the respondent had no right to object because she was properly entered on the list as both owner and occupier by virtue of the short tenancies of the premises. But she was not precluded from a joint instead of a several assessment. On the assumption that she had to submit to the list as prepared it was claimed that her rights under Section 69 would be defeated. Section 24 *et seq* constituted the Assessment Court for hearing objections. Section 30 gave the Court wide powers of correction, and the Judge must initial all alterations and sign the list. By Section 33 the valuation list so signed becomes the valuation roll for the district and it was conclusive evidence of its contents. The Court of Appeal in **Speight v. Auckland City Council,** 16 N.Z. L.R. 651, held that the roll was not conclusive as to the rateability of property, but except upon that point the word "conclusive" in Section 33 (2) had so far as His Honour knew its ordinary meaning. Section 36 contained certain provisions as

to altering the valuation roll. These powers were limited to adding accidentally omitted properties, removing properties erroneously placed thereon, placing the real owner's name where the owner was unknown at the time the roll was prepared, and inserting changes due to transfers. Provision was also made for inserting properties which subsequent to the making of the valuation roll had become rateable. Subsection (2) expressly provided that nothing should authorise the alteration of any rateable value "except when such rateable value has been affected by the addition or removal of buildings" and then only to the extent so affected. Subsection (3), which was not relied upon by appellant, provided: "If such alteration is in the nature of a division of any rateable property, the rateable value of each division of the property so divided may be altered," and then followed provision for making the total of the divisions equal the rateable value of the whole. That provision referred to the right given by Section 68 to have transfers of part of the property duly noted. The right to make such alterations was expressly conferred by Section 36 (a). Except as authorised by Section 36 the valuation roll was inviolate. Mr. Goulding was forced to resort to Section 36 for the purpose of getting on to the roll the alteration he claimed as permissible under Section 71. He agreed that Section 36 (a) had no application. The only portion of Section 36 which he could so invoke was Subsection (b) of Section 36, which said "by placing thereon any lands which subsequent to the coming into force of the roll have become rateable property," and he contended that those words could apply to property which had become separately rateable. But the words clearly postulated the placing on the roll of property not theretofore rateable. Respondent's properties were rateable and were actually rated and the rates paid. His contention was in effect that the words must be taken as conferring authority to divide properties rated as one into as many separate properties as they were capable of dividing into. His Honour could not strain the plain meaning of the words to such an extent. The right given by Section 69 was that: "such person shall be liable to pay only half the amount which would otherwise be payable for the year's rates in respect of such dwellinghouse," with a refund if paid. It it were not possible to alter the valuation roll it seemed to His Honour there was grave difficulty in saying what was paid in respect of part of a rated property. There was no way by which it could be ascertained. And if it was unascertainable how could a municipal authority—a strict trustee of public funds—pay it. Further, the want of an appropriate entry on the valuation roll made it impossible to ascertain the amount of rate of part of a rated property. By Section 51 (d) every rate had to be of a stated amount in the £ on the rateable value of the property as appearing in the valuation roll. By Section 52 (2) the names and other particulars as to occupiers owners and property and the rateable values should be taken from the valuation roll; and by Subsection (3) all alterations lawfully made in the valuation roll should be transcribed in the rate book. Therefore without an appropriate entry in the valuation roll it was not possible to get the entry into the rate book. Public notification must be given of the completion of the rate book and objections called for, but most of the objections permitted were to ensure perfect coincidence between the valuation roll and the rate book. Section 58 made the signed rate book conclusive evidence of its contents. It followed, therefore, that if the roll could not be altered neither could the rate book. His Honour referred to the decision of Skerrett, C.J., in **Mayor of Auckland v. Irvine and Stevenson,** (1926) N.Z.L.R. 734, 738 on this point. It seemed to His Honour that before respondent could succeed in her claim she must show that she had paid a rate the half of which she was entitled to have refunded. To get exemption from half liability for a rate payable but not actually paid she must have ascertained the amount of her liability.

Section 71 was claimed by respondent and referred to by the Magistrate as conferring the power to get separate assessments on respondent's property. The section applied to assessments prior to the completion of the valuation roll, not to alterations attempted to be made after the valuation roll and rate book had been completed. When the roll was being prepared respondent had only to ask for separate assessment and she would have got it. The case stated it was the invariable practice to do that on request. It was the valuer and the Assessment Court that prepared the roll, not the appellant. If the appellant were seeking to take undue advantage of something it did different considerations might arise. The Council was, subject to the same right of appeal as any ratepayer had, bound to accept the valuation roll as it left the Assessment Court whether it liked it or not. There might be many properties in Auckland which were capable of separate assessment, but which the owners or occupiers preferred to have treated as one. His Honour held, therefore, that respondent had no right to recover against the appellant and allowed the appeal.

Solicitors for appellant: **Stanton, Johnstone and Spence,** Auckland.

Solicitors for respondent: **Goulding and Rennie,** Auckland.

Court of Arbitration.

Frazer, J. February 15; 16, 1929.
Wellington.

LEATHAM v. THE PETONE CENTRAL BOWLING CLUB.

Workers' Compensation—Average Weekly Earnings—Worker Employed by Club at Weekly Wage During Summer Months—Independent Contractor During Rest of Year—Weekly Wage While Employed by Club Held to be Average Weekly Earnings—Workers' Compensation Act, 1922, Section 6 (1) and (2).

Claim for compensation by the plaintiff in respect of the death of her husband resulting from an injury by accident arising out of and in the course of his employment with the defendant club. The deceased had been employed by the defendant Club as a groundsman during the summer months from 2nd September, 1927, until the date of the accident, at a weekly wage of £4 15s. 0d. The employment was terminable by one month's notice. During the remainder of the year preceding his death he worked as a contractor. The question arising was whether the average weekly earnings of the deceased should be regarded as £4 15s. 0d. per week, or should be taken to be a sum arrived at by multiplying £4 15s. 0d. by 22 (the number of weeks in the year during which he was employed as a worker) and dividing the result by 52.

R. E. Harding for plaintiff.

C. A. L. Treadwell for defendant.

FRAZER, J., said that counsel for plaintiff submitted that the principle stated in **Wright v. Wellington Meat Export Co. Ltd.,** 15 G.L.R. 601, **Kelly v. North Canterbury Sheepfarmers' Co-operative Freezing, Export and Agency Co., Ltd.,** (1921) G.L.R. 606, and **White v. Borrie,** (1923) N.Z.L.R. 797, applied and that, in view of the continuous employment of the deceased for 22 weeks at a fixed weekly wage, it could not be said that it was impracticable to determine his average weekly earnings under Subsection (1) of Section 6. Counsel for defendant Club argued that Subsection (1) was not intended to cover the case of a man who was a worker for part of the year and an independent contractor for the remainder of the year, and that the break during the winter months, when he was not employed by the Club, must be regarded as an incident of his employment—**Anslow v. Cannock Chase Colliery Co.,** 2 B.W.C.C. 365. Counsel submitted that, as in **Roberts v. Taupiri Coal Mines Ltd.,** (1919), G.L.R. 32, it would be impracticable in the sense of unjust or unreasonable, to treat the weekly wages earned by the deceased while employed by the Club as a groundsman as his average weekly earnings. His Honour stated that it had been pointed out by the Court on a former occasion that the difference in wording between the English and the New Zealand statutes prevented the decisions of the English Courts on the subject of the computation of average weekly earnings from being generally applicable in New Zealand: **Scott v. Hill,** (1921) N.Z.L.R. 986. His Honour, distinguishing **Roberts v. Tauiiri Coal Mines Ltd.** (*cit. sup.*), held that as in the present case, the deceased was employed at a flat rate of £4 15s. 0d. a week, for a continuous period of 22 weeks, there was no difficulty whatever in applying the precise language of Subsection (1). The deceased's average weekly earnings received while at work for the period during which he had been in the employment of the same employer were unquestionably £4 15s. 0d.

Solicitors for plaintiff: **Meek, Kirk, Harding, Phillips and Free,** Wellington.

Solicitors for defendant: **Treadwell and Sons,** Wellington.

Obituary

Sir Charles Perrin Skerrett, K.C.M.G.

Chief Justice of New Zealand.

In the death of the Chief Justice, Sir Charles Skerrett, K.C.M.G., the Supreme Court Bench has lost a third member in the last eighteen months. The late Sir Charles Skerrett was born in India on 2nd September, 1863, and was educated in Wellington. His legal career was commenced in the office of the Magistrates' Court at Wellington, and later, in 1881, he was articled to the firm of Buller, Lewis and Gully. Before he had reached the age of twenty-one not only had he passed all the examinations, then conducted by the Judges, for admission to the Profession, but he was first in all subjects in his year. In 1884 he was admitted as a barrister and solicitor and, commencing practice on his own account in 1886, notwithstanding the fact that the Wellington Bar boasted about that time such men as H. D. Bell, Hugh Gully, Martin Chapman, W. B. Edwards and C. B. Morison, he quickly came into prominence. In 1887, with Mr. Balcombe Brown and Mr. A. E. Dean, he formed the firm of Brown, Skerrett and Dean. About six years later he retired from the partnership, and practised on his own account, being joined shortly afterwards by Mr. Andrew Wylie, the firm practising under the style of Skerrett and Wylie. In 1909 the partnership amalgamated with Messrs. Chapman and Tripp, the combined firm being known as Chapman, Skerrett, Wylie and Tripp, and Mr. Skerrett being its head; Mr. A. W. Blair, now Mr. Justice Blair, was also taken into partnership, but his name did not appear. In 1913 Mr. Martin Chapman, K.C., and Mr. Wylie retired. Some years before Mr. Skerrett's elevation to the Bench, Messrs. P. B. Cooke, G. G. G. Watson, and A. G. Jorgensen were admitted as members of the firm. In 1907 Mr. Skerrett was made a King's Counsel. He was several times President of the Wellington District Law Society, and from 1918 until 1926 was President of the New Zealand Law Society. On 1st February, 1926, on the retirement of Sir Robert Stout, he was appointed Chief Justice of New Zealand, and a knighthood was conferred upon him in the New Year Honours of the following year.

Sir Charles Skerrett's interests outside of the law were numerous. He was a keen polo player and captain of the Wellington Polo Club before it disbanded in 1906. He had been deputy-master of the United Hunt Club, a vice-president of the Wellington Racing Club, president of the New Zealand Football Association and of the New Zealand Sports Protection League. Other forms of sport in which he took an active interest include angling, deer-stalking, shooting, and golf. He had been president of the New Zealand Welfare League, and of the Licensing Reform Association, and he served several terms as president of both the Wellington and Wellesley Clubs.

TRIBUTES OF BENCH AND BAR.

The universal high esteem in which the late Sir Charles Skerrett was held by Bench and Profession alike is shown by the tributes to his memory which have been publicly expressed throughout the Dominion: the expressions of Bench and Bar in Wellington, Auckland and Christchurch are published below.

WELLINGTON.

The Profession assembled at the Supreme Court to voice their tributes on February 21st. The Acting Chief Justice (His Honour Mr. Justice Herdman), Mr. Justice Frazer and Sir Frederick Chapman were on the Bench.

The Rt. Hon. Sir Francis Bell said: "May it please your Honours, in the absence of the Attorney-General, who desires to express his deep regret that he is unable to speak as leader of the Profession here to-day, we who have assembled—members of the Bar—desire, with your permission, to speak of one who so recently filled the chief place in this Court, and whose death is so deeply regretted by us all. Sir Charles Skerrett was called to his high office by the unanimous assent of his fellows in the Profession and equally by the unanimous assent of the public, who knew his worth. And in the two brief years of his tenure of that great office he has verified the anticipations of those who best knew his fitness and his quality. Our Law Reports are filled with the cases that he argued and they will record as precedents his exposition of the law in the judgments that he, in that too brief time, delivered. Almost his last and greatest service to his King and country was his acceptance of the presidency of the Samoan Commission. A political accident made it my duty to convey to the late Chief Justice the respectful request of the Government, and his readiness to accept that arduous duty is vividly in my memory. He was ready if in the then great exigencies of this Court he could, consistently with his judicial duties, accept. It is easy to understand that there was little attraction for him in that duty. He knew and recognised the discomfort that he was to endure in that long investigation in a tropical country. It may be—I hope it is not so—that his undertaking of that duty may have hastened his end. I hope it is not true. But, your Honours, it is not the memory of his judicial services, or of that last and most important service in Samoa, that is filling our minds to-day and has brought us here in union in almost unexampled numbers. It is the memory of our association with him when he was still in our ranks and was by common consent foremost there. In the first important case that he conducted in the Court of Appeal—while still young and apparently inexperienced—that Court, at its

The Late Sir Charles Perrin Skerrett, K.C.M.G.
Chief Justice of New Zealand.

termination when it recorded its judgment, called him before them to thank him, in the words of the then Chief Justice, "for his capable and able argument." Later in his career at the conclusion of an argument in which he took part before the Judicial Committee, that Committee called him to the Bar to thank him and to express its appreciation of his argument. And these two examples—singular incidents—are examples of the distinction, the special distinction, that he held in the profession of the law. There was no man in this country—few in any other—whose advancement was so immediate and so rapid, and it was not long—a few years, indeed, after his call—when he attained that recognised pre-eminence accepted by his brethren of the profession, a pre-eminence won by his own hand and by the force of his character without any adventitious aid or influence, and accepted because not only his fellow professional men, but also because his clients, numerous throughout New Zealand, had come to recognise the force of his advocacy before tribunals of fact, and the quality of his arguments before Courts dealing purely with law. It is not exaggeration, in speaking of his career, to say that there have been many eminent men but none who stood out so head and shoulders above the others in the estimation of the business community, and his clients from one end of the country to the other. But that does not sum it all up for us. There are other memories perhaps defined as vivid as the man himself. He had qualified himself in many manly exercises. He seemed able to put aside the cares of office, the tremendous weight of his business relations, and separate himself from his tasks, to the happy careless freedom in which we knew him away from his work and office. He was in private life as honoured as in the place he attained in the Profession. Of course, he was conscious of his power, self-reliant and insistent on the view he finally took of any matter with which he had to deal. But with all the deference that was paid to him, by lawyer and client, he bore himself simply all his life, without affectation, without arrogance, without ostentation. He never courted the publicity which came to him, but it may be justly said of him that he was easily the most popular man in private and social life as he was pre-eminent in the work of his life. We were his friends—his admirers are uncounted—but still we who knew him best, whose work was side by side with him, we who learned to value him in work and in play, we feel that the loss is to us heavier than to others, except possibly to the Bench. But there is one to whom all our sympathy goes out, who was unexampled in the sisterly devotion shown to him, who was the companion of his years of trouble and the sharer of his triumphs of success, who was the faithful nurse through the torture and critical times of the last few months, and who was with him to the end, and to whom the end has brought so great sorrow and the extinguishment of so many hopes. Sympathy is idle, but it may be a solace to her to know that as long as memory lives there will remain with us the memory of her brother and the memory of her great and constant devotion and care."

Mr. A. Gray, K.C., said: "I desire, as representing the New Zealand Law Society, of which the late Sir Charles Skerrett was, for several years before his elevation to the Bench, the President, to express on behalf of the whole Profession throughout New Zealand our entire concurrence with the observations that have fallen from Sir Francis Bell. May I say that the Nelson Law Society has sent a message expressing their regret at the sad occurrence. The lamented death of Sir Charles Skerrett has been remarkable among other things for a wonderful outburst of expressions of deep sorrow and sympathy felt not only by the Profession but by the public generally throughout New Zealand, and, indeed, in other parts of the Empire, to which his fame and reputation has spread. And these expressions of regret have been accompanied by tributes paid both by Bench and Bar, attesting not only to his distinguished ability as a lawyer and as a Judge, but also to his lovable personal qualities and character. These demonstrations of respect and regard are, I think, unique in the history of our Profession in this country at least, because of their wonderful unanimity. It is surely given to few men on leaving this life to leave behind them such a record of usefulness and service as that created by the late Sir Charles, and such a sense of personal loss as is felt not only by the members of the Profession—his friends and associates—but by all with whom he came in contact. The personality of Sir Charles Skerrett was unique, and I think it is right to say that there has not been in our experience anyone quite like him. The only person, perhaps, connected with our Profession with whom he might be compared was the late Hugh Gully, under whose guidance Sir Charles Skerrett began his training in the Profession of which he became such a distinguished ornament. In his time the late Mr. Gully was probably the best known and ablest advocate that New Zealand had known, and in associating with Mr. Gully, Sir Charles Skerrett developed many of those qualities which distinguished his employer, though in later years the pupil out-shone the master. Each of them had the same capacity in his work for recognising essentials and disregarding non-essentials. Each had the same powers of concentration and perception, and each had confidence in himself and in his own powers, and each, too, had the God-given gift of a cheerful and sunny disposition and a bright outlook on life generally and on human affairs. And each had that extraordinary power of attracting to himself people of every class and kind. Thus equipped, Sir Charles Skerrett, when he entered on the active practice of his Profession, speedily, as was expected, made a name for himself and achieved fame. He was, as Sir Francis Bell has said, ever a loyal and generous friend and in private life a boon companion. So, too, in his Profession: his conduct was affected by the same qualities—he was ever a fair, honourable and zealous opponent. His appointment to the Bench was, as has been said, received with marked approval by the whole community and especially by those who knew best his capacity and worth. It would be presumptuous for me to say that his conduct of affairs in this Court and in the Court of Appeal was always marked by the same

characteristics of perception, fair dealing and justice which characterised his career at the Bar. Unfortunately, his career on the Bench was all too short, but, as has already been said, our Law Reports will be a standing testimony to the ability that he exhibited in the Courts, and it is remarkable that in his short time he was able to contribute such a volume of judicial decisions as are recorded in those reports. The place of Sir Charles Skerrett in the community will not be readily filled—in fact, it will never be quite filled. We mourn his loss—the loss of a great and distinguished lawyer, an able Judge and a faithful, affectionate friend."

Mr. H. F. Johnston said: "As President of the Wellington Law Society, I desire to associate myself, on behalf of the members of that Society, with all that has been said so ably by my learned friends. Of course, the ranks of the Wellington Law Society comprise many members who were long and old friends of Sir Charles Skerrett, and I think the Wellington Law Society took a special pride in owning him as their own. He, of course, served as an officer of the Society, both as a member of the Council, as Vice-President, and as President, and in those offices did valuable work, but everyone will know that the great and lasting service which he rendered to the Profession was done by the example he set of how a lawyer should conduct his work. His candour, his honesty, his contempt for anything bordering on the shabby, were examples that have permeated through the whole ranks of the Profession in Wellington, and I am sure his example and the incalculable good that he rendered to the Profession will last for many, many years. Sir Francis Bell referred to the rapid advance that his abilities enabled him to achieve in the Profession. Many competent observers have ranked him as one in the very front rank of advocates throughout the British Empire, and I believe their estimates are perfectly correct. The members of the Wellington Profession mourn the loss of a Judge, the loss of one who was the leader of their Profession in Wellington and in New Zealand, one who reflected the greatest credit on them and on the Profession with which he was associated, and still more they mourn the loss of a very dear friend. On behalf of them I desire to express their sympathy to his sister and all his near relations."

His Honour Mr. Justice Herdman said: "I know of few incidents that have happened during my career in the legal Profession that have evoked such universal and genuine sorrow as the death of Sir Charles Skerrett. Regarded with affection by those who knew him intimately, respected by all sections of the community, he has faded out of our lives in circumstances that are tragic and heartbreaking. When he was appointed to the high office of Chief Justice I looked forward to many happy years of useful work in the service of the public beside him. But that was not to be. Fate ordained otherwise and has given a decision against which there is no appeal. The career of the late Chief Justice was, I imagine, one of the most remarkable in the history of the New Zealand Bar. With little to help him in his youth except a bright and powerful intellect, a courage that never faltered and a personality of irresistible charm, he climbed the ladder of success with ease. I doubt whether New Zealand has ever possessed an advocate who shone with such distinction, no matter where he worked and no matter what he was called upon to do. Whether it was trial before a jury, or an investigation before a Judge, or whether called upon to conduct some intricate argument in the Court of Appeal, Sir Charles Skerrett was always complete master of the situation and proved himself time after time to be a counsel of outstanding eminence. It is difficult to assess the loss that the country, the Judiciary and the Bar have sustained. For so many years one had been accustomed to see his well-known figure in the front bench on the floor of the Court, and for a shorter period where I am sitting now. Thinking of him as I knew him he always seemed to me to be the embodiment of integrity and the very essence of courtesy and kindness. More than that; no member of the Bench or of the Bar knew better than he did how essential it was for the well-being of a new country like New Zealand that the dignity of the Judiciary should be preserved, that the administration of Justice should be respected, and that the Bench and the Bar alike should see to it that the deeply-rooted confidence which the people have in what is perhaps the most valuable of all British institutions should become more firmly established as the years rolled on. When men of this type are moved out of life one is disposed to say: "Why is this done?" His death gives rise to mourning, and it will be difficult for some of us to adjust ourselves in the future to a life lived in an atmosphere of Law without the presence and the inspiration of one who, for so many years, loomed large in it. But, at any rate we have an example left us of thoroughness, of efficiency, of quick brilliant work, and of the highest standard of professional conduct. That example is imperishable, and in the years to come stories of his victories at the Bar and of his wisdom on the Bench, and of innumerable acts of unostentatious kindness will be told and retold to future generations of barristers. Though the flesh may die, the spirit and the example will live, and from that we derive some consolation. At a time like this our thoughts go out to his sister who was devoted to him, and to his other relatives. We sincerely trust that the sympathy we give utterance to in a room in which the late Chief Justice spent so much of his life, and in which his voice was so often heard may help to lighten the burden of a great sorrow."

AUCKLAND.

Mr. Justice Blair and Mr. Justice Kennedy were on the Bench at Auckland.

Mr. F. L. G. West, President of the Auckland District Law Society, said that the death of a Chief Justice was in any case a matter of national importance and the expression of national regret, but in the case of Sir Charles Skerrett, the romance of his career and his wonderful courage through his illness had touched the hearts of the whole of the people of New Zealand. The newspapers were full of the story of his life and of eulogies of his mind and

work. With the Bar there was a more personal, a more intimate, feeling. They mourned the loss of the greatest of their brethren; and those who were assembled in the Court that morning had come as a tribute not only of respect, but of affection. So short was the time in which he occupied high office, compared with the long period during which he was leader of the Bar, that they were most likely to remember him as plain Charles Skerrett, K.C., to whom during the past twenty years most of them had gone for advice and assistance—of which he always gave the best and gave generously. Of his character it might be said that he had one of the finest analytical minds of the day supported by untiring industry—not the mere capacity for plodding at details but the capacity for strenuous and sustained thought. On the social side of his character there was his great love of freedom. No such cause ever looked to him in vain, and as instances might be mentioned the support he gave such bodies as the New Zealand Welfare League and the Sportsmen's Protection League. Such movements always gave rise to bitter controversies, but no one ever pointed the finger of blame or shame at Charles Skerrett. His personal courage was shown in his long illness. Even when he was suffering worst he would have the law reports at his bedside. In conclusion, Mr. West referred to the noble care of the late Chief Justice by his sister, Miss Skerrett. The Bar would like to express its gratitude to her, and also its deepest sympathy with her and the other members of the family.

Mr. Justice Blair said: "It were better far that the duty of paying due tribute to the memory of New Zealand's greatest lawyer and judge should have fallen to a tongue more eloquent than mine. But I yield to no one in the claim that if respect and admiration, yea, even love for the great man just departed be any qualification to speak then am I indeed qualified. I bore for him a love passing that of a woman. We mourn the loss of a great leader, a man who was my greatest inspiration as he was an inspiration to all honoured by his friendship. It would be easy to multiply instance upon instance of what he accomplished and showing his sterling character and loving heart. To do so now seems futile to me, because it is not what we now say, but what he did, that counts. His whole life was the very embodiment of inspiring devotion to work, not for personal or material aggrandisement, but because of a deep consciousness of his duty to those—whether man or State—who required his services. Nor did he ever swerve from a determination from what he believed to be right. In his last remaining days in New Zealand, racked though he was by the ravages of the disease that ultimately claimed him, he bore his pain with fortitude, steadily refusing to admit, even to himself, that his sadly maimed body, the legacy of his malady, was capable of preventing him from performing the duties of his high office. My brother Judge and myself saw him within a few hours of his departure from New Zealand, and his last words were of cheer and encouragement to us, and abiding hope of his speedy return to office. We join with you in voicing New Zealand's irreparable loss, and it only remains for us to perform the last loving office of a friend, and place upon the grave of his memory a wreath of acknowledgement of his greatness and love for his fellow men."

CHRISTCHURCH.

At Christchurch Mr. Justice Adams presided. and with him on the Bench were Messrs. F. K. Hunt, S.M., H. A. Young, S.M., and H. P. Lawry, S.M.

Mr .K. Neave, President of the Canterbury Law Society, said: "Only a few weeks ago we gathered to express to his Honour regret at the passing of Mr. Justice Sim. To-day we have occasion to meet together to record the heavy loss which the Bench and the Bar, and, indeed, the whole of New Zealand have sustained by the death of the Chief Justice. It is, I feel, unnecessary to speak of the great attainments of the late Chief Justice. They were so marked, and so well recognised and acknowledged that to attempt to enumerate even some of them would be superfluous repetition. Perhaps the outstanding characteristic of the late Chief Justice was his earnest persistency in the discharge of his duties whether as advisor, advocate or Judge. I venture, however, to think that, as time passes, he will be best remembered for his kindly human nature. He was just and generous of mind, thoughtful and considerate to his juniors and to those less gifted than himself, and ever fair to his opponents. The noble example of his life-work will be an inspiration to all."

His Honour Mr. Justice Adams said: "I associate myself fully and completely with what has been said. On such occasions one is inclined to platitudes or language that is extravagant or not altogether fitting. In the history of the judiciary in the last few years there have been successive events that are nothing short of tragedy. Sir John Salmond died after a life of memorable service and honourable achievement. His Honour Mr. Justice Alpers was cut off by an insidious disease; there was the death of His Honour Sir William Sim, and now there is the death of Sir Charles Skerrett, the Chief Justice. Sir Charles entered on his professional career two years after I began the practice of the law, so that I was able throughout to look on and mark the wonderful progress and the high intellectual attainments of Sir Charles. Sir Charles was remarkable for his serenity, kindness and impartiality. Perhaps the most remarkable feature of his career was his undisturbable serenity. I have never seen Sir Charles put out in a case; he was always courteous and deliberate. Everyone knew of his high qualifications when he accepted the office of Chief Justice but he was allowed for only two short years the full exercise of that office. Of his heroic struggle, wonderful patience and courage, I shall say no more than that it was a fine example of fortitude and courage. Time will develop more fully appreciation of the high attainments and service of Sir Charles to the Dominion. At the moment they are too near to form a just appreciation. His life and career will be a model and example to many."

Family Protection Act, 1908—Part II.

A Review of the Decisions Thereunder.

By A. C. Stephens, LL.M.

The history of the New Zealand legislation in regard to Testators' Family Maintenance is short and simple. The first provision appeared in 1900 in the Testators' Family Maintenance Act, 1900, which is described in the title as "an Act to insure provision for Testators' Families." It is a short Act of five sections which are repeated with small alterations in the subsequent legislation. In 1903 an amending Act provided that where an order was made under the principal Act the death duties on the estate of the testator should be computed as if the order had been part of the will —Testators' Family Maintenance Amendment Act, 1903. In 1906 the above-mentioned Acts were repealed by the Testators' Family Maintenance Act, 1906, which contained the provisions of the previous Acts (with an important amendment in regard to the time of application) and several additional subsections. It was passed as a result of the case of *Plimmer v. Plimmer*, 9 G.L.R. 10 C.A., which showed some difference of judicial opinion as to certain important questions, namely, whether the Court could order provision to be made by way of a lump sum, whether the provision must necessarily fall primarily on the residue of the estate of the testator, and as to the right of appeal to the Court of Appeal.

The latter Act appears in the Consolidated Statutes as Part II of the Family Protection Act, 1908. The only amendment since 1908 is contained in the Family Protection Amendment Act, 1921-22, which makes a further amendment to the subsection dealing with the time limit for applications.

This article is designed to supply a digest of the cases decided under Part II of the Act and the preceding Statutes, but references to the statutory provisions have been incorporated in the appropriate context and there are included also certain indications as to practice.

For the sake of brevity I shall refer to "the Act" instead of to "Part II of the Act."

THE OBJECT OF THE ACT.

The Act is designed to enable the Court to make proper provision for those whom a testator is bound to maintain (the wife, husband, or children) but it is not an Act to modify or set aside unjust wills. The object of the Act is not to enable the Court to make a new subdivision of the testator's property even though the applicant may have been unfairly treated. The Court will not make a new will. It will alter the will only so far as is necessary to provide for the proper maintenance and support of the wife, husband, or children of the deceased: *Re Phillips*, 4 G.L.R. 192; *Handley v. Walker*, 22 N.Z.L.R. 932; *Laird v. Laird*, 5 G.L.R. 466; *Wilkinson v. Wilkinson*, 24 N.Z.L.R. 156; *Munt v. Findlay*, 25 N.Z.L.R. 488, 492; *Allardice v. Allardice*, 29 N.Z.L.R. 959 C.A. (affirmed on appeal (1911) A.C. 730); *Sinclair v. Sutherland*, (1917) N.Z.L.R. 144.

In a case which came before Adams, J., in Christchurch last year, *Lewis v. Lewis* (not reported), the Court was asked to make provision by way of a lump sum for a son of the deceased as the other members of the family felt it was the fair thing to do. Adams, J., is reported to have said: "You cannot do what is called the fair thing under the Family Protection Act. Under the Act all the Court can do is to make an order to supplement inadequate provision by a testator for somebody to whom he has a duty. The Court cannot do 'the fair thing' which in plain terms would be making a new will." In this case there appear to have been infant beneficiaries who were not independently represented. The Court will, however, go a considerable distance towards making a new will where all the beneficiaries are of age and consent to the order. See, for example, *Hunt v. Public Trustee*, 29 N.Z.L.R. 307.

In one case, where property was purchased in the wife's name with the savings of a wife and husband and the wife died leaving an unsatisfactory will, the Court practically made a new will: *Brown v. McCarthy*, 26 N.Z.L.R. 762. (See however, note as to intestacy under heading "General" infra.)

APPLICANTS FOR RELIEF.

"It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. If the Court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it": per Edwards, J., in *Allardice v. Allardice*, 29 N.Z.L.R. 959, 972, C.A.

"It is well settled that the provision which this Court is authorised by s. 33 of the Family Protection Act, 1908, to make for the maintenance of the widow or children of the testator is not limited to a merely eleemosynary provision sufficient to meet the bare necessities of the claimants. The Act is not designed merely as a supplement to the Destitute Persons Act for the purpose of continuing and enforcing, after a man's death, the legal obligations which lay upon him in his lifetime of supplying the necessities of existence for the wife and children dependent upon him. The Act is, on the contrary, designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make, in the interests of his widow and children, had he been fully aware of all the relevant circumstances. If it is manifest that the testator has, whether consciously or inadvertently, failed to perform this duty, it is the right and duty of the Court to perform it for him, by making such alterations in his testamentary dispositions as may be adequate but no more than adequate, for that purpose": per Salmond, J., *Welsh v. Mulcock*, (1924) N.Z.L.R. 673, 684, C.A.

The Act is something more than an extension of the Destitute Persons Act. Mere maintenance is not the test: *Allardice v. Allardice* (supra); *Heagerty v. Con-*

sidine, 34 N.Z.L.R. 905; *Allen v. Manchester*, (1922) N.Z.L.R. 218; *Welsh v. Mulcock* (supra).

The circumstance that the applicant is domiciled and resident out of New Zealand does not deprive him of his rights under the Act: *Re Roper* (1927) N.Z.L.R. 731, 743.

Widow.

The widow's claim is at least as great as that which she would have had against the testator during his lifetime if he had failed to maintain her: *Rush v. Rush*, 20 N.Z.L.R. 249, 254. In case of a contest between the widow and adult children capable of supporting themselves the former will prevail. A man's widow has a higher moral claim on his estate than anyone else: *Rush v. Rush* (supra); *Russell v. Dunn*, 9 G.L.R. 510; *Allardice v. Allardice*, 29 N.Z.L.R. 959, 969, C.A.; *E. v. E.*, 34 N.Z.L.R. 785 C.A.; *Re Estall*, 16 G.L.R. 185.

The widow is not to have her mode of living reduced by the death of the testator: *Heagerty v. Considine*, 34 N.Z.L.R. 905; *Bell v. Hunter* (No. 2), 34 N.Z.L.R. 1068. See also *Welsh v. Mulcock*, (1924) N.Z.L.R. 673, 686, C.A. She should where reasonably possible be placed in such a position that she will not be a burden on her children. *Russell v. Dunn* (supra); *Cook v. Webb*, (1918) N.Z.L.R. 664.

The fact that the widow helped the testator to make his money is relevant: *Heagerty v. Considine* (supra).

The widow will not generally be allowed a lump sum but payments will be ordered out of capital if income is not sufficient: *Bell v. Hunter* (No. 2) (supra). Cf. *Hutchison v. Hutchison*, (1921) N.Z.L.R. 743, 746.

The widow's right to make a claim under the Act is not barred by the fact that she was not living with the testator at his death. In deciding on the relief to be afforded the Court will take the fact of separation into account but the amount which the testator allowed to his wife during his lifetime does not necessarily afford a measure of the amount which may be allowed to her out of his estate under the Act: *Re Rees*, 5 G.L.R. 145; *Public Trustee v. Denton*, (1917) N.Z.L.R. 263; *Plimmer v. Plimmer*, 9 G.L.R. 10, 14, 24, C.A.; *Cook v. Webb*, (1918) N.Z.L.R. 664, C.A.; *Toner v. Lister*, (1919) G.L.R. 498. See also *Colquhoun v. Public Trustee*, 31 N.Z.L.R. 1139; *Golightly v. Jefcoate*, 33 N.Z.L.R. 91; *Paxton v. Nicholson*, (1918) G.L.R. 393; and *Gardiner v. Boag*, (1923) N.Z.L.R. 739.

An order was refused to the widow where the estate was left partly to her and her children and partly to illegitimate children of the testator and it was not shown that the latter children had any other means of support: *Worthington v. Ongley*, 29 N.Z.L.R. 1167. An order has also been refused to the widow on the ground that her financial position did not justify further provision: *Allen v. Manchester*, (1922) N.Z.L.R. 218.

An order was made in favour of the widow in the following cases: *Rush v. Rush* (supra); *Re Phillips*, 4 G.L.R. 192; *Re Rees* (supra); *Plimmer v. Plimmer* (supra); *Russell v. Dunn* (supra); *Re Gunn*, 32 N.Z. L.R. 153; *Plank v. Plank*, 32 N.Z.L.R. 898; *Heagerty v. Considine* (supra); *Bell v. Hunter* (No. 2) (supra); *Cook v. Webb* (supra); *Shepherd v. Preen*, (1918) G.L.R. 60; *Brown v. Public Trustee*, (1918) G.L.R. 209; *Re Higgins*, (1918) G.L.R. 387; *Paxton v. Nicholson*, (1918) G.L.R. 393; *Jackson v. Hunger*, (1919) G.L.R. 69; *Murphy v. Public Trustee*, (1921) G.L.R. 152; *Armstrong v. Armstrong*, (1921) G.L.R. 184; *Marshall v. Public Trustee*, (1921) N.Z.L.R. 714; *Hutchison v. Hutchison* (supra); *Gardiner v. Boag* (supra); *Toner v. Lister*, (1925) G.L.R. 313; *Parish v. Parish*, (1924) N.Z.L.R. 307 F. C.; *Collins v. Public Trustee*, (1927) N.Z.L.R. 746.

A divorced wife of the testator has no rights under the Act: see *Allardice v. Allardice* (supra).

Where testator has made provision by his will for his widow subject to a condition to be performed by her and she fails to comply with the condition she does not thereby lose her right to apply for relief under the Act: *Re Gunn* (supra).

On remarriage a widow loses her status as widow of the testator and is not entitled to provision under the Act: *Newman v. Newman*, (1927) N.Z.L.R. 418.

(To be continued)

Bench and Bar.

The Acting Chief Justice (His Hon. Mr. Justice Herdman) will act as Chairman of the Prisons Board during the absence from New Zealand of His Hon. Mr. Justice Reed.

We regret to record the death at Christchurch of Mr. Ward, a partner in the legal firm of Messrs. Weston, Ward and Lascelles, with which firm he had been connected for nearly twenty-four years. The late Mr. Ward was the second son of the Rev. C. E. Ward. He was born in Invercargill, in 1880, and received his early education in Wellington and Dunedin, completing it at Prince Albert College, Auckland. In March, 1905, he joined the legal firm of Messrs. T. S. Weston and Son, and in 1919 was admitted to partnership in the firm, which is now known as Messrs. Weston, Ward and Lascelles. In athletic circles Mr. Ward was very prominent and was for many years a bulwark of Canterbury cricket, both on the playing and administrative sides. He was chairman of the Lancaster Park Board of Control, representative of the Cricket Association on the Board, and a Vice-president of the Canterbury Cricket Association.

Mr. H. F. Von Haast has returned to New Zealand and has commenced practice on his own account at Wellington as a barrister and solicitor.

Consequent upon the resignation of Professor Garrow from the position of Professor of Law at Victoria University College, the Victoria College Council have appointed to the position of Senior Lecturer in Law, Mr. H. H. Cornish, of the firm of Webb, Richmond, Cornish and Swan, with the right of private practice. It has been decided not to appoint for the present another Professor.

Reference was made recently in the Magistrates' Court at Nelson to the death of the late Mr. E. J. Kemnitz. Mr. E. B. Moore (President of the Nelson District Law Society) said that he had to express on behalf of the Nelson members of the Profession their personal sense of the loss the Profession had sustained by the

untimely death of Mr. Kemnitz. Since the last sitting of the Court he had passed away from them with tragic suddenness. Having qualified for the Law at what must have been a very early age, Mr. Kemnitz came to Nelson some fourteen or fifteen years ago and was associated with Mr. C. R. Fell, first as managing clerk, and later as junior partner. By his unfailing tact and genial nature, by his capability and great industry, he won the esteem and respect not only of all the members of the Profession with whom he came in contact, but also of the community in general. For many years he had been the able secretary of the Nelson Law Society. As an indication of Mr. Kemnitz's industry and ability in his Profession Mr. Moore referred to his work last year as acting-Crown Prosecutor and Crown Solicitor. Mr. Moore expressed the sympathy of the Nelson members of the Profession with Mrs. Kemnitz and the members of the deceased's family.

Mr. C. R. Fell, the senior partner in the firm of which Mr. Kemnitz was a member, said that both he and Mr. H. L. Harley felt Mr. Kemnitz's death very keenly. The speaker wished to add his appreciation of Mr. Kemnitz not only as a member of the Profession, but also as his late partner. He was a man of great kindliness of character and his loss would be very much felt

Mr. T. E. Maunsell, S.M., said that the news of the tragedy came to him in Blenheim as a very great shock, for there was an intimate friendship between him and Mr. Kemnitz. It was a privilege to have Mr. Kemnitz's assistance in his work and to be associated with him as a friend. He had hoped that his friendship with him would have extended over many years, for prosperity was beckoning him on towards a distinguished professional career. Mr. Kemnitz was a man of unfailing cheerful disposition, who showed the same unbounding enthusiasm both in his sport and in his work, and everything he did bore the hall-mark of efficiency. Mr. Maunsell joined in the expression of sympathy with the deceased's sorrowing wife, daughter and mother.

Mr. L. J. Frank, J.P., President of the Nelson Justices' Association, endorsed what had been said by the other speakers.

Mr. A. M. Goulding, LL.B., has been appointed to the position of part-time lecturer in law at Auckland University College.

Mr. W. E. Barnard, M.P., who has formerly been practising at Helensville, has now commenced practice at Napier.

Among the candidates who have been successful in obtaining the University of New Zealand's degree of Master of Laws with first class honours are Mr. J. F. F. Platts-Mills and Mr. W. C. Wylie, both of Victoria University College, and Mr. E. E. Bailey, of Auckland University College. Mr. R. G. M'Elroy (Auckland), and Mr. M. A. Brook (University of Otago) obtained the degree with second class honours, and Messrs. C. E. H. Ball, and E. W. R. Haldane, of Victoria University College, passed the examination.

Doctors are said to belong to the most generous profession; but solicitors are almost on a level with them.—Lord Hanworth.

Easter Conference.

Further Arrangements.

The Conference Committee constituted by the Wellington District Law Society is leaving nothing undone to ensure the success of the Second Annual Legal Conference. In our issue of February 5th we published the arrangements made to that date, and since that time a great deal more has been done.

The Governor-General (Sir Charles Fergusson) has consented to open the Conference, and the Attorney-General (Hon. T. K. Sidey) will deliver an inaugural address, for this purpose selecting the subject of "Legal Education." The Attorney-General will hold an At-Home at the Parliament Buildings in the afternoon of the first day of the Conference; the Reception–Dance has been arranged for that evening, and the Dinner for the evening of the second day.

The following gentlemen have consented to read papers at the Conference: Sir John Findlay, K.C. ("The Etiquette of the Profession"); Professor J. Adamson ("The University and the Profession"); Mr. P. J. O'Regan ("An Elective Judiciary"); Mr. R. L. Ziman ("The Crown in Business—Considered from the Constitutional and Legal Viewpoints"); Mr. G. M. Spence ("The Functions of the Law Society"). Messrs. A. G. Donnelly and A. H. Johnstone have also promised papers, but their precise nature has not yet been notified. Each paper will be followed by discussion.

A choice of remits will be made when replies have been received from all the District Law Societies.

The visitors to date as at the time of writing notified to the Conference Secretary by the Secretaries of the District Law Societies from whom replies have so far been received are:—

Canterbury District Law Society: Mr. D. Bates, Mr. and Mrs. L. A. Charles, Mr. A. C. Cottrell, Mr. and Mrs. M. J. Gresson, Mr. and Mrs. W. M. Hamilton, Mr. and Mrs. Hunter, Mr. and Mrs. D. S. Murchison, Mr. and Mrs. A. S. Taylor, and Mr. and Mrs. C. S. Thomas, Mr. D. E. Wanklyn, and Mr. W. A. White.

Gisborne District Law Society: Mr. and Mrs. L. T. Burnard and Messrs. R. Gambrill and J. G. Nolan.

Marlborough District Law Society: Mr. and Mrs. W. T. Churchward, Mr. R. McCallum, Mr. and Mrs. A. C. Nathan, Mr. and Mrs. A. E. Scantlebury, Mr. and Mrs. C. T. Smith.

Wanganui District Law Society: Mr. and Mrs. A. A. Barton, Mr. and Mrs. M. C. Barton, Mr. and Mrs. A. D. Brodie, Mr. and Mrs. C. P. Brown, Mr. C. S. Brown, Mr. and Mrs. C. H. Clinkard, Mr. and Miss Cohen, Mr. and Mrs. G. W. Currie, Mr. and Mrs. C. L. Harris, Mr. W. A. Izard, Mr. and Mrs. Kincaid, Mr. and Mrs. W. H. MacLean, Mr. and Mrs. R. Mackay, Mr. and Mrs. C. F. Treadwell, Mr. W. J. Treadwell, Mr. and Mrs. V. B. Willis, Mr. and Mrs. A. B. Wilson.

Nelson District Law Society: Mr. and Mrs. C. R. Fell, Mr. S. Moynagh, Mr. and Mrs. W. Nicholson, Mr. W. V. Rout, Mr. and Mrs. G. Samuel.

Visitors: The Conference Committee would like any practitioners who propose attending the Conference, and who have not already informed their District Society, to write immediately to the Conference Secretary (Mr. W. E. Leicester, 100 Lambton Quay, Wellington).

Wellington District Law Society.

Annual Meeting.

The Annual General Meeting of the Wellington District Law Society for the year ended 31st December, 1928, was held at the Supreme Court Buildings at Wellington, on the 25th February, when there was a large attendance of members. The retiring President (Mr. H. F. Johnston) occupied the chair until the election of his successor for the current year, and before proceeding with the business of the meeting he referred to the lamented death of the Hon. Sir Charles Skerrett, Chief Justice of New Zealand. He moved that the Society record its deep sense of the great loss sustained by the Bench, the Profession of the Law, and the public by the death of Sir Charles Skerrett, Chief Justice, and its sympathy with Miss Skerrett and the members of her family in their bereavement. He then asked those present to stand in token of their respect and esteem for the late Judge. It was resolved to ask the President to convey a copy of the resolution to Miss Skerrett.

The following extracts are taken from the Annual Report :—

Meetings of Council.—During the year thirteen meetings of Council were called, and the Council which held office in 1927 met twice until the appointment of its successor. Two General Meetings were held, namely : The Annual Meeting, and a meeting of members to discuss proposed Solicitors' Guarantee Bill.

Obituary.—The Council regrets to record the death of Sir John Hosking, formerly a Judge of the Supreme Court, also of the Honourable Mr. Justice Sim, of Dunedin, who, when his untimely death occurred, was presiding over the Civil Sittings of the Supreme Court in Wellington. Tributes to their distinguished services on the Bench and the high regard in which they were held by their colleagues, and by the profession were paid in open Court.

Judicial Appointment.—The vacancy caused by the lamentable death of Mr. Justice Alpers, towards the close of last year, was filled by the appointment of Mr. D. S. Smith, of Wellington.

Vacancy on the Council.—Upon Mr. D. S. Smith's appointment to the vacant Judgeship, a vacancy occurred on the Council of this Society, and was filled by the appointment of Mr. M. F. Luckie for the unexpired term of the office.

Practitioners and Membership of Law Society.—The actual number of practitioners' certificates issued in the district total 371, being 281 in the City and Suburbs and 90 in the Country Towns. The increase over last year, mainly in the City, is 24. The numerical strength of the membership of the Society continues to increase—the membership consists of 225 in the City and Suburbs and 47 in the Country Districts, showing an increase of 19 over last year. Practitioners numbering 21 were elected under rule 3 of the Society's rules to membership during the year.

Admissions to the Profession.—The Council during the year considered 68 applications for admission to the profession ; 40 were for admission as a Solicitor ; nine as Barrister and Solicitor ; six as Barrister and thirteen as Barrister under Section 5 of The Law Practitioners Act, 1908. Upon due enquiry a certificate was issued to each applicant as required by the amended rules of the 1st September, 1927.

Books for Library.—Careful attention has been given to the supplies of books, and apart from the standing orders, the Council purchased a secondhand set of the Selden Publications, and has arranged to carry on the yearly subscription for this work. The Council has purchased nine volumes of Holdsworth's History of English Law.

Branch Law Libraries.—The Branch Law Library at Feilding was brought into line with those already established at Palmerston North and Masterton, and a sum of £28 was allocated to Feilding for expenses for the year.

Solicitors' Guarantee Fund.—Members attended a special meeting to consider the draft Bill prepared by a Committee set up by the Council of the New Zealand Law Society. The various clauses were considered and reported upon. The Bill, as approved by representatives of District Law Societies, was in the first instance introduced into the Legislative Council, in a modified form and passed by that House, and referred to the House of Representatives, reaching its second reading and then referred to the Statutes Revision Committee, but was not proceeded with, as the Bill had come before the Committee at a stage in the Session when it was impossible for the Committee to be fully informed of all matters relating thereto. The Chairman of the Committee reported to the House accordingly.

Legal Conference.—The New Zealand Law Society has decided that the next Conference for 1929 should be held in Wellington. The Council, in accordance with the resolutions of that Society, met and set up a Committee to undertake all necessary arrangements for the Conference, which will be opened at Wellington on the 3rd April, in the Easter vacation.

Judicial Appointments.—The Council considered the question of the appointment of Judges either permanent or temporary, and resolved to write to the Attorney-General to the effect that a Judge should be appointed only from actively practising members of the Bar.

The following officers were elected for the ensuing year : President, Mr. C. G. White ; Vice-President, Mr. Albert A. Wylie ; Hon. Treasurer, Mr. W. E. Leicester ; Members of Council : Mr. H. H. Cornish, Mr. H. F. Johnston, Mr. P. Levi, Mr. M. M. F. Luckie, Mr. William Perry, Mr. G. G. G. Watson ; Auditor, Mr. J. S. Hanna.

Messrs. A. Gray, K.C. (President of the New Zealand Law Society), C. H. Treadwell (Vice-President of the New Zealand Law Society) and C. G. White (President Wellington District Law Society) were appointed to be the Wellington representatives on the Council of the New Zealand Law Society as required by Section 72 of " The Law Practitioners Act, 1908."

Messrs. M. Myers, K.C., and C. H. Treadwell were appointed to be the Wellington representatives on the Council of Law Reporting.

It was resolved that the Easter Vacation to be observed by practitioners in the city commence at noon on Thursday, 28th March, and terminate on Saturday, 6th April.

The following motion was carried in reference to the appointment of Mr. R. Kennedy to be a Judge of the Supreme Court : " That this meeting places on record its high appreciation of the services rendered to the Society for many years by Mr. Robert Kennedy as a past President and Member of the Council of the Society."

Auckland District Law Society.

Annual Meeting.

The annual meeting of the Auckland District Law Society was held in the Magistrates' Court on Friday, 22nd February. Mr. F. L. G. West, the President of the Society was in the chair.

The Annual Report stated that 232 practising certificates for barristers and 534 for solicitors were issued during the year as against 223 and 520 in 1927. During 1928 there had been five admissions as barristers and solicitors, 24 as solicitors only, and 14 solicitors were admitted as barristers. The Library had been electrically heated, but the much-needed extensions to the building had not yet been made. Proceedings to strike off the roll under the Law Practitioners Act had been taken in four cases; in two cases the practitioners concerned had been struck off the roll, and the other two cases had yet to be dealt with by the Court of Appeal.

Reviewing the work of the past year, the President said that the increase in the number of practitioners in Auckland between 1921 and 1924 totalled 146—an average of over 36 a year. But since 1924 the average annual increase had been only 12. Strenuous efforts had been made to induce the Government to commence the construction of the new accommodation for the Library. The present Minister of Justice was not prepared to authorise the work prior to 31st March next.

This year the Society will celebrate its fiftieth anniversary, it having been constituted at a meeting held on 28th March, 1879. It was decided to celebrate the occasion by a Bar Dinner to be held after the Easter Vacation. Mr. Samuel Hesketh, Mr. S. E. Whitaker, and Mr. J. B. Graham are, according to the records, the only surviving original members of the society.

The election of officers for the ensuing year resulted as follows: President, Mr. F. L. G. West; Vice-President, Mr. R. P. Towle; Treasurer, Mr. J. H. Reyburn; Members of the Council, Messrs. G. P. Finlay, A. M. Goulding, J. B. Johnston, A. H. Johnstone, R. McVeagh, F. G. Massey; Delegates to the New Zealand Law Society, Messrs. F. L. G. West, A. H. Johnstone, and R. McVeagh; Auckland Members of the Council of Law Reporting, Messrs. R. McVeagh and H. P. Richmond; Auditor, Mr. N. A. Duthie.

Legal Literature.

Crime: The Autobiography of a Crook.

By Eddie Guerin. (John Murray).

This is a most interesting autobiography of a once very infamous criminal. After a long life, of which fifty years have been spent in prisons in England, France, and the United States of America, Guerin takes an account of himself and professedly advises us that crime is a hopeless trade out of which can come no profit but only misery and degradation. To students of penology, and indeed to criminologists in general, there is to be found an illuminating account of the development of the humane treatment for the reformation of the criminal. The ineffectiveness of the brutal system in vogue when Guerin started his "profession" leaves one in little doubt of the wisdom of our present humane system.

Guerin began his criminal record when he was caught stealing a box of cutlery from a firm to which he had delivered a telegram. He records his entry into a prison in the 'Seventies as follows:—

> "I shall never forget my first taste of prison life. They put me in what was known as the House of Correction, and I went numb with horror at the sights I saw. There were blacks and whites of all ages and sizes and the place stank like a sewer. Men were lying about the floors smoking, spitting, cursing, idling away the time until they were dealt with. They laughed when they saw me, asked me what I had done, and amusedly poked each other in the ribs when I said I was in for 'nicking' a box of cutlery."

He made some preparations for escape and this is the manner in which the authorities dealt with him:—

> "They put a pair of handcuffs on my wrists, put a hook between them, and then pulled me up the stairs and dropped me down again until I almost fainted. For something like ten minutes they kept on with the torture. Up and down I went screaming blue murder and calling Mack and the warders all the names I could think of. I was on the verge of unconsciousness when they finally hauled me up, took the handcuffs off my wrists, and flung me into a dungeon, with a basin of water and a lump of bread to keep me alive."

No better way, one should imagine, could be devised for the making of a criminal.

After a long and varied experience in and out of different State prisons, Guerin crosses the Atlantic and there, after helping to steal 250,000 francs at the Credit Lyonnais, he receives a sentence of ten years' imprisonment. Guerin is then able to contrast French and American prisons, which he does in favour of the former. After serving his sentence he becomes associated, enamoured is too endearing an expression, with that famous American female criminal, Chicago May. They spend a "honeymoon" in Paris and there, with some fellow rogues, Guerin breaks into and robs the American Express Co. of over £50,000. For this he was sent to French Guiana—of which the Ile du Diable, of Dreyfus fame, is an island. How he lives there, escapes to the United States, and later goes to England is well worth reading. His ultimate arrest at the request of the French Government, and his famous extradition proceedings at which Mr. Richard Muir made a brilliant and successful defence nearly brings his tale to an end. A few more minor convictions and Chicago May's vengeance on him give the reader a vivid impression of the life a criminal leads. He closes the narrative of his life with the expressed opinion that crime does not pay. His life shows that. He displays no real shame and little real regret; but there is no sign of pride in his career. One is inclined to be the more impressed with the sincerity of his story by his not affecting a decent shame.

To the reader who cares for a good stirring story, to the psychologist, and to the student of criminology this book can, without hesitation, be recommended.

—C. A. L. Treadwell.

New Books and Publications.

Trial of James Blomfield Rush. (Notable British Trials Series). Edited by Teignmouth Shore. (Butterworth & Co. (Aus.) Ltd.). Price 9/–.

The Representation of the People Acts, 1918-1928, and Law Relating to Jurors. By G. P. Warner Terry. (C. Knight). Price £1/9/–.

Goodeve and Potter's Modern Law of Real Property. Founded on the fifth edition of Goodeve's Real Property. By Harold Potter, LL.B. (Sweet & Maxwell, Ltd.). Price £1/12/6.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

We are said to know the Law when we apprehend the reason of the Law.

—Lord Coke

Vol. V. Tuesday, March 19, 1929. No. 2

The Forthcoming Conference.

The second Annual Conference of members of the Legal Profession will be opened by His Excellency the Governor-General, on Wednesday, 3rd April. The Committee in charge of the arrangements are to be congratulated on having obtained His Excellency's consent to open the Conference, not only by reason of the distinction conferred on the opening ceremony by the presence of His Excellency, but also because the Conference may confidently expect from His Excellency a very interesting and excellent address. By the courtesy of the Committee in charge of the arrangements we print in another part of this Journal the programme decided upon. Although Wellington as a City cannot hold out to visitors the exceptional advantages for such a Conference which Christchurch enjoys, there is no reason to doubt but that the arrangements made for the entertainment of visitors will enable them to enjoy a pleasant holiday as well as to attend to the main purpose of the Conference. The remits and papers cover a wide range of subjects and the discussions that will take place should prove both stimulating and suggestive.

The Attorney-General for his Address has chosen the topic of legal education. The Honourable Mr. Sidey has throughout his long public life been always interested in educational questions and served for many years as a member of the New Zealand University Senate so that he will voice an opinion on this subject acquired with full information of the means of education in this Dominion. Inasmuch as the education that should be deemed essential before a solicitor is entitled to practise should assure not only knowledge of legal principles and practice but training in the requirements of character and manner demanded by the Profession, his address may touch upon legislation necessary to assure that, till such training has been undergone, qualification should not be granted. Taken in conjunction with the paper to be read by Sir John Findlay, K.C., on "The Etiquette of the Legal Profession" there should be material before the Law Society which will enable definite proposals for qualification to be framed. Closely allied with the papers of the Attorney-General and Sir John Findlay is that on "The University and the Profession," by Professor J. Adamson who may be expected to speak from the University point of view and to make suggestions under which the conduct of such examinations as are necessary should be subject to a Board comprising both practising members of the Profession and members of the University teaching staff, and for the institution of lectures by actively practising lawyers more frequently than is now the case.

It is difficult to forecast from the title of his paper, "Courts and Court-houses," the line that Mr. A. T. Donnelly proposes to take. He will, no doubt, be both amusing and instructive, and if his paper and that of Mr. P. J. O'Regan on "An Elective Judiciary," are not taken on the same day, the humour that is likely to brighten discussion on these papers will be pleasantly spread. We understand that shortly put, Mr. O'Regan's proposal is that the legal profession should itself be entrusted to elect from its body all those required to fill judicial offices, that is to say, both judges and magistrates, and function through a college of forty elected members who would choose all judges and magistrates by secret ballot. Inasmuch as when preferential, or transferable, or proportional methods of election to the Legislature make their appearance in the newspapers as topics of the moment Mr. O'Regan himself generally is one of the large body of correspondents, he will undoubtedly be prepared to meet the volume of criticism sure to be directed to his scheme and to explain how the effects on his system of tickets, block voting and similar devices usually connected with electoral schemes, will operate. Mr. A. H. Johnstone on "The Profession of a Barrister in New Zealand," and Mr. G. M. Spence on "The Functions of the Law Society," are sure to be interesting, and if Mr. Spence's paper includes some discussion on the practical working of the Law Society, it may lead to useful innovations in the procedure of that body.

A paper that will command more than professional interest is that of Mr. R. L. Ziman on "The Crown in Business: Considered from the Constitutional and Legal Viewpoints." Questions under this heading are of very general interest to the whole of the business community and the legal standpoint will undoubtedly be appreciated in the business world which is at a loss to understand the reason for the advantages given the Crown in litigation concerning business affairs in which the Crown competes with the individual. The question of the Crown in litigation is at present receiving a great deal of attention in England, and is being treated as one urgently demanding reform. There are, however, some exceptional cases in which the favoured position of the Crown in litigation is desirable in the common interest. No doubt Mr. Ziman will make those cases clear, but his paper cannot fail to stimulate the commercial fraternity who will probably find in it conclusive reasons for reforms they have been for years past urging.

Many of the remits such as that relating to "Statements taken by the Police" provide ample material for debate, and it looks as if in order to get through the Agenda Paper, the Conference will have to sit for reasonably long hours on the appointed days. An Agenda Paper which contains so much matter that is attractive and of moment to lawyers, should attract to Wellington large numbers of the Profession, who by the early circulation of the programme will appreciate the efforts of the Committee to render the intrusion of the Conference into the Easter vacation as painless as possible. So much of the matter before the Conference is of public importance that interest in the proceedings will be general throughout the Dominion.

All the signs indicate for the Conference the success it deserves and which we hope it will enjoy.

Privy Council.

The Lord Chancellor.
Lord Shaw of Dunfermline.
Lord Carson.
Lord Atkin.
Sir Charles Sargant.

January 22, 1929.

FINCH v. COMMISSIONER OF STAMP DUTIES.

Revenue—Death Duties—Estate Duty—Expenditure by Deceased in Alterations and Repairs to Family Home Belonging to Deceased's Wife—Not Referable to any Intent to Make a Gift or Improve Value of Estate of Wife—No Gift—Death Duties Act, 1921, Sections 5, 38, 39.

Appeal from decision of the Court of Appeal reported in 3 B.F.N. 210, holding that certain monies spent by the deceased, in alterations and repairs to a house in which he and his wife (the appellant) were both living but which belonged to the wife, were, for the purposes of the Death Duties Act, 1921, gifts to the wife.

G. R. Blanco White for appellant.
A. M. Latter, K.C., and **Cyril King** for respondent.

THE LORD CHANCELLOR delivering the judgment of the Judicial Committee stated that in their Lordships' opinion the appeal succeeded. It appeared that the deceased and his wife were living together in a house belonging to the wife. Both the husband and the wife enjoyed a separate income and the wife's income was habitually under contribution to the household expenditure. The deceased husband's contribution to the joint purse for housekeeping purposes had been kept at a low figure for the purpose of accumulating his capital. In the years 1925 and 1926 the husband caused certain alterations and repairs to be made in the house in which they were both living. The total amount so expended came to £1,982, and was spent under contracts made directly between the husband and the builder who did the alterations and repairs. In those circumstances the Crown claimed that the payments so made to the builder were, for the purpose of the Death Duties Act, gifts to the wife. In order to see whether that contention was well founded it was necessary to look at one or two sections of the Act in question. Under Section 5 of the Act it was provided that the estate of a deceased person should be deemed to include any property comprised in any gift within the meaning of Part IV of the Act made by the deceased within three years before his death. In Part IV under Section 38 the term "gift" was defined to mean "any disposition of property (as hereinafter defined) which is made otherwise than by will, whether with or without an instrument in writing, without fully adequate consideration in money or money's worth." Section 30 provided that the term "disposition of property" meant "any conveyance, transfer, assignment, settlement, delivery payment, or other alienation of property, whether at law or in equity," and by Subsection (f): "Any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of the estate of any other person." Originally it appeared that the Crown based its claim upon Subsection (f), and alleged that the payments to the builder were transactions entered into by the husband with intent thereby to diminish the value of his own estate and to increase the value of his wife's estate. In their Lordship's opinion the facts found by the Commissioner rendered that contention quite hopeless. It was expressly found that there was no reason to believe that the deceased would not enjoy the normal span of life (he was in fact only 53 years of age when he died) or that he would necessarily predecease the appellant, and it was added in the supplementary Statement of Facts that the appellant's estate was as large as that of the deceased. It was further found that the object in the appellant's mind and, as far as she knew, the object in the deceased's mind was simply the improvement of the family home in accordance with their means and station in life.

In their Lordship's view, when the Statute brought in as a gift a transaction entered into with intent to diminish the value of one estate and to increase the value of another, what was hit at by the Statute was a transaction which the person entering into it intended to have the effect stated in Subsection (f). It was not enough merely to prove that the result which was stated in that subsection accrued. The Commissioner in the present case had found that there was no such intention, and, there, the claim under Subsection (f) failed. But in the argument before the Chief Justice it was contended alternatively for the Crown that subsection (a) was applicable, and that these payments to the builder were payments without any adequate consideration in money or money's worth. A reference was made to a decision in New South Wales in the case of **Chadwick v. Commissioner for Stamps,** 19 N.S.W.S.R. 39, where Sir William Cullen said: "If A knowingly and voluntarily spends his money in building upon B's land with B's knowledge and approval he makes a gift to B as effectually as if he handed him the money for the purpose of building on it himself." That one method of making a gift might be by spending money on the property of the donee was no doubt quite true, but the Chief Justice quite obviously did not intend to convey that every expenditure of that kind must necessarily involve a gift, because he went on a little later in his judgment to say: "The fact that A himself has a partial interest in the property is not necessarily proof that the expenditure is not a gift, wholly or in part. According to the circumstances of the case, the facts may show that the expenditure is referable to other considerations." On the facts found in the present case, it seemed to their Lordships quite plain that the payments to the builder were not referable to any intention of making a gift or improving the value of the estate of the wife, but were referable to the desire of the husband to improve the home in which he was living and in which his children were being brought up, and did not constitute either the intention of or in fact a gift to the wife, but merely a provision made by him for his own enjoyment and benefit and for the proper maintenance of his home and his children. For those reasons, which were substantially the reasons set out in the judgment of the Chief Justice in New Zealand with which their Lordships found themselves in full agreement, their Lordships come to the conclusion that the payments were not rightly included in the dutiable estate of the deceased.

Appeal allowed.

Solicitor for appellant: **Harry F. Strouts,** agent for **Buddle, Anderson, Kirkcaldie and Parry,** Wellington.
Solicitors for respondent: **Mackrell, Maton, Godlee and Quincey,** agents for **Crown Law Office,** Wellington.

Supreme Court.

Herdman, A.C.J.

February 26; March 1, 1929.
Wellington.

EASTBOURNE BOROUGH v. WELLINGTON CITY CORPORATION.

Rating—Exemption—Land used "for Purposes of Public Plantations"—Not Confined to Trees Planted by Hand—Land Held and Used for Propagation of Trees and on Which Beech Trees were Growing from Seed Falling from Neighbouring Trees Held to be Within Exemption—Rating Act, 1925, Section 2 (1).

Proceedings to determine whether the defendant Corporation was liable for the payment of rates in respect of certain land at Day's Bay which it occupied. The defendant Corporation asserted that it held the lands referred to for "plantation purposes" and that the land was therefore immune from rates by virtue of an exemption from the definition of "rateable property" contained in paragraph (i) of Section 2 of the Rating Act, 1925. The lands in question were adjacent to the Day's Bay Recreation Reserve which had become vested, some years previously, in the Mayor and Councillors of Wellington, and were in the immediate neighbourhood of land which was covered with trees. Evidence was given that trees growing on part of the land which the plaintiff Corporation sought to rate were destroyed by fire some years ago, but that the land was being restocked with trees in accordance with a settled plan. If, for instance, gorse was present, the affected area was planted with pine trees, wattle and blue gums; but on parts on which gorse had made its appearance an effort was made to cultivate the growth of native trees. It appeared that there was difficulty about transplanting native beech trees successfully but if left alone the land would in time produce trees from seeds that fell naturally on the soil from parent trees in the neighbourhood. A process of regeneration was gradually proceeding where fire destroyed the trees some years ago and a beech wood was gradually making its appearance. Beech trees of all sizes from inches up to six feet and up to sixty feet were to be found on the land, and there was evidence that they were multiplying.

Parry for plaintiff.
O'Shea for defendants.

HERDMAN, A.C.J., said that he was satisfied that the land which was the subject matter of the action was being held and used for the purpose of propagating trees. The provision under which exemption was claimed read as follows: "Lands, not exceeding in each case one hundred acres in extent, and buildings used for a public mental hospital, a hospital, or light-house purposes, and lands used as quarantine, pilot, or signal stations, or for purposes of public plantations." Mr. Parry, on behalf of the Eastbourne Borough Council argued that only land on which stood forests or woods that had been planted by hand were entitled to exemption. It was conceded that some trees were growing on the land in question and it was admitted that as soon as the defendant Corporation commenced to plant trees it would be entitled to the benefit of the exemption above quoted, but it seemed to His Honour that a collection of trees which was the consequence of the natural seeding in the locality was just as much a plantation as that which was the result of manual labour. His Honour had no doubt that the Legislature when it designed that provision wished to give some advantage to land belonging to the public which was rendered attractive by the cultivation or preservation of trees. Public plantations were plantations which the public owned and could enjoy. A local body might acquire an area of land on which stood an aggregation of trees that had been planted years ago. That, surely, would be land used for a public plantation and if that were so, why exclude land upon which there existed a mass of trees that had been planted by nature or which was to be devoted to the growing of trees for public enjoyment or advantage?

Judgment for defendants.

Solicitors for plaintiff: **Buddle, Anderson, Kirkcaldie and Parry,** Wellington.

Solicitor for defendant: **J. O'Shea,** City Solicitor, Wellington.

MacGregor, J. February 20; March 6, 1929. Invercargill.

BRODRICK v. GENGE AND PUBLIC TRUSTEE.

Principal and Surety—Mortgage—Covenant by Several Persons to Pay Principal and Interest, One Covenantor Joining as Surety Only—Provision that Mortgagee Must Without Consent of Surety Give Time for Payment Without Releasing Surety—Agreement Without Consent of Surety Increasing Rate of Interest—Subsequent Agreement Without Consent of Surety Reducing Interest—Surety Discharged.

Action to recover the principal and interest alleged to be owing under a mortgage long overdue. By memorandum of mortgage dated 18th May, 1915, the defendant, T. Genge, his brother, D. Genge, and one McDonald covenanted to pay to the Invercargill Savings Bank the sum of £1,000 on 31st March, 1917, with interest at £5 per cent. until actual payment. The money was advanced to the two Genges, and McDonald joined in the covenant as surety only. The mortgage contained a clause providing that the mortgagee his successors or assigns should be at liberty at any time without the consent of the said McDonald to give time for payment of the said principal or any interest for such time or times after the due date as he or they should think fit and that he or they should not be answerable or responsible for any delay or omission in any such respect and providing also that the giving of such time or the omission to call in and take steps to enforce the payment of any such moneys should not release McDonald from his covenants thereunder. The principal sum was not paid on its due date, and on 30th March, 1921, an agreement was entered into between the defendant T. Genge and the plaintiff Bank, raising the rate of interest under the mortgage to 6½ per cent. from 1st April, 1921. By a subsequent agreement between the Bank and T. Genge the rate of interest was reduced to 6 per cent. as from 1st July, 1924. The two agreements to vary the terms of the mortgage were made without the consent or knowledge of McDonald, who was in no way a party to either of them. No interest had been paid since 31st March, 1925, and the principal sum of £1,000 still remained owing. One of the brothers Genge was dead, and the other insolvent. McDonald died on 1st September, 1928, and the Public Trustee was executor under his will. Judgment was claimed against the Public Trustee for the sum of £1,000 as principal, together with £210 interest thereon at 6 per cent. from 31st March, 1925, to 30th September, 1928. The defence set up by the Public Trustee to the action against him was that McDonald was discharged from all liability at law by reason of the alteration of the terms of the mortgage effected by the two agreements between the Bank and T. Genge without McDonald's consent or approval, he being a surety only.

Stout for plaintiff.

Hay for defendant, the Public Trustee.

MacGREGOR, J., said that after full consideration of the various cases cited in argument he thought that McDonald being a surety was released by the alteration of the terms of the mortgage without his consent. A similar question was dealt with by the Judicial Committee in **Egbert v. National Crown Bank,** (1918) A.C. 903, where Lord Dunedin reviewed the earlier cases on the subject (see pp. 908, 909). In 1921, and again in 1924, the Bank chose for its own purposes to enter into an agreement with one of the principal debtors raising the rate of interest payable under the mortgage without consulting the surety. His Honour could see no escape from the conclusion that it thereby released the surety from all further liability under the mortgage. The same result must, His Honour thought, be arrived at from a careful examination of the line of cases commencing with **In re Goldstone's Mortgage,** (1916) N.Z.L.R. 19, 489, and ending with **Public Trustee v. Mortleman,** (1928) G.L.R. 216, in which a like doctrine had been applied to instruments executed under our Land Transfer Act. In His Honour's opinion the present case was not distinguishable in principle from those cases. It appeared that the effect of the agreement made between the creditor and one of the principal debtors to raise the rate of interest under the mortgage had been to create a new compound contract, in substitution for the original contract contained in the mortgage itself. Or, to put the matter in another way, there was an unauthorised variation of the original contract between the principal and the surety, and the clause of the mortgage referred to above admittedly did not apply or extend to that variation. The legal result in either case was the same, i.e., that the surety was thereby discharged from all liability.

On behalf of the plaintiff Mr. Stout argued that the alteration in the rate of interest was not material *qua* the surety here, and did not in any way prejudice his position. Of that question it seemed that the surety himself must be the sole judge: see **Holme v. Brunskill,** 3 Q.B.D. 495. Further it appeared to His Honour that to raise the rate of interest must inevitably tend to prejudice the position of the surety, as it correspondingly diminished the power of the principal debtor to repay the principal debt which was also guaranteed by the surety himself. The full report of the Canadian case cited by Mr. Stout. (**See v. London Guarantee Coy.,** 56 Ont. L.R.) did not appear to be available in New Zealand, and the meagre reference to it in the English and Empire Digest rendered it in His Honour's judgment of little or no value, opposed as it appeared to be to the strong current of English and New Zealand authority in the opposite direction. His Honour referred to the judgment of Cotton, L.J., in **Holme v. Brunskill,** 3 Q.B.D. 495, 505.

Judgment for defendant, the Public Trustee.

Solicitors for plaintiff: **Stout and Lillicrap,** Invercargill.

Solicitor for defendant, the Public Trustee: **W. G. Hay,** Dunedin.

Blair, J. October 23, 24, 25, 28, 1928; February 18, 1929.

IN RE BEDGOOD'S WILL.

Will—Interpretation—Bequest of Nett Proceeds of Sale and Realisation of "Springbank" Property—Sale Prior to Death of Testator—Part of Purchase Price Paid in Cash and Balance Left on Mortgage—Bequest Adeemed by Sale.

Originating summons for the interpretation of the will of the abovenamed testator. By her will the testator devised her property upon trust for sale and conversion and directed her trustees (*inter alia*) to pay the nett proceeds of the sale and realisation of her real estate at Keri Keri, Bay of Islands, known as "Springbank" (subject to a legacy of fifty pounds) to the trustees of St. John's College, Auckland, as an addition to the John King Scholarship Fund. The will was dated 13th March, 1922, and in or about April, 1924, she sold "Springbank" to her nephew for £800 of which £150 was paid in cash and the balance was secured by a first mortgage of the said property to the testatrix. She deposited the £150 in the Savings Bank at Auckland, and operated on the account from time to time as she thereafter required money. At the date of the death there was a sum of £95 to her credit but that credit remained after taking into account other moneys she had paid into that

account. The mortgage by the nephew to the deceased was still subsisting. The question for decision was whether the bequests in the will of the nett proceeds of the sale and realisation of the "Springbank" property had been adeemed or failed wholly or in part.

J. B. Johnston for Public Trustee as trustee of will.

Northcroft for Public Trustee as administrator of Maria King's estate.

Cocker for St. John's College Trust Board.

West for other beneficiaries.

BLAIR, J., said that the sum of £150 paid in cash to the deceased on the sale was not traceable because it had been mixed up with other moneys. The £650 mortgage moneys were identifiable. It was clear that the legacies were specific, they were to be paid only out of the proceeds of the property specified. In such case the rule was that if at the death of the testator he had no property answering that description the legacies failed. His Honour referred to **Wilson v. Bray,** 12 N.Z.L.R. 628; **In re Bridle,** 4 C.P.D., 366, and distinguished **Gilfoyle v. Wood Martin,** (1921), 1 I.R. 105, as a case of very special circumstances. His Honour held that the bequests of the proceeds of the sale of the "Springbank" property had been wholly adeemed.

Solicitors for the Public Trustee as trustee of the will: **Stewart, Johnston, Hough and Campbell,** Auckland.

Solicitors for the Public Trustee as administrator of Marie King's estate: **Earl, Kent, Massey, and Northcroft.** Auckland.

Solicitors for the St. John's College Trust Board: **Hesketh, Richmond, Adams and Cocker,** Auckland.

Solicitors for the other beneficiaries: **Jackson, Russell, Tonks and West,** Auckland.

Blair, J. February 22; 23, 1929. Auckland.

IN RE ODD: EX PARTE COSSLETT.

Bankruptcy—Adjudication—Non-compliance with Bankruptcy Notice—Notice Based on Default Judgment in Magistrates' Court—Rehearing Subsequently Granted—On Rehearing Judgment Given for Larger Amount—Original Judgment and Bankruptcy Notice Founded thereon Vacated.

Summons for adjudication based upon non-compliance with a bankruptcy notice. Judgment by default for £91 1s. 3d. was on the 25th October, 1928, given against the debtor in favour of the petitioning creditor. On the 12th November, 1927, the debtor was duly served with a bankruptcy notice founded on such judgment. The notice not having been complied with the creditor on the 20th November filed a bankruptcy petition against the debtor. The petition came on for hearing on the 30th November when it was adjourned because the debtor disputed the judgment and intimated that he was applying for a rehearing in the Magistrates' Court. This he did and a rehearing was granted. On the rehearing judgment was given for £2 more than the original default judgment.

Simpson for petitioning creditor.

Dickson for debtor.

BLAIR, J., said that the point was taken that a rehearing having been granted the original judgment by default was vacated and therefore the act of bankruptcy founded on such judgment was also vacated. The order for rehearing (Form 61) of the Rules under the Magistrates' Court Act provided: "It is ordered that the judgment in this action and all subsequent proceedings be set aside and a rehearing had," etc. That was the necessary result of a rehearing. The bankruptcy notice upon which the petition was founded was based upon a judgment which was vacated and it appeared to His Honour, therefore, that the effect of that was to vacate the bankruptcy notice. Section 41 of the Bankruptcy Act, authorising the Court to stay or dismiss a petition founded upon a judgment as to which an appeal was pending, contemplated the vacating of a bankruptcy notice on the appeal succeeding. That was not apt to the present case but the principle was.

Petition dismissed.

Solicitors for petitioning creditor: **Hosking and Simpson,** Auckland.

Solicitor for debtor: **J. F. W. Dickson,** Auckland.

Blair, J. February 9; 23, 1929. Auckland.

IN RE TAMASESE'S APPLICATION.

Samoa—Mandate—Powers of Mandatory—Enactment Providing for Transfer to Prison in New Zealand of Persons Sentenced in Samoa to Imprisonment for Six Months *intra vires* New Zealand Legislature—Habeas Corpus Act (Eng.) 1679, Section 12—Foreign Jurisdiction Act, 1890, (Eng.) Section 7—Samoa Act, 1921, Section 210.

Application for writ of *habeas corpus*. Lealafi Tamasese was on 5th December, 1928, at Apia, Samoa, convicted "for that on the 27th day of November, 1928, at Vaimoso he the said Tamasese did resist and wilfully obstruct Police Constable Moore, Hollis, Taylor, Paramore, and others in the execution of their duty." The certificate under the hand of a Judge of the High Court of Western Samoa and under the Seal of that Court then went on to state: "and on such conviction the said Tamasese was thereupon sentenced with hard labour for the term of six calendar months." The conviction was stated in argument to have been made under Section 76 (c) of the Samoa Act, 1921, but His Honour said that the conviction was obviously made under Section 7 of "The Maintenance of Authority in Native Affairs (No. 2) Ordinance, 1928," an ordinance of Western Samoa providing for a fine not exceeding £100 or imprisonment for a term not exceeding one year. On 15th December, 1928, a warrant under the hand of the Administrator and the seal of Samoa was duly issued under Section 210 (1) of the Samoa Act, 1921, transferring Tamasese to Auckland Prison. Accompanying this warrant was a certificate in terms of Section 210 (3). No suggestion was made by counsel for the applicants against the form of these documents. The grounds upon which the application was based appear sufficiently from the report of the judgment.

Hall Skelton for applicant.

Meredith and Hubble for the gaoler.

BLAIR, J., said that the application came before this Court on two grounds, the first being that there was no jurisdiction to impose imprisonment on Tamasese because that was an attempt to enforce payment of a civil debt by means of imprisonment. In order to establish that ground it would be necessary to go behind the warrant and conviction and (assuming it were possible for the Supreme Court so to do) it would be necessary to have before that Court full details of all steps prior to conviction together with copies of all documents. None of these details had been supplied and Mr. Hall Skelton intimated that he accordingly abandoned that point. If after considering the facts anterior to conviction Counsel for the applicant should consider there was any justification for a further application to the Supreme Court based on such facts, it was open for him so to do: **Eshugbayi Elecko v. Officer Administering Algeria,** 139 L.T. 527.

The basis of the application was that Section 210 of the Samoa Act, 1921, was *ultra vires* the New Zealand Legislature. Subsection (1) of that section enacted: "Every person sentenced to imprisonment or committed to prison for six months or more may by warrant under the hand of the administrator and the seal of Samoa be transferred to some prison in New Zealand named or described in the warrant." It was claimed that to require a man to serve his sentence out of Samoa as provided by Section 210 conflicted with the principle of Section 12 of the Habeas Corpus Act, 1679, which Act was by the effect of Section 349 of the Samoa Act, 1921, made applicable to Samoa. It was contended that it was not possible for the New Zealand Parliament to make the Habeas Corpus Act inapplicable to Samoa because it derived its power of legislation regarding Samoa, not from the Imperial Parliament, but from the prerogative powers of the King himself, and that those prerogative powers were limited in that the King was incapable of depriving any dependency of the Crown of its rights under the Habeas Corpus Act. As a proper understanding of the ambits of New Zealand's powers and duties was necessary for the decision of this case, His Honour said that he would attempt shortly to indicate what those powers and duties were, with a view of endeavouring to remove what he believed to be certain misconceptions on the subject.

It was necessary first to note that prior to the war and Treaty of Peace Samoa was a German possession and administered by German officials. By the Treaty of Peace Germany renounced not to Great Britain but to the Allied Powers all Germany's rights in Samoa. The Allied Powers in whose favour this re-

nunciation was made had not handed over these rights and powers to Great Britain but had retained them and the dominant authority administering Samoa to-day was the Council of the League of Nations. It was necessary that somebody be appointed by the League of Nations to attend to the details of administering the affairs of Samoa and accordingly His Britannic Majesty on behalf of New Zealand was asked to perform that duty, and agreed to do so through the Government of the Dominion of New Zealand. Thus it was that the Government of New Zealand became what might be called the Administrator of Samoa, not on its own behalf or on behalf of Great Britain, but for and on behalf of the League of Nations. The document which imposed that duty on New Zealand was called a mandate. The preamble of that mandate recited that His Britannic Majesty for and on behalf of the Government of New Zealand had agreed to accept the mandate and "*has undertaken to exercise it on behalf of the League of Nations.*" Article 2 provided that "*the mandatory* shall promote to the utmost the material and moral well being and social progress of the Inhabitants of the territory." New Zealand in administering the affairs of Samoa was a mere servant bound to obey the directions of its master the Council of the League of Nations. By Article 6 of the Mandate the mandatory was required to make an annual report to the Council of the League of Nations detailing the measures taken to carry out the obligations undertaken. Thus would it be seen that so far as Samoa is concerned New Zealand was a mere servant or trustee which had undertaken to obey the League of Nations. It followed also that if New Zealand were to fail in its obligations to the Samoan people the League of Nations would no doubt take steps to have appointed another mandatory who would better fulfil those obligations. His Honour had not overlooked the point referred to by Mr. Hall Skelton that the preamble of the Samoa Act itself recited that the mandate was conferred "Upon His Majesty to be exercised on his behalf by the Government of the Dominion of New Zealand." A similar recital appeared in the mandate itself, but the Court of Appeal in **Tagaloa v. Inspector of Police,** (1927) N.Z.L.R. 883, held that the Government of New Zealand was intended to be the mandatory. New Zealand was required by the mandate to "promote to the utmost the material and moral well being and social progress of the inhabitants." It might be that Tamasese and his adherents did not agree with the methods adopted by New Zealand, but he would admit that although those methods might not be the methods which he and his adherents advocated and would adopt if the duties under the mandate were in their hands, New Zealand in adopting the course it was adopting did so because it believed its methods to be the best for the attainment of the desired objects. It was the Council of the League of Nations which was the judge as to whether the methods adopted for promoting the material and moral well being and social progress of Samoa were wise or unwise Tamasese was not the judge of this and neither was New Zealand.

Mr. Hall Skelton submitted that Section 210 was *ultra vires* the New Zealand Legislature. His whole argument was based on the erroneous assumption that His Majesty conferred the mandate on New Zealand. As previously explained the mandate came from the League of Nations. Mr. Hall Skelton's argument postulated that because the mandate reached New Zealand per medium of His Majesty this mediation of His Majesty derogated from the grant. In other words his argument meant that although the fullest plenary powers were conferred on the mandatory by the giver of the mandate yet because His Majesty became the nominal recipient on behalf of New Zealand the powers that reached New Zealand had lost some of their potency. If the fullest plenary powers left the League of Nations on their way to New Zealand but in the process of transition some of these powers did not reach New Zealand, what then happened to them, and where were they now? His Honour could not accept such a contention, but even were he inclined so to do he thought that it was a necessary inference from **Tagaloa's case** that New Zealand, as regards Samoa, possessed authority as plenary and ample as the Imperial Parliament. Mr. Hall Skelton admitted that the Imperial Parliament could abrogate the Habeas Corpus Act. It would seem to follow therefore that the only authority which was given legislative authority over Samoa could do the same.

That really disposed of the whole of applicant's submissions. But there were other points which His Honour should notice. Section 12 of the Habeas Corpus Act which formed the whole basis of applicant's argument provided that no resident of England, Wales, or Town of Berwick-on-Tweed should be sent prisoner into Scotland, Ireland or Jersey, Guernsey, Tangier or islands or places beyond the seas. Read literally that has no bearing on the present application. Section 7 of the Foreign Jurisdiction Act, 1890, (53 & 54 Vict. C. 37) provided that where a person was convicted in a British Court in a foreign country and sentenced to imprisonment the sentence should be carried into effect at such place as might be directed by order-in-council. Under that provision only an order-in-council was necessary to imprison out of the foreign territory.

Application dismissed with costs.

Solicitors for applicant: **Hall, Skelton and Skelton,** Auckland.
Solicitors for the Gaoler: **Meredith, Hubble and Ward,** Auckland.

Blair, J. February 20; 22, 1929.
Auckland.

THAMES BOROUGH v. CONGREGATIONAL CHURCH TRUSTEES.

Rating—Exemptions—"Lands Occupied by Churches"—Building Owned by One Religious Denomination and Used as Church by that Denomination and Another—Partially Destroyed by Fire—Not Repaired or Used as Church During Rating Year in Question—Attempts to Sell to Other Denomination During Year and Subsequent Sale—Building Not a "Church" Within Meaning of Exemption—Use Determining Character of Premises—Sacerdotal Character Abandoned—Quaere Whether "Occupied" Means "Used and Occupied"—Rating Act, 1925, Section 2.

Claim by the plaintiff Corporation for rates in respect of certain land at Thames belonging to the defendants. The rates claimed were for the year commencing 1st April, 1926, and ending 31st March, 1927. On the land was a church belonging also to the defendants which had prior to 12th February, 1926, been used for church services. The services were conducted as a Union church composed of both Congregationalists and Baptists, the latter having the considerable majority of adherents. On 12th February, 1926, a fire partially destroyed the church and rendered it unfit for use until repaired. Prior to the fire negotiations were on foot for the Baptists to acquire the church. Further overtures were made to them after the fire, but without result. The property, still unrepaired, was in September, 1926, placed in the hands of a land agent for sale, who advertised it as suitable for an auction mart or garage. The Moderator of the Congregational Church said that this was done to bring the Baptists to the purchasing point, and that they would not have allowed the building to be sold for anything but a church. The usual authority was, however, given to the agent. The Baptists eventually bought the damaged church, taking possession on 1st April, 1927. No church services were held from 9th February, 1926, until after it was repaired. The defendants claimed exemption upon the ground that the lands were "lands occupied by churches and chapels or cemeteries other than cemeteries owned by private persons for pecuniary gain or profit" within section 2 of the Rating Act, 1925.

A. H. Johnstone for plaintiff.
Glaister for defendant.

BLAIR, J., said that it appeared clear that the defendants after the happening of the fire had no intention of repairing the church for the purpose of holding services there. Their members in Thames had become so few as not to justify the continuance of services. From their point of view they wanted another denomination—the Baptists—to take it off their hands, and they took steps, which ultimately proved successful, to that end. To His Honour's mind, whether the offer to sell for a non-religious purpose was genuine or not, the fact remained that from the defendants' point of view it was no longer to be used by them as a church, however desirable it was that its character as a church should not be lost. The legal position appeared to His Honour to be the same whether there had been complete or only partial destruction of the building. In its partially destroyed condition it was useless as a church and it was thus in the same position as if the fire had swept the land clean. Instead of being an active and live church it was the ruins of a church and the owners of the ruins had not any intention of themselves restoring those ruins, although they desired that another body should buy the ruins, restore them, and resume services in them. The ruins as far as defendants were concerned were a property for sale although they proposed to take steps to see that the purchaser put them to religious uses.

It was not disputed that the words "church or chapel" did not refer to use by a religious society, or body, but to use by being built on by means of a church or chapel: **Perpetual Trus-**

tees v. Mayor of Dunedin, 34 N.Z.L.R. 877. The first question, therefore, was whether the land was occupied by a "church or chapel." The land was certainly covered with a building that had been a church and used as a church. But it was a "church" in the period in question? As His Honour understood the term "church" it meant a building for public worship. The size of the building or the grandeur of its architecture did not make a church; many churches used buildings of the humblest description. It was the sacerdotal element in a building that made it a church. The Congregationalists after the happening of the fire had decided that they would no longer hold services there, nor would they repair the building in order that another denomination could so so. The building appeared to His Honour to have lost its sacerdotal character, and the land and building was in the defendants' hands as a property for sale. In His Honour's opinion, therefore, the land during the rating year in question was not occupied by a "church," and the exemption did not apply.

Another point taken by Mr. Johnstone was that the word "occupied" in the exemption meant "used and occupied"; and that unless the building was used as a church the land was not occupied by a church. In one sense, user by way of holding services was what converted what otherwise was an ordinary building into a church, so that there must be both occupancy and user for the specified purpose to give a building its sacerdotal character: See **Borough of Karori v. Taine,** 2 G.L.R. 297. In **Wanganui Borough v. Wanganui High School Board** (1923) N.Z.L.R. 515, which was a case of land bought for, and intended to be used for, a school site. Chapman, J., refused to exempt because an intention to use was not "used." The words of the exemption claimed in that case were "lands and buildings used for the purposes of a secondary school." That case turned on the word "used," which was not in the exemption relied upon in the present case. In **Mayor of Miramar v. Devoy,** 34 N.Z.L.R. 1072, portion of a building was dedicated as a church, but the remaining portion was used for purposes other than a church. It was held that the other use took the premises out of the exception. That decision was consistent with the view His Honour had already expressed that a non-sacerdotal use of the building took it out of the category of "church." Most of the exceptions in that part of the Rating Act had the word "used," but the exemption in the present case selected the word "occupied." His Honour did not think it necessary for the purposes of the present case to hold that the word "occupied" meant "used and occupied." His Honour based his decision on the ground that user determined the character of the premises, and accordingly came to the conclusion that in the rating year in question the premises in question were not a church within the exemption.

Judgment for plaintiff.

Solicitor for plaintiff: **Stanton, Johnstone and Spence,** Auckland.

Solicitors for defendant: **Glaister and Ennor,** Auckland.

Kennedy, J. February 25; March 2, 1929. Auckland.

WALKER v. GUILLARD BLUE METAL QUARRY CO. LTD.

Nuisance—Interim Injunction—Pollution of Stream—Nuisance Complained of Existing Twelve Months Before Action Brought—Only Complaint Four Months Before Action Brought—No Evidence of Substantial Injury—Court Not Satisfied that Plaintiff Would Suffer Irreparable Injury from Delay Consequent on Refusal of Injunction—Defendant Consenting to Inquiry at Trial as to Damages Suffered Between Issue of Writ and Trial of Action and to Judgment being Entered for such Damages—Interim Injunction Refused.

Motion by plaintiff for an interim injunction to restrain the defendant company from polluting a stream. The plaintiff was the owner and occupier of a farm on the banks of the stream, and the defendant company carried on, higher up the stream, the business of a metal crusher. Since January, 1928, the defendant company had used the water of the stream to free crushed metal from clay. The water used was carried by a pipe to a washer; clay which was washed off, fell into a truck and was then deposited away from the stream while muddy water, with clay in suspension, flowed back into the stream. In the meantime some clay, carried in suspension, settled and the water still carrying clay in suspension flowed down stream through and along the plaintiff's farm. A writ claiming £250 damages and an injunction was issued and served on 12th February, 1929. Four days thereafter the plaintiff made the present application.

Lovegrove for plaintiff.
Towle for defendant.

KENNEDY, J., said that there was a contest as to whether, by reason of the operations of the defendant company, the stream was rendered less fit for any purpose for which it might otherwise be used. His Honour would not, however, review the evidence, as in view of the fact that the matter might proceed to trial, it was proper that the Court should not further refer to the facts established than to state them so far as was necessary to dispose of the application: **Woodbridge v. Bellamy,** (1911) 1 Ch. 326, 338. The ultimate question between the parties would be decided on the evidence called at the trial. His Honour was satisfied on the evidence before him that the water flowing through and along the plaintiff's farm was not reasonably fit for human consumption and was not rendered less fit for that purpose by the operations of the defendant company. There had, however, been pollution and the stream was, in His Honour's opinion, less fit for the use of animals and possibly for some domestic purposes other than use for human consumption. The evidence did not, however, establish substantial injury. In His Honour's opinion an interlocutory injunction should be issued only if it appeared on the evidence that the plaintiff would suffer irreparable injury in the sense of material damage which could not be adequately remedied by damages: **Attorney-General v. Hallett,** 16 M. & W. 569; **Dyke v. Taylor,** 3 De G.F. & J. 467. His Honour was not so satisfied. The matter of which the plaintiff complained, had obtained, according to the plaintiff's pleadings, for one year prior to the action being brought, and during that time the plaintiff had but once complained and that was over four months before action was brought. It was difficult to believe that a matter, which the plaintiff allowed without action to endure for twelve months, would, if it endured for the further two months which must elapse before the action came to trial, cause him material damage which could not be adequately remedied by damages. His Honour decided that the evidence did not establish that the plaintiff would suffer irreparable injury between the date of the commencement of the action and the date of the hearing if an interlocutory injunction was not issued. During the argument His Honour asked counsel for the defendant company whether he would undertake, on behalf of the defendant company, if the interlocutory injunction were refused, to consent to an inquiry at the trial of the action as to the damages which might be suffered by the plaintiff between the date of the issue of the writ and the trial of the action and if he would then consent to judgment for such damages as the plaintiff might prove he so suffered, and he intimated that such undertaking would be given. His Honour proposed to embody that undertaking in his order which would be that, the defendant company by its counsel having undertaken to consent to an inquiry at the trial of the action as to the damages which the plaintiff might suffer between the date of the commencement of the action and the trial thereof and, in the event of such damage being shown to be due to the operations of the defendant company infringing the plaintiff's legal right, to consent to judgment therefor, application for an interlocutory injunction be refused, but liberty be reserved to the plaintiff to make further application should the pollution now obtaining be in the meantime increased to his injury.

Solicitors for plaintiff: **Lovegrove and George,** Auckland.
Solicitors for defendant: **Towle and Cooper,** Auckland.

Court of Arbitration.

Frazer, J. February, 5; March 2, 1929. Wellington.

MUIR v. J. C. HUTTON (N.Z.) LTD.

Workers Compensation—Accident—Sudden Death of Worker While Doing Heavy Work—Worker Suffering from Disease of Heart of Long Standing—Dependant of Worker Entitled to Compensation—Evidence of Special Strain Not Necessary—Test Whether Strain of Work Contributed to Death of Worker.

Claim by plaintiff for compensation in respect of the death of her husband. The deceased was aged 48 and had been employed by the defendant company in its bacon factory for nineteen years. About nine years before these proceedings he had had an attack of muscular rheumatism, but except for occasional pains in the chest, to which he attached no significance, he had apparently enjoyed good health since. On 3rd September, 1928, he was employed for some time in pushing carcases of pork from a freezing chamber to a distance of 200 yards. He was then put on to assist the foreman in stacking heavy bundles of cartons. The bundles were carried about 20 feet, and stacked to a height of 5 ft. 6 ins. or 6 ft. After about a quarter of an hour at that work, the deceased, who had just carried a bundle weighing 89 lbs. and placed it on top of the stack, was walking back for another bundle, when he staggered and fell, and died within a minute or two. It was claimed that his death was caused by accident arising out of and in the course of his employment. A post mortem examination of the body disclosed long-standing disease of the aortic valve, with dilatation of the left ventricle and thickening of the heart muscle. The condition was one of chronic aortic endo-carditis. Death was due to aortic disease. The medical witnesses agreed that if the deceased had consulted a doctor after the condition of his heart had become observable, he would have been warned against heavy work. It was common ground that the aortic disease was of long standing, and that the heart had been progressively deteriorating for some years. The medical witnesses stated that the deceased might have died while walking or sitting in a chair, but that an effort of any kind might have hastened his death.

P. J. O'Regan for plaintiff.

H. F. O'Leary for defendant.

FRAZER, J., delivering the judgment of the Court, said that before the decision of the English Court of Appeal in **McFarlane v. Hutton Bros. (Stevedores) Ltd.**, 20 B.W.C.C., 222, it was considered that proof of some special strain, of however slight a nature, was necessary in such cases to establish an accident within the meaning of the Act. His Honour referred to the cases of **Clayton and Co. v. Hughes**, 3 B.W.C.C., 275, and **Barnabas v. Bersham Colliery Co.**, 4 B.W.C.C., 119 and to a note appearing in Ruegg's Workmen's Compensation, 9th Edn., 49. In **McFarlane v. Hutton Bros. (Stevedores) Ltd.** (*cit. sup.*) however Lord Hanworth, M.R., said, in the course of his judgment: "A man may suffer an accident, and be entitled to recover in respect of the injury caused by the accident within the meaning of the Workmen's Compensation Act, although the strain which sets up and puts in motion the cause of his death may arise in the ordinary exercise of his work which he is employed to do, and is not of a special or momentary nature." It did not follow, of course, that every man who died at his work from heart disease could be said to die from the effects of an accident arising out of and in the course of his employment. There must be evidence that the strain of the work he had been doing had contributed to his death, and that, but for that work, he would not have died at that time. Each case must be decided upon its own special facts. The question that the Court must put to itself in every case was that propounded by Lord Loreburn, in **Clover, Clayton and Co. v. Hughes** (*cit. sup.*): "Did he die from the disease alone, or from the disease and the employment taken together?" The present case presented the history of a man doing strenuous work, pushing carcases of pork from a freezing chamber, and then, for ten or fifteen minutes, undertaking particularly heavy lifting work. Within a few seconds after carrying a bundle weighing 89 lbs., and lifting it on to a stack, he suddenly collapsed, and died a few minutes later. The medical evidence was that his heart was in so advanced a condition of disease that any strain or effort might have hastened his death. It was impossible to assert, definitely and dogmatically, that if the deceased had not performed the heavy work that he had been doing that morning he would not have died when he did, or that he would have died at that time if he had not been doing that work. There was evidence, however, that the man's heart was diseased; that any strain or effort would be detrimental to it; that he had, owing to the nature of his work, been undergoing a continued strain beyond the limits that a medical practitioner would have considered reasonable for a man in his condition of health; and that he collapsed and died while at that work. The obvious inference was that the work the deceased was doing so acted upon his diseased heart, by exhausting its last reserve, as to bring about its collapse. Judgment for plaintiff for £1,000, and £32 14s. 6d. funeral expenses.

Solicitor for plaintiff: **P. J. O'Regan**, Wellington.

Solicitors for defendant company: **Bell, Gully, Mackenzie and O'Leary**, Wellington.

Frazer, J. February 6; March 2, 1929.
Wellington.

MICHALICK v. McGREGOR.

Worker's Compensation—Owner of Land Granting License to Fell and Remove Dead Timber with Incidental Rights Not Liable to Pay Compensation to Bushman Engaged by Grantee of Such License—Contract by Owner of Land with Grantee a Contract for Grant of Timber Rights, Not a Contract for Execution of any Work—Worker's Compensation Act, 1922, Sections 13, 63.

Claim by plaintiff against the defendant, the owner of certain land in the Tangitu Survey District to recover compensation in respect of the death of her husband, a bush contractor, who died from injuries received through a tree falling on him while he was working on the defendant's land. The defendant had by agreement granted to one Emily Archer license to fell, remove and carry away from his land all dead timber standing or lying thereon, with incidental privileges as to laying tramlines, constructing mills, etc. The grantee was to pay the defendant a royalty of 4s. per 100 feet, on all timber removed from the land. She also agreed to supply the defendant with 10,000 feet of sawn timber free of cost, and to cart a number of posts and strainers for the defendant at specified rates. The grantee had engaged the deceased and others to fell and remove the timber on her behalf and while so doing, the deceased was fatally injured.

P. J. O'Regan for plaintiff.

H. F. Johnston for defendant.

FRAZER, J., delivering the judgment of the Court said that it was clear that the contract between the grantee and the deceased was a contract to cut standing timber, and that she was accordingly liable, under Section 63 of the Workers Compensation Act, 1922, to pay compensation for his death, in the same manner as if he had been a worker under a contract of service. In order to make the defendant liable to pay compensation, the plaintiff invoked the provisions of Section 13 of the Act, by which any principal who contracted with a contractor for the execution of any work was deemed, for the purposes of the Act, to be the employer of the contractor's workers, and was made jointly liable with the contractor for payment of compensation in the event of any of those workers being injured or killed by accident. The liability of the principal was limited by Subsection 4 of Section 13. In the opinion of the Court, the agreement made between the defendant and the grantee was not a contract "for the execution of any work" by or under the grantee, except in so far as related to the carting of posts and strainers, which could properly be regarded as severable from the rest of the contract. In essence and substance, the agreement was a contract for the sale of timber in *situ* and for the grant of rights incidental thereto. Even if the agreement could be regarded as coming within Subsection (1) of Section 13, the work of cutting timber was not directly a part of or a process in the trade or business of the defendant, and so did not comply with the condition set out in Subsection (4) (a). The defendant was a farmer, not a sawmiller or a timber merchant, and the contract into which he entered was not for clearing his land, but was for the sale of dead timber thereon. The conditions set out in Subsection (4) (b) were not complied with, for the payment to be made by the defendant to the grantee for carting posts and strainers involved a payment of less than £20. In any event, the deceased was not employed at the time of the accident in doing the work for which a payment was to be made by the defendant to the grantee.

Judgment for defendant.

Solicitor for plaintiff: **P. J. O'Regan**, Wellington.

Solicitors for defendant: **Johnston, Beere and Co.**, Wellington.

A Verdict-Getting Remark.

Counsel addressing the Court at Auckland: "I do not intend to quote any law to your Honour because that would be like carrying coals to Newcastle."

Family Protection Act, 1908—Part II.

A Review of the Decisions Thereunder.

By A. C. Stephens, LL.M.

(Continued from page 13)

APPLICANTS FOR RELIEF (Ctd.)

Widower.

Order made in favour of widower: *Nosworthy v. Nosworthy*, 26 N.Z.L.R. 285; *Brown v. McCarthy*, 26 N.Z.L.R. 762; *Colquhoun v. Public Trustee*, 31 N.Z.L.R. 1139; *Golightly v. Jefcoate*, 33 N.Z.L.R. 91; *Hooker v. Guardian Trust and Executors Co.*, (1927) G.L.R. 536.

Order refused to widower on the grounds that he had been guilty of misconduct and that he had sons who were able to contribute to his support: *Geen v. Geen*, 33 N.Z.L.R. 81.

Children.

An order is not readily made in favour of adult children: *Rush v. Rush*, 20 N.Z.L.R. 249. If the estate is large and the testator makes insufficient provision for children who are poor and unable to maintain themselves, the Court will order proper provision to be made for them though they are adults; but if the estate is small and the children are adults and have other persons on whom they can rely for maintenance, it is doubtful whether the Court will interfere: *Handley v. Walker*, 22 N.Z.L.R. 932.

For a general statement of the principles on which the relief is granted, see the extracts from *Allardice v. Allardice*, 29 N.Z.L.R. 959 C.A. and *Welsh v. Mulcock*, (1924) N.Z.L.R. 673 C.A., quoted above.

The Act covers a child unborn at the date of the will: *Public Trustee v. Brown*, 34 N.Z.L.R. 951.

The Act does not extend to grandchildren: *Pulleng v. Public Trustee*, (1922) N.Z.L.R. 1022.

The Act does not cover an illegitimate child: *E. v. E.*, 34 N.Z.L.R. 785 C.A.; see also *Re Herd*, (1923) G.L.R. 118. But where illegitimate children are beneficiaries under the will they will not be deprived of their interest on an application by other persons entitled to apply under the Act simply on the ground of illegitimacy: *Worthington v. Ongley*, 29 N.Z.L.R. 1167.

Provision has been made by agreement between the other beneficiaries for children absent from the Dominion: *Hunt v. Public Trustee*, 29 N.Z.L.R. 307.

In the following cases the Court ordered provision to be made in favour of adult children: *Handley v. Walker* (supra); *Wilkinson v. Wilkinson*, 24 N.Z.L.R. 156; *Munt v. Findlay*, 25 N.Z.L.R. 488; *Kerr v. Bridge*, 25 N.Z.L.R. 907; *Re Bleasel*, 25 N.Z.L.R. 974; *Rowe v. Lewis*, 26 N.Z.L.R. 769; *Hunt v. Public Trustee* (supra); *Hoffmann v. Hoffmann*, 29 N.Z.L.R. 425; *Allardice v. Allardice* (supra); *Re Green*, 13 G.L.R. 477; *Glasgow v. Glasgow*, 13 G.L.R. 647; *Re Raymond*, 14 G.L.R. 560; *Plank v. Plank*, 32 N.Z.L.R. 898; *Re Estall*, 16 G.L.R. 185; *Davidson v. Sundstrum*, 33 N.Z.L.R. 212; *E. v. E.* (supra); *Severn v. Public Trustee*, (1916) N.Z.L.R. 711; *Lean v. Tipping* (No. 2), (1917) G.L.R. 355; *Re Higgins*, (1918) G.L.R. 387; *Cook v. Webb*, (1918) N.Z.L.R. 664 C.A.; *Brown v. Public Trustee*, (1918) G.L.R. 209; *Fletcher v. Usher*, (1921) N.Z.L.R. 649; *Allen v. Manchester*, (1922) N.Z.L.R. 218; *Rose v. Rose*, (1922) N.Z.L.R. 809 C.A.; *Pulleng v. Public Trustee* (supra); *Re Herd*, (1923) G.L.R. 118; *Corbey v. Boonstra*, (1923) G.L.R. 433; *Gardiner v. Boag*, (1923) N.Z.L.R. 739; *Welsh v. Mulcock* (supra); *Smith v. Public Trustee*, (1927) N.Z.L.R. 342; *Re Roper*, (1927) N.Z.L.R. 731; *Copeland v. Wakelin*, (1927) N.Z.L.R. 846.

In *Collins v. Public Trustee*, (1927) N.Z.L.R. 746, the Court made a generous allowance in favour of infant sons by way of lump sum subject to an annuity for the widow.

In the following cases the Court refused to make an order in favour of adult children: *Allardice v. Allardice* (supra); *Re Green* (supra); *Glasgow v. Glasgow* (supra); *Re Raymond* (supra); *Sinclair v. Sinclair*, (1917) N.Z.L.R. 144; *Ray v. Moncrieff*, (1917) N.Z.L.R. 234; *Gardiner v. Boag* (supra); *Sollitt v. Fairhead*, (1924) G.L.R. 533.

Failure on the part of the testator to educate his children will be taken into account: *Cook v. Webb*, (1918) N.Z.L.R. 664, 671, C.A. But see also *Allardice v. Allardice*, 29 N.Z.L.R. 959, 969 C.A.

Apparently there is no duty resting on the executor to apply on behalf of the infant children of the testator: *Spelman v. Spelman*, (1920) N.Z.L.R. 202. See also *Re McCarthy*, (1919) N.Z.L.R. 807.

RELEVANT CIRCUMSTANCES.

The Court takes all the relevant circumstances into account in deciding whether an order should be made under the Act. The following statement contains a list of the chief factors which appear to have influenced the Court. I use the word "appear" advisedly because in some cases the relevant circumstances appear only in a preliminary statement of facts or in the headnote to the report and are not mentioned in the judgment at all, although they must have been considered by the Court in the framing of the order. In other cases a statement of facts appears in the judgment but the order is made without reference to any particular circumstance.

1. **The age and state of health of the applicant and ability to earn a living.** *Allardice v. Allardice*, 29 N.Z.L.R. 959, 974, C.A.; *E. v. E.*, 34 N.Z.L.R. 785 C.A.; *Cook v. Webb*, (1918) N.Z.L.R. 664 C.A.; *Welsh v. Mulcock*, (1924) N.Z.L.R. 673, C.A. (This point is mentioned in the large majority of cases under the Act).

It is important to have medical evidence on questions of health: see *Cook v. Webb*, (1918) N.Z.L.R. 664, 670 C.A.

It is still to be settled whether the state of health of the applicant at the time of the application can be taken into account where the ill-health has arisen subsequent to the death of the testator: see *Milne v. Cunningham*, (1917) N.Z.L.R. 687, 692.

2. **The provision (if any) made by the testator for the applicant under the will.** *Wilkinson v. Wilkinson*, 24 N.Z.L.R. 156; *Re Bleasel*, 25 N.Z.L.R. 974; *Nosworthy v. Nosworthy*, 26 N.Z.L.R. 285; *Rowe v. Lewis*, 26 N.Z.L.R. 769; *Plank v. Plank*, 32 N.Z.L.R. 898; *Sinclair v. Sinclair*, (1917) N.Z.L.R. 144; *Allen v. Manchester*, (1922) N.Z.L.R. 218.

The Court has required the applicant to abandon the provision made for him by the testator under the will as a condition of the making of an order under

the Act: *Rush v. Rush*, 20 N.Z.L.R. 249; *Laird v. Laird*, 5 G.L.R. 466. See also *Fletcher v. Usher*, (1921) N.Z.L.R. 649.

3. The amount of property possessed by the applicant. *Munt v. Findlay*, 25 N.Z.L.R. 488; *Nosworthy v. Nosworthy*, 26 N.Z.L.R. 285; *Allardice v. Allardice*, 29 N.Z. L.R. 959 C.A.; *E. v. E.*, 34 N.Z.L.R. 785 C.A.; *Parish v. Valentine*, (1916) N.Z.L.R. 455; *Severn v. Public Trustee*, (1916) N.Z.L.R. 710; *Murphy v. Public Trustee*, (1921) G.L.R. 152; *Allen v. Manchester*, (1922) N.Z.L.R. 218; *Welsh v. Mulcock*, (1924) N.Z.L.R. 673 C.A.

The Court has refused to make such an order as will enable the applicant to keep his own capital intact: *Parish v. Valentine*, (1916) N.Z.L.R. 455.

The acquisition of property by the applicant between the date of death of the testator and the time of the application will also be taken into account. *Plimmer v. Plimmer*, 9 G.L.R. 10, 19, 27, C.A.; *Rowe v. Lewis*, 26 N.Z.L.R. 769.

4. The size of the estate. *Re Phillips*, 4 G.L.R. 192; *Laird v. Laird*, 5 G.L.R. 466; *Wilkinson v. Wilkinson*, 24 N.Z.L.R. 156; *Rowe v. Lewis*, 26 N.Z.L.R. 769; *Hoffman v. Hoffman*, 29 N.Z.L.R. 425, 429; *Allardice v. Allardice*, 29 N.Z.L.R. 959 C.A.; *E. v. E.*, 34 N.Z. L.R. 785 C.A.; *Welsh v. Mulcock*, (1924) N.Z.L.R. 673, 682, C.A.

5. The character and conduct of the applicant. (Subsection (2) Section 33). *Re Bleasel*, 25 N.Z.L.R. 974; *Colquhoun v. Public Trustee*, 31 N.Z.L.R. 1139; *Geen v. Geen*, 33 N.Z.L.R. 81; *Ray v. Moncrieff*. (1917) N.Z.L.R. 234; *Fletcher v. Usher*, (1921) N.Z.L.R. 649: Cf. *Re Estall*, 16 G.L.R. 185.

Improvidence on the part of the applicant will be taken into account by the Court: *Sinclair v. Sinclair*, (1917) N.Z.L.R. 144.

6. The provision (if any) made for the applicant by testator before his death. *Munt v. Findlay*, 25 N.Z.L.R. 488; *Hoffman v. Hoffman*, 29 N.Z.L.R. 425.

If the testator has maintained the applicant in the past an order will be more readily made in his favour: *Golightly v. Jefcoate*, 33 N.Z.L.R. 91; *Allardice v. Allardice*, 29 N.Z.L.R. 959, 969, C.A.

In the case of children the Court will also take into account the testator's failure to educate his children where such failure results in a decreased earning power on their part: *Cook v. Webb*, (1918) N.Z.L.R. 664, 671, C.A. Cf. *Allardice v. Allardice*, 29 N.Z.L.R. 959, 969 C.A.

7. The earning capacity of anyone who is legally liable to maintain the applicant. *Handley v. Walker*, 22 N.Z.L.R. 932; *Allardice v. Allardice*, 29 N.Z.L.R. 959, C.A.; *Geen v. Geen*, 33 N.Z.L.R. 81; *Davidson v. Sundstrum*, 33 N.Z.L.R. 212; *Severn v. Public Trustee*, (1916) N.Z.L.R. 710.

8. The moral claim and financial position of anyone who would be adversely affected by the making of provision for the applicant. *Laird v. Laird*, 5 G.L.R. 466; *Wilkinson v. Wilkinson*, 24 N.Z.L.R. 156; *Plimmer v. Plimmer*, 9 G.L.R. 10, C.A.; *E. v. E.*, 34 N.Z.L.R. 785 C.A.; *Re Koehler*, (1920) N.Z.L.R. 257; *Sinclair v. Sinclair*, (1917) N.Z.L.R. 144, 147; *Rose v. Rose*, (1922) N.Z.L.R. 809 C.A.

An order in favour of the applicant will be made more readily where it can be made so as to affect only strangers or persons who are not closely related to the testator. See *Kerr v. Bridge*, 25 N.Z.L.R. 907; *Rowe v. Lewis*, 26 N.Z.L.R. 769; *Davidson v. Sundstrum*, 33 N.Z.L.R. 212; *Cook v. Webb*, (1918) N.Z.L.R. 664, 672, C.A.; *Collins v. Public Trustee*, (1927) N.Z. L.R. 746.

The Court will take into account the fact that the order will operate against a person who has dependents even though they are illegitimate: *E. v. E.* (supra).

The measure of assistance given to the testator by the person opposing the making of an order is relevant: *Lean v. Tipping* (No. 2), (1917) G.L.R. 355; *Rose v. Rose* (supra); *Gardiner v. Boag*, (1923) N.Z.L.R. 741.

It is doubtful how far an applicant's claim should prevail against the rights of persons who were beneficiaries under the will of the testator and who morally if not legally were the owners of the property which was bequeathed to them by the will. See *Milne v. Cunningham*, (1917) N.Z.L.R. 687, 692. Contrast *Colquhoun v. Public Trustee*, 31 N.Z.L.R. 1139.

9. The assistance given to the testator by the applicant in the accumulation of the estate or otherwise. *Handley v. Walker*, 22 N.Z.L.R. 932; *Laird v. Laird*, 5 G.L.R. 466; *Heagerty v. Considine*, 34 N.Z.L.R. 905; *Pulleng v. Public Trustee*, (1922) N.Z.L.R. 1022. Contrast *Carroll v. Carroll*, (1917) G.L.R. 600.

10. The intention of the testator as shown by the terms of the will. *Laird v. Laird*, 5 G.L.R. 466; *Hoffmann v. Hoffmann*, 29 N.Z.L.R. 425, 429; *Welsh v. Mulcock*, (1924) N.Z.L.R. 673, 682, C.A.; *Smith v. Public Trustee*, (1927) N.Z.L.R. 342. Cf. *Collins v. Public Trustee*, (1927) N.Z.L.R. 746.

11. The consent of the person against whom an order under the Act will operate. *Nosworthy v. Nosworthy*, 26 N.Z.L.R. 285; *Hunt v. Public Trustee*, 29 N.Z.L.R. 307.

12. The absence of other applicants under the Act: *Rowe v. Lewis*, 26 N.Z.L.R. 769; *Russell v. Dunn*, 9 G.L.R. 510; *Collins v. Public Trustee*, (1927) N.Z. L.R. 746; *Hooker v. Guardian Trust and Executors Co.*, (1927) G.L.R. 536.

13. The style of living to which the applicant has been accustomed. *Re Phillips*, 4 G.L.R. 192; *Laird v. Laird*, 5 G.L.R. 466; *Allardice v. Allardice*, 29 N Z L.R. 959, 969, C.A.; *Bell v. Hunter* (No. 2), 34 N.Z. L.R. 1068, *Cook v. Webb*, (1918) N.Z.L.R. 664; *Hutchison v. Hutchison*, (1921) N.Z.L.R. 743; *Armstrong v. Armstrong*, (1921) G.L.R. 184; *Allen v. Manchester*, (1922) N.Z.L.R. 218, 222. But see also *Welsh v. Mulcock*, (1924) N.Z.L.R. 673 C.A.

14. The existence of persons dependent upon the applicant or the defendant or in receipt of assistance from him. *E. v. E.*, 34 N.Z.L.R. 785 C.A.; *Lean v. Tipping* (No. 2), (1917) G.L.R. 355; *Paxton v. Nicholson*, (1918) G.L.R. 393; *Rose v. Rose*, (1922) N.Z.L.R. 809 C.A.; *Welsh v. Mulcock*, (1924) N.Z.L.R 673, 682, C.A.; *Re Roper*, (1927) N.Z.L.R. 731.

(To be continued).

It is most unfortunate that now-a-days commercial cases are decided by heterogenous juries, often including women, who know nothing of bills of lading though they may know a good deal about bills of sale.—Lord Riddell.

Lord Halsbury.

His Life and Times.

Permission has been granted to the " New Zealand Law Journal *" to publish a series of extracts from the Biography of the first Earl of Halsbury, which is shortly to be published.*

Early Days.

The day Hardinge Giffard was called, he got his first brief. One of the well-known firm of Morgan and Humphreys, solicitors, called on his father and said, "What are you going to do with young Hardinge?" On hearing that he had just been called to the Bar, he said he would give him a brief. When the brief arrived, it was to prosecute a man who had spat twice in another man's face. Hardinge won his case, and the offender was fined two guineas—a guinea a spit!

The same solicitor advised him to join the South Wales Circuit, and it was a fortunate choice, for just at that time there was a dispute between the solicitors on the Circuit and the Bar, and as a protest the solicitors decided to brief the new man, who had joined after the difficulty had arisen. Hardinge, therefore, among others, got the opportunity of a start, which is not always the good fortune of a beginner.

Indeed, he was a fortunate man in every way. Not only for the opportunities that came to him, but in the possession of the quick and daring intelligence which seized and utilised them, when another might have let them pass. Within a year his father, writing in 1851, says that he hears "from a man on his Circuit that Mr. Hardinge Giffard did everything that was to be done there last time," and ends with the confident prophecy, "That young man will be Lord Chancellor. Remember my words."

The Criminal Bar was a very close borough in those days, and the work was mostly in a few hands, among whom were Hardinge Giffard and Poland. Hardinge Giffard acted for the Humphreys. He soon became the leader in that Court, and practised largely there until 1866, when he took silk, and so had to vacate his post as Junior Counsel to the Treasury.

It is interesting that Giffard began at the Old Bailey, because Macaulay once wrote, speaking of the Old Bailey Bar, that "Advocates have always here used a licence of tongue unknown at Westminster Hall, which has not often proved the nursing mother of a Lord Chancellor." Giffard was an apt pupil, and soon made his way. He possessed a virile force, a combativeness, a strength of conviction, and a pertinacity which carried all before him. He was absolute master of his trade, and possessed, as the world soon came to recognise, an innate genius for the Law.

In 1851 Giffard joined his brother John in Chambers in Chancery Lane. John was the Chancery Reporter, and afterwards County Court Judge at Totnes, which was a Liberal appointment. The brothers were two of the untidiest men in the world, and the state of their Chambers, as described by the author of *Fifty Years at the Bar* was, to say the least of it, picturesque.

In 1852 Poland persuaded Giffard to join him in the basement of 7 King's Bench Walk, where he remained till 1865, when he took silk. They then removed to 5 Paper Buildings. The other members of the Chambers were Tom Allen, Giffard's lifelong friend, and Harry Giffard. In the same year Hardinge Giffard was married to Miss Humphreys. She brought him comfort and peace, freedom from pecuniary anxieties, and opportunities of distinction in his profession. Their married life was a very happy one. Their first home was in Gloucester Place, Portman Square.

The first case in which Giffard appeared in the High Court was before Lord Campbell, and Giffard fell victim to an attack of extreme nervousness, hesitating and stammering. Lord Campbell, who was not the most patient of men, leaned over from the Bench, saying, "For God's sake, get on, young man!" which so stimulated Hardinge that he did get on, and was never again nervous in Court.

Giffard's first case of real importance was *Feret v. Hill* on May 29, 1854, and he afterwards attributed his success in London to the remarks that were made of him in it. The Court was very much against him, and indeed every conceivable prejudice was against the case he was arguing. The case was this:—

In February, 1853, the plaintiff, Feret, asked the defendant, Hill, to let him certain rooms in a house, representing that he wanted them for the purpose of carrying on a perfumery business, and giving references.

A lease of the rooms was accordingly granted by Hill to Feret. Feret took possession of the rooms, but instead of carrying on the business of a perfumer, he used them for an improper and illegal purpose. Whereupon the defendant gave him notice to quit immediately, and, upon his refusal to do so, forcibly expelled him. Feret accordingly brought an action of ejectment against the defendant. The argument turned upon the question whether the misrepresentation by the plaintiff of the purpose for which he intended to use the premises made the contract void. When his leader, Massey Dawson, had failed to convince the Bench of four Judges, Giffard succeeded in putting the case so well, arguing that the agreement having been made, and the plaintiff let into possession, the estate passed so as to prevent its being diverted by a collateral fraud, that they were all convinced and gave judgment in favour of the plaintiff.

A Lucky Escape.

In 1854 Giffard was in a case at Cardiff, which had serious, and might have had fatal results. He was engaged in speaking before Lord Campbell when a madman called Willoughby made a disturbance in Court, objecting violently to his conduct of the case, and making wild and extravagant accusations against judge and counsel. A few weeks later Giffard was waiting, robed, at the Old Bailey, when Willoughby suddenly appeared, pulled out a pistol, and saying, "Do you remember Cardiff?" fired it point-blank in Giffard's face. Luckily the pistol was a muzzle-loader, and, as he had neglected to put in a wad, the bullet jerked out as he raised it, and was later found in Giffard's sleeve. But the explosion at such close quarters burnt his cheek, and left a scar.

Willoughby was indicted for feloniously wounding Hardinge Giffard with intent to murder. Messrs. Ryland and Locke prosecuted, and Mr. W. Clarkson defended. While Mr. Clarkson was cross-examining Giffard, Willoughby repudiated him as counsel, refusing to accept his services. This raised a point of law, which was discussed, and Lord Chief Baron Pollock decided

that counsel could not be forced upon a prisoner who preferred to conduct his own case.

Clarkson therefore withdrew, and the prisoner was found "Not guilty, on the ground of insanity," and was sentenced to detention during Her Majesty's pleasure.

"Hardinge treated the affair very lightly," says Sir Harry Poland, who was present.

A Phenomenal Memory.

Lord Halsbury's memory was quite extraordinary. Countless examples could be quoted, but these few may serve. His son, the present Earl of Halsbury, joined the Chester Circuit in 1906, and was shown an old brief of his father's. It was a very large brief, dated 1855. There was not a mark on it except on the last page, where the times of three trains to London were jotted down. On returning to London, he asked his father about the case, and he remembered every witness, what each had said, which broke down, and which were believed. He told him of the two important letters which won the case, the name of the judge, and every detail of the affair. Fifty-one years before!

Over and over again, when a point of law was put to him, he would remember, not only the case, but the volume and the page of the Report, where it was to be found, the judge who decided the point, and who argued it.

He was a very quick worker, and never made a note, which his wonderful memory made unnecessary. For this reason he had the reputation of not reading his papers.

Sir Harry Poland told a story about Giffard attending a political debating society, called the Belvedere. The leader of the Radicals was called Southwell, who made a brilliant speech that brought down the house. But unfortunately for him he had not allowed for Giffard's memory. He remembered not only the speech, but the real author, and where it was printed. The book was produced, and that was the end of Mr. Southwell!

Giffard and Campbell.

Lord Campbell was a difficult man to get the better of. In a case in which he was very much against Giffard, it became obvious that sooner or later he would have to rule on a point of law. Under the practice in those days, one way of challenging a judge's ruling was by way of a Bill of Exceptions, a document on parchment, prepared by Counsel, setting out the point and the ruling. The judge, under the penalty of a very severe fine, was bound to sign this, and on this the appellate tribunal gave their decision.

Foreseeing that the judge was going to decide against him, Giffard prepared the Bill of Exceptions, and upon Campbell's ruling, immediately handed it in. Campbell was angry, but equal to the occasion. He said at once, "I cannot sign this Bill. It does not accurately set out the point nor the ruling."

"In what way is it inaccurate?" asked Giffard.

"No, no," said Campbell. "It is not the duty of a judge to say how a Bill of Exceptions should be drawn. All I say is that this one is inaccurate. If you will present me with one accurately drawn, I will sign it."

In another case, Giffard did get the better of Campbell. The whole question turned on whether Giffard's client was drunk. Campbell, in his summing up, told the jury that there was plenty of evidence that he was drunk and none that he was sober. Giffard protested, and was told to sit down.

"I will sit down when I have done my duty to my client and not before," he said. "The evidence that he was sober is that immediately after the occurrence he drove a pair-horse carriage 16 miles in the dark along country roads, without an accident."

The judge was annoyed, but the jury agreed with Hardinge Giffard.

Giffard continued to forge ahead in London as well as on Circuit. Curiously enough his practice in London was mostly confined to the Chancery side, though he has often been called an Old Bailey lawyer, and it was said he had made his name at the Old Bailey. It was not the case at that time, though later on he became conspicuously successful there. And other of his friends, besides his proud father, were venturing on prophecy. "Bob" Orridge betted 10*l* that within twelve years Giffard would be Attorney-General, and end his days as Lord Chancellor.

Sir Harry Poland, with whom Giffard shared Chambers for about 15 years, speaks of him in these words:—

"Hardinge Giffard was a wonderful man, a kindly, cheerful friend, ever with a jest on his lips, a fine lawyer, a great advocate, a classical scholar, and—an immoderate reader of novels. He did well on Circuit, and well everywhere. He had the most retentive memory of any man I have ever known. He was never at a loss. He saw into a man as soon as he had read the brief. He knew his man every time. I never knew his equal at cross-examination and he was ahead of Ballantyne, who alone approached him in that difficult art."

(To be continued)

Bench and Bar.

Mr. J. W. Macdonald, the Public Trustee, has had conferred upon him in the delayed New Year Honours, the distinction of C.M.G.

Mr. P. H. Harper, the new appointee to the Magisterial Bench, was born in 1884, and is the fourth son of Mr. George Harper, of Christchurch. He was educated at Christchurch Boys' High School, and received his legal training in his father's office. He was admitted as a barrister and solicitor in 1907, and then practised on his own account at Levin. Later he entered into partnership with Mr. J. L. C. Merton, but the partnership was subsequently dissolved, Mr. Merton practising at Palmerston North, and Mr. Harper continuing to practice at Levin.

Mr. G. T. McDowell, who has for the past six years been managing clerk to Messrs. Goldstine & O'Donnell, of Auckland, has commenced practice on his own account at Rotorua.

The following admissions to the Profession have been made recently at Wellington: Mr. H. K. Bullock (Barrister and Solicitor); Messrs. C. R. Barrett and R. I. Hawkins (Solicitors on the Roll admitted as Barristers); Messrs. H. F. Bollard, I. A. Hart, and N. J. Lewis (Solicitors).

Legal Conference.

Full Programme of Functions and Business.

We are now able to publish the full programme of functions and business for the Second Annual Legal Conference.

FUNCTIONS.

Wednesday, 3rd April—

12.15 p.m. – Civic reception at Town Hall.

4 p.m. – Reception by Attorney-General (Hon. T. K. Sidey) and Mrs. Sidey at Parliamentary Buildings.

8 p.m. – Reception and Dance at the Adelphi Cabaret, Cuba Street.

Thursday, 4th April—

11.30 a.m. – Motor Drive for Ladies.

1 p.m. – Lunch for Ladies at Brown Owl, Akatarawa.

7.30 p.m. – Dinner for Men at Kirkcaldie and Stains Ltd.

8 p.m. – Bridge Party for Ladies at Adelphi Cabaret.

Friday, 5th April—

Golf and tennis at Heretaunga, at a starting time to be arranged. The "New Zealand Law Journal" has donated a cup for the golf competition.

4.0 p.m. – Afternoon Tea at Heretaunga as the guests of the President of the N.Z. Law Society (Mr. A. Gray, K.C.) and Mrs. Gray and the President of the Wellington District Law Society (Mr. C. G. White) and Mrs. White.

BUSINESS.

1. Roll-call at Dominion Farmers' Institute, Featherston Street, at 9.15 a.m.
2. Opening of Conference by the Governor-General, Sir Charles Fergusson, at 10 a.m.
3. Inaugural Address — "Legal Education" — Hon. T. K. Sidey.
4. Paper—"The Etiquette of the Legal Profession" —Sir John Findlay, K.C.
   Discussion thereon.
5. Remit:
   (a) "That this Conference urges the New Zealand Law Society to do all in its power to ensure that the amendment to the Law Practitioners Act, 1908, dealing with a Solicitors' Guarantee Fund be passed into law, at the first available Session of Parliament.
   (b) "That a deputation from this Conference wait upon the Hon. the Attorney-General and urge that the above mentioned bill be taken up as a Government measure." —(Canterbury.)
6. Paper—"The Crown in Business—Considered from the Constitutional and Legal Viewpoints."—Mr. R. L. Ziman.
7. Remit: "That the recovery of debt or damages by or against a Government Department should be placed upon the same footing in all respects as the recovery of a debt or damages by or against private traders, and that the institution of and the defending of proceedings by or against Government trading departments in the name of His Majesty is an abuse of the royal prerogative and enables Government trading departments to come into Court with the enormous leverage of the royal prerogative to the detriment of and with injustice to private traders, and that the Crown Suits Act and the law generally be altered so that actions by or against a Government Department may be instituted by or against such Department in the name of such Department and not in the name of His Majesty the King."—(Canterbury.)
   Discussion on paper and remit.
8. Paper—"An Elective Judiciary."—Mr. P. J. O'Regan.
   Discussion thereon.
9. Remit: "That it is imperative that the Profession take concerted action to consolidate its position and regain lost ground in view of the increasing inroads which are being made by Land Brokers on the conveyancing work of Solicitors."—(Southland.)
10. Paper—"The University and the Profession"—Professor J. Adamson.
    Discussion thereon.
11. Remit:
    (1) "That the Destitute Persons Act be amended to permit a Magistrate, hearing any information or complaint laid pursuant to that Act, to make an order for the taking of evidence before another Magistrate, and that a similar right to have evidence taken be given to Defendants in By-law cases and cases under the Motor Regulations."—(Wanganui).
    (2) "That the whole question of the taking of statements by the Police in connection with any crime, committed or suspected, should be investigated, and that in all cases where such a statement is demanded, the position should be governed by a regulation providing for the witness being previously informed that he is entitled to have present with him at the taking of the statement his Solicitor or a friend."—(Hawke's Bay.)
12. Paper—"The Profession of a Barrister in New Zealand."—Mr. A. H. Johnstone.
    Discussion thereon.
13. Remit: "That this Conference endeavour to have inserted in Fire Insurance Policies a clause providing that the insurance of the Mortgagee's interest shall not be invalidated by any act or omission on the part of the mortgagor or owner, nor by the unoccupancy of the premises or any other increase in risk without the knowledge of the mortgagee, with a proviso that the mortgagee will inform the company of any increase of risk known to him, and pay any additional premiums required by the circumstances."—(Canterbury).
14. Paper—"Courts and Court-houses."—Mr. A. T. Donnelly.

15. Paper—"The Functions of the Law Society."—Mr. G. M. Spence.

16. Remits:
    (1) "That the New Zealand Law Society should, at the commencement of each year, settle the holidays to be observed by the legal profession."—(TARANAKI).
    (2) "That Section 61 of 'The Law Practitioners Act' be amended, the maximum number of the Council to be eleven instead of nine."—(WELLINGTON).
    (3) "That 'The Law Practitioners Act' be amended to permit either a Barrister or a Solicitor to voluntarily remove his name from the Roll."—(CANTERBURY).
    (4) "That no Solicitor shall be entitled to practice as a Solicitor on his own account until he has attained the age of twenty-five years."—(CANTERBURY).

    Discussion on paper and remits.

17. Remit: "That this Conference views with grave concern the dangers arising from the provisions regarding customary hire-purchase agreements in 'The Chattels Transfer Act, 1924,' and the constant extension of the articles to which these provisions apply, and urges that means be devised to protect purchasers of chattels to which such provisions may relate."—(NELSON).

18. Remit: "That the rules of procedure in the Supreme Court in both Civil and Divorce proceedings should be revised with the object of simplifying and reducing the number of forms of process and pleading."—(WELLINGTON).

In our last issue we published the names of the visitors as notified by the Canterbury, Gisborne, Marlborough, Nelson, and Wanganui District Law Societies, and we publish below the names of those from the other District Law Societies who are attending the Conference and also the names of those Wellington practitioners who have to date signified their intention of attending:—

HAWKE'S BAY DISTRICT LAW SOCIETY: Mr. and Mrs. W. E. Barnard, Mr. and Mrs. C. V. Chamberlain, Mr. and Mrs. H. de Denne, Mr. and Mrs. P. W. Dorrington, Mr. M. R. Grant, Mr. and Mrs. C. B. E. Harker, Mr. and Mrs. H. Holderness, Mr. and Mrs. W. E. Lawry, Mr. W. J. Langley, Mr. H. B. Lusk, Mr. N. J. McKay, Mr. S. H. Morrison, Mr. L. A. Rogers, Mr. and Mrs. E. Sandeman, Mr. and Mrs. W. G. Wood.

TARANAKI DISTRICT LAW SOCIETY: Mr. and Mrs. A. G. Anderson, Mr. H. R. Billing, Mr. and Mrs. A. Coleman (Hawera), Mr. and Mrs. A. Coleman (Stratford), Mr. and Mrs. R. C. Hughes, Mr. and Mrs. R. V. Kay, Mr. S. Macalister, Mr. and Mrs. W. Middleton, Mr. and Mrs. C. E. Monaghan, Mr. and Mrs. L. M. Moss, Mr. and Mrs. N. H. Moss, Mr. and Mrs. R. H. Quilliam, Mr. and Mrs. I. W. B. Roy, Mr. J. H. Sheat, Mr. G. M. Spence, Mr. L. A. Taylor, Mr. and Mrs. P. Thomson, Mr. R. R. Tyrer.

AUCKLAND LAW SOCIETY: Mr. J. L. Hogben, Mr. A. H. Johnstone, Mr. R. P. Towle, Mr. F. L. G. West, Mr. and Mrs. H. J. Wily, Miss Stewart, Mr. R. L. Ziman, Mr. and Mrs. J. Stanton, Mr. W. H. Cocker.

OTAGO LAW SOCIETY: Mr. F. B. Adams, Mr. Aspinall, Mr. H. L. Cook, Mr. and Mrs. A. Duncan, Mr. and Mrs. A. James, Mr. A. C. Stephens, Mr. and Mrs. A. H. Tomkinson, Mr. W. G. Hay, Mr. C. B. Barrowclough, Mr. W. D. Taylor.

SOUTHLAND LAW SOCIETY: Mr. and Mrs. F. G. Hall-Jones, Mr. and Mrs. H. J. Macalister.

WESTLAND LAW SOCIETY: Messrs. H. Lovell, W. P. McCarthy, Molony, L. E. Morgan, I. Patterson, G. A. Revell, Wilson.

WELLINGTON LAW SOCIETY: Professor J. Adamson, Messrs. H. E. Anderson, A. H. Barnett, M. O. Barnett, C. R. Barrett, R. St. J. Beere, E. D. Bell, C. Bell, Sir F. H. D. Bell, Messrs. C. O. Bell, J. R. E. Bennett, W. B. Brown, E. P. Bunny, R. Burton, S. J. Castle, T. P. Cleary, F. T. Clere, W. Coles, P. B. Cooke, H. H. Cornish, F. J. Courtney, A. M. Cousins, A. B. Croker, M. Crombie, A. E. Currie, J. M. Dale, H. H. Daniell, Sir K. Douglas, Mrs. A. Down, Messrs. A. T. Duncan, A. M. Dunkley, S. E. Eichelbaum, H. E. Evans, C. Evans-Scott, A. Fair, K.C., Sir John Findlay, K.C., Messrs. G. Findlay, A. W. Free, J. J. Garbett, J. M. E. Garrow, A. Gray, K. C., E. F. Hadfield, H. Hall, J. S. Hanna, R. E. Harding, Mr. E. P. Hay, L. C. Hemery, L. H. Herd, J. R. Herd, W. F. Hogg, E. T. Hogg, D. R. Hoggard, F. Holdsworth, A. Hornblow, H. J. V. James, H. F. Johnston, A. G. Jorgensen, H. Jowett, P. Keesing, E. Kirkcaldie, W. E. Leicester, A. J. Luke, R. L. Macalister, A. K. S. Mackenzie, F. E. McDonald, H. J. McEldowney, J. J. McGrath, H. McSherry, F. Martin, T. F. Martin, W. N. Matthews, N. H. Mather, A. J. Mazengarb, O. C. Mazengarb, A. R. Meek, W. G. Mellish, J. Meltzer, J. H. Miles, R. M. Morgan, M. Myers, K. C., C. W. Neilson, G. A. Nicholls, C. B. O'Donnell, J. O'Donovan, H. F. O'Leary, F. W. Ongley, P. J. O'Regan, A. J. Park, E. Parry, J. C. Peacock, D. Perry, W. Perry, G. C. Phillips, W. B. Rainey, D. Richmond, H. C. Robinson, T. U. Ronayne, R. R. Scott, A. B. Sievwright, G. H. Smith, R. P. Smyth, F. C. Spratt, G. G. Stephenson, J. F. Stevenson, J. F. Stewart, G. Swan, A. H. L. Treadwell, C. A. L. Treadwell, C. H. Treadwell, L. O. Tripp, C. G. Turner, D. W. Virtue, H. F. Von Haast, C. B. Walker, G. G. G. Watson, R. Webb, T S Weston, C. G. White, Hon. T. M. Wilford, Messrs. J. D. Willis, L. K. Wilson, S. A. Wiren, A. Wylie, Andrew Wylie, C. W. Tanner.

THE CUPS FOR COMPETITION AT GOLF

London Letter.

Temple, London,
15th January, 1929.

My dear N.Z.,—

I am, as I write, wishing you all a very prosperous New Year and a happy one; a fortnight too late on my own account and about two months too late, I suppose, when the time is added for the mail to reach you? Whatever any one else might be in the circumstances, I am unrepentant; however late I am, and however much to blame for being late, I continue to hope, and hope aloud, that for your country, your profession, and yourselves, 1929 may be a year of progressive happiness and prosperity and may, by the time the wish reaches you, have already shown itself to be a year of that character and tendency.

A month's silence has been due to an unforseen prolongation of my stay in the United States. There I saw something of American lawyers and law; just enough to impress upon me that the subject is one to be discussed not lightly and least of all upon a superficial impression. I hope to have established a professional contact which may develop into a closer touch, with the incidental result that later on I may be in a position to undertake with you a comparative discussion. Suffice it, for the moment, to say that the excursion was far from uninteresting but that I am glad to be back in our ancient Temple again.

If I may plague you for one more minute, only, with my own affairs so far as they can have any public interest, I may add that before I went I was confronted with the fact of the re-organisation of the Office of the Parliamentary Counsel, and with the offer of part and lot in the new organisation. This would have meant, of course, giving up private practice and settling down forever to the exacting work of drafting Bills of Parliament, on the Government's behalf. The Office is one of distinction and responsibility; its work brings its members into close touch with national business and the Ministers of the day; scholars of great achievement have served, and serve, it; the remuneration is not mean and is certainly not precarious. But . . . .; and for those reasons I remain practising at the Bar! The re-organisation takes place upon the passing of Sir Frederick Liddell from that Office to the position of Counsel to the Speaker; Sir William Graham-Harrison succeeds him, and my only real regret in my decision is the self-denial of a near association with so eminent an intellect and so human a heart. It is an odd reflection that a man, so essentially connected with the Laws of this Realm, should be so little known not only to the lawabiding subjects but even to the general mass of lawyers. He is, however, as was his predecessor, a very great man.

The death of Mr. Justice Salter is, indeed, a sad loss. It is not excessive to say that none of His Majesty's Judges in any Division commanded, at the date of its sudden occurrence, a higher respect or a deeper affection. The soundness of his judgment, the infallible courtesy of his demeanour, the kindness of his character were so marked and so equally balanced that had you, at any moment, enquired of any member of our Bar as to our best type of Judge of the day, it is almost certain his name would have been quoted. He made it all seem so easy: so easy to be considerate, so easy to be quiet, and so easy, thereafter, to be wise. It is inevitable, appreciating a man after his death, to tend a little to the favourable view; and I must say that, if I have ventured to enlarge upon the characteristics of our Judicature as at present constituted, the truth is that the standard is very high and the attributes I have mentioned are widespread. Allowing for that, however, it remains the plain fact (and every Judge on the Bench would probably endorse it) that Salter, J., was the accepted model, and there can be no appreciation of him, expressed in obituary reference and read by you after his death, which was not felt during his life.

Sir Malcolm Macnaghten, K.C., who is appointed in his stead, will be the name well known to you of a quietly efficient and universally liked son of a very distinguished father. He has the reputation, made for the most part perhaps before the Judicial Committee of the Privy Council, of being an able lawyer. He will be no discredit to our Bench; whether or not he will add to its distinction remains very much to be seen. I am prepared to bet, with a little of my money but by no means with all, that he will.

To turn to the other side of our profession, the retirement of Sir Cecil Coward from the widely reputed firm of solicitors, Coward, Chance and Company, is a matter for comment. When you come to think of it, our great London firms occupy a singularly important position in the order of civilised things and their immaculate fame is a thing to be very proud of. Sir Cecil, retiring from active work at something over eighty years of age, may (though I doubt if he does) take full credit for sustaining this prestige in his time. Of the many responsible functions he has exercised, with a fine gift for law and a genius for human affairs, not the least have been in association with the out, posts of the Empire. New Zealand comes early, and high, in his list, as you probably know better than I. You may not however, know that he was originally called to the Bar; no firm of solicitors has a higher standing than that to which he, abandoning advocacy, became attached. He is, it almost goes without saying, an ex-President of the Law Society.

So much for the recent past. As to the near future we wait, all agog, the selection of the new Lord of Appeal in Ordinary. A persistent rumour that Stewart Bevan, K.C., will shortly become Solicitor-General cannot be traced to its source, but may imply that the Attorney-General is about to take this promotion. Other possibilities which are canvassed are that Lord Merrivale will go to this post, or that one of the following will be appointed: Lord Justice Greer, Lord Justice Russell, or Mr. Justice Tomlin. There is a strong tendency to back the last-named, but nothing, I think, is known and what is confidently stated is the merest guesswork in reality.

And lastly we approach the period of the year when the forthcoming list of new King's Counsel is foreshadowed and the names of most of the applicants are known. Most interesting of all, at least on the common law side, are Donald Somervell and John Dickinson, two perfectly delightful men and Juniors with as big practices as exist these meagre days. If it is true they have applied (and there is no reason to doubt the news that they have) there can be no question of their being duly honoured. If this happens, there must be a considerable redistribution of junior work, though it is probable that no one man will get all, or a very large share of, their released clientele. Their arrival amongst

the Silks will cause a considerable disturbance, also, but of a less welcome nature. Two lesser men, but not unfit candidates, are J. F. Eales, and Marshall Freeman whose origin was of the Birmingham local Bar, but whose prospects need not be doubted on that account. Not a few of our busy leaders thus originate; Birmingham is notoriously loyal to its own productions even upon their being carried away to London, as they probably will if they succeed as Juniors and as they necessarily must be if they take Silk.

Of the sudden, almost surreptitious, marriage of the Lord Chancellor only one thing is to be said: it is likely to be an essentially and especially happy one. This I am told by those who know Lord Hailsham personally; and this I am more inclined to believe from my slight but valuable acquaintance with Lady Hailsham. There is humanity, in large quantity and high quality, on both sides.

Yours ever,
INNER TEMPLAR.

Legal Literature.

Salmond's Law of Torts.

Seventh Edition: By W. T. S. STALLYBRASS.
(pp. xlvii; 641; 45. (Sweet & Maxwell, Ltd.)

The seventh edition of this work is still essentially Sir John Salmond's book, and the editor has rarely forgotten this fact. So far as the law has remained the same he has retained the words used by the late author. Where new law has been made, or older law explained, or new theories brought to bear upon the law, he has done his task in a manner which the late author would no doubt have fully approved. If it means anything to say so, the present editor's style is a little less practical and a little more academic than that of Sir John Salmond. It might be that he would be happier in discussing theories and tendencies than in setting out clearly and logically the state to which the law has attained. This is by no means a fault; for the student reader it is probably a virtue.

The previous editions are so well known that it is proposed in this review merely to point out one or two of the alterations and additions which the present editor has seen fit to make. In chapter I he has gone further in adding an excursus dealing with the question as to whether there is a general law of tort. The view set out in the excursus is probably more widely accepted than the view of Sir John Salmond, and one may go practically as far as saying that it is now the generally accepted view. One can trace so many instances of the development of new torts that it seems impossible to say that the number of torts has become fixed and cannot be added to. Novelty can be no more than a presumptive argument against an action in tort. It may be said, however, that the clear statement which Sir John Salmond made, and the expression of his arguments, brought the matter more clearly under consideration and, therefore, in formulating this theory, even though it be not accepted now, he did a great service to the study of this branch of the law. On the question of negligence, the editor again differs from the author. Dr. Winfield's view of this is worth stating. He concludes that until the nineteenth century, there was no tort known by the name of negligence though many wrongs which would now be classed under that heading were redressed by the law in some other way. It developed into an independent tort but it has not yet lost its other meaning of a particular method of committing certain torts or indeed of some legal wrongs that are not torts at all. Dr. Winfield states that between 1841 and 1921 there are at least thirty-five references by judges to "the action for negligence." The subject of contributory negligence is clarified to some extent by the paragraph headed: "The doctrine of alternative danger." This is a particularly valuable addition. The question of liability in employment of independent contractors is very interesting to read in the light of excursus A. The editor raises the question as to whether fault in itself is the test in a tort, or whether on the other hand the test is becoming which of two innocent parties should bear the loss. He states that the former view has no inherent virtue as opposed to the latter, and that the latter is growing in importance. Valuable additions are made in the chapters dealing with remoteness of damage on which the law has been brought up to date. The very indefinite state of the law as regards the waiver of torts is well brought out. It seems wise to have set out the rule in *Rylands v. Fletcher* in a separate chapter, especially in view of the very excellent excursus B, which is worthy of study by the reader. A further excursus is added at the end of the chapter on defamation. This excursus deals with the nature of the defence of fair comment and, though a little more involved than the others, is very short. Since the last edition, the question of intimidation has come up for discussion in the case *Sorrell v. Smith*, (1925) A.C. 700. It has, therefore, become necessary to re-write part of this chapter. One cannot but agree with the editor that it is a great pity that when the House of Lords has the opportunity of bringing "order into chaos" it does not do so. Of course, on the other hand, the duty of the Court is to decide the case before it and not necessarily to go into law generally.

In conclusion, one cannot but state that the seventh edition of a very famous book is worthy of the best intentions of its late author, and that if he were able to express his thoughts concerning it, he would undoubtedly approve it.

W. A. BEATTIE.

Legislation of the Day.

Eve, J., at a recent dinner of the Incorporated Law Society of Plymouth, proceeded to express the general dissatisfaction of the Judges with the trend and quality of modern legislation. Some of his points were:—(a) recent legislation has imposed an excessive strain on the legal profession; (b) in bulk and complexity it is beyond all precedent, and if further ill-digested statutes are to be added, the burden will become almost unbearable; (c) those responsible for a statute use words which do not correspond with the intention of the statute; and (d) what the draughtsmen set out is so hopelessly mangled as to be beyond recognition, and in such cases the responsibility ought to be transferred from those who drafted a Bill to those who mangled it.

Correspondence.

The Editor,
"N.Z. Law Journal."
Sir,

Privilege of Communications between Solicitor and Client.

I have read with interest your editorial article in your issue of the 19th February entitled "Privilege of Communications between Solicitor and Client." I appeared in support of the summons for production which is reported under the name of *Keep Bros. v. Birch and Bradshaw Ltd.*, (1928) N.Z.L.R. 360, and while at the present time I do not propose to make any comment either on the judgment or on your article, I take this opportunity to state the facts somewhat more fully than they are reported in order that the judgment may be properly construed.

Birch and Bradshaw Limited was an incorporated company carrying on business in Auckland as a dealer in painters' and paperhangers' supplies. It imported largely from abroad. Keep Brothers were an English firm who acted as its buying agent in England. Birch and Bradshaw Limited was managed by a Mr. Minter who was also a Director.

As is reported, Birch and Bradshaw Limited gave security for its debt to Keep Bros. a few days prior to going into liquidation, and on a debenture which formed part of such security Keep Bros. subsequently sued the liquidator of Birch and Bradshaw Limited. The liquidator pleaded that the debenture was void as a fraudulent preference.

It appeared on inspection of the documents discovered by Keep Bros. that there were letters in respect of which privilege was claimed. The liquidator of Birch and Bradshaw Limited then issued a summons for the production for inspection of four letters. At the hearing of the summons Counsel for Keep Bros. admitted that three of the letters must be produced but contended that the fourth letter was privileged from production. One of the letters which it was so admitted must be produced was a letter written by Mr. Minter to Keep Bros. Its actual contents were not known at the time but it was written to and received by Keep Bros. immediately prior to their instructing solicitors in New Zealand to obtain security for their debt.

Upon receipt of such instructions from Keep Bros. their solicitors in New Zealand apparently communicated with Mr. Minter and then discussed the matter with him. They subsequently wrote to Birch and Bradshaw Limited and made certain suggestions as to the form of the security which should be given to Keep Bros.

Mr. Minter as manager of Birch and Bradshaw Limited wrote in reply thereto agreeing to the suggestions and concluding: "Nobody could have their (Keep Bros.) interests more at heart than the writer and it was solely my suggestion to them to appoint legal representatives in case action was necessary."

This letter gave some indication as to the contents of the letter which Mr. Minter had written to Keep Bros. and on receipt of which Keep Bros. had instructed their solicitors in New Zealand. It was on these facts, namely that Mr. Minter had written to Keep Bros. obviously with the intention of enabling them to obtain a preference over the other creditors, and that they had on receipt of such letter instructed solicitors in New Zealand to act for the purpose of obtaining such security, that I claimed the right to production for inspection of the letter from Keep Bros. to their solicitors in New Zealand, upon the ground that the letter was written for the purpose of effecting the transaction which it was alleged was a fraud.—Yours, etc.,

R. H. MACKAY.

Auckland.

The Editor,
"N.Z. Law Journal."
Sir,

re Solicitors in the Employ of Government Departments.

Section 6 of the Regulations of the 2nd November, 1922, governing the Native Trustee says, *inter alia*:—

> "The Native Trustee may fix the scale of charges to be paid to solicitors in respect of the preparation, perusal, and completion of securities to or instruments for the Native Trustee, and for the discharge, renewal, or variance of such securities, and generally for the transaction of legal business for the Native Trustee. Such scale, with such modifications as the Native Trustee directs, shall apply where the work is done by the Office Solicitor, and in that case the money received shall be paid into the Native Trustee's Account."

My client has been sued by the Native Trustee in the Magistrates' Court for a sum certain. There is added to the claim the usual plaint fee and £1 solicitor's fee. In answer to a note of mine raising the question whether the solicitor's fee could be collected in view of the fact that the plaint was signed by a solicitor in the employ of the Native Trustee, the Native Trustee has cited the above regulation. Exigencies compelled capitulation, but I doubt very much whether the regulation enables the Trustee to make the charge. My view is that the regulation empowers the Trustee to fix the scale of charges to be paid to outside solicitors for and in respect of conveyancing work done for him.

To make the regulation apply to the work done in the common law branch, he is compelled to rely upon the general clause which gives him the power to fix generally the scale of charges for the transaction of legal business for the Native Trustee. The regulation then goes on to say that "such scale" shall apply to the Office Solicitor; but the Native Trustee cannot alter the charges on a summons. They are fixed by the Magistrates' Court Act, though I suppose that the proceedings would be accepted if nothing were claimed as solicitor's fees. He certainly could not claim more than those fixed by the various proclamations. Moreover, the word "scale" is not apt to describe common law work at all. No scale governs it. What is meant is the ladder-like series of charges which vary with the magnitude of the property dealt with in conveyancing matters.

I would be glad to have the opinion of other members of the Profession on the point.—Yours, etc.,

L. A. TAYLOR.

Hawera.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

Destroy the bar, and you would destroy a bulwark of civil and criminal justice, nay, you would destroy security and liberty itself.

—His Honour Mr. Justice McCardie

Vol. V. Tuesday, April 30, 1929. Nos. 3, 4 & 5

The Second Annual Conference.

The Conference Committee is to be congratulated on the satisfactory result of the arrangements for the Conference, and the President of the New Zealand Law Society on the efficient manner in which he conducted the proceedings. The sense of corporate interest engendered at the first Conference was increased, and it seems beyond doubt that the value of such Conferences is established. If, as we believe, those who attended felt not only pleasure in the meeting but pride in the association, it is as well that this should be understood by those members of the Profession who were not able to attend the Conference and especially those who, on the subject of Conferences, are "doubting Thomases" and stayed away. It can be safely asserted that the second Conference, like the first, made a considerable impression on the mind of the business community, and realisation of the fact that such a Conference of the Profession brings together from all parts of New Zealand men who are held in high respect, not only by the Profession but by the community generally, should enable members to appreciate the services these Conferences do their own Profession. The important service the Profession has rendered in the past, and should render in the future, to the community, must have been fully recognised by His Excellency the Governor-General because his presence at the Conference and his delightful address were founded on appreciation of the fact that the fundamental and profound respect held in New Zealand for law and order is to a great extent due to the respect paid to law and order by those in the Profession of the law. Respect for law and order is one of the most valuable assets any community can have. New Zealanders have inherited it from their forefathers; but such inherited respect would not, however, have survived unless it were fostered, and the task of maintaining it unimpaired, although falling generally upon the leaders of a community, is and has been, necessarily, more particularly the duty of those who are actively engaged in and about the actual administration of justice. It is well that the importance of maintaining the spirit of reverence for law and order should not be lost sight of, and that it should be understood that this spirit cannot be maintained unless those particularly associated with the administration of law are credited with the dignity of their task.

It is with this consideration in mind that the question of judicial salaries, which was the subject of a Remit at the Conference, should be approached. This Remit had its place also on the order paper of the first Conference. But the sufficiency of judicial salaries is not determined by considerations that are frequently put forward at such Conferences such as those relating to the proportion a Judge's salary bears to the amount he earned while in practice, the incomes earned by those in active practice, and the difficulty or otherwise, of obtaining leaders in the Profession with incomes larger than the salary to forego those incomes for the honour of judicial status. The question is one of interest to the community in general who know full well that the personages who administer justice must of necessity be accorded positions high in the estimation of the community as a whole, and who regard it as essential that the dignity of the office should carry what to their mind is a sufficient and handsome honorarium. Intelligent outsiders, intent upon ascertaining the habits and merits of a community, invariably takes steps to ascertain the position of the Judges and to a certain extent gauge that position by the salary which attaches to it because they appreciate the fact that a society which regards law and order as of primary importance will see that its instruments are suitably and honourably placed in the community. It is from general considerations of this nature that those responsible should judge of the sufficiency of judicial salaries rather than from comparisons and details generally submitted when the question comes under review. In our view the sense of the community is all in favour of a proper salary for judicial officers and, on broad considerations, is entirely opposed to a policy of sufficiency that would in effect, even if insensibly, inevitably finally result in a diminution of the prestige attaching to judicial office.

It is impossible here to deal adequately with the many interesting papers read at the Conference and published in this number. It was unfortunate that the quantum of business to be considered did not allow of discussion on the papers after they were read. The general discussion at the end of the sitting was of necessity too curtailed to admit of any really valuable criticism on the subjects discussed. This was generally recognised and suggestions were made which it is hoped will avoid this difficulty at the next Conference. In the meantime it is hoped that study of the papers will lead to examination of their various propositions in the columns of this Journal. Mr. O'Regan commended Mr. Ziman's paper on the ground that his contentions were reached as the result of irresistible logic, but lawyers seem to have anticipated Einstein and for many years regarded "relativity" as more fundamental than the findings of academic logic, so that despite the fervour shown by the Conference whenever the slogan of "No interference by Government in business" was sounded, more prolonged discussion might have shown that it is not practical to put Government departments on *exactly* the same level as private individuals, even in litigation. The Committee set up to examine and report on the papers on Education will not, we hope, assume that all the premises which have been assumed as general, are in reality so. It may not be the examination system that is at fault, but the system of teaching; nor is it admitted that a Barrister should be subject to higher qualification than a Solicitor; nor is it to be assumed that a Barrister qualified by virtue of five years' experience as a Solicitor, is, because such method has been designated "entry through the back door," necessarily not better qualified than some holders of a LL.B. Degree. And even Mr. Donnelly's sunlit Courts may not coincide with the inner dream an ancient people, as opposed to his American authority, may have as to the habiliments of a Court of Law.

Court of Appeal.

Herdman, A.C.J.
Adams, J.
MacGregor, J.
Kennedy, J.

March 18, 19; 27, 1929.
Wellington.

REX v. POWER.

Police Force—Summary Dismissal by Commissioner of a Police Constable Offending Against Police Regulations—Constable Previously, After Inquiry by Inspector, Fined for Offence and Fine Deducted from Wages—Police Officers Servants of Crown Holding Office During Pleasure of Crown—Commissioner Absolute Power of Dismissal whenever in His Opinion Constable Unfit to Remain in the Force—Uncontrolled Discretion—Constable Not Punished Twice for Same Offence—Dismissal Not "Punishment"—Contract of Service Unilateral—No Right of Action for Wrongful Dismissal by Commissioner—Police Force Act, 1908—Police Force Act, 1913, Sections 8, 9, 16 (3)—Police Force Amendment Act, 1924, Sections 4 (3).

Appeal by the Crown from a judgment of Ostler, J., in an action by the respondent Power, a police constable, who was dismissed from the Force by the Commissioner of Police on 28th March, 1928, against the Crown to recover damages for wrongful dismissal. The matter came before Ostler, J., in the form of a special case stated by the parties for the opinion of the Court. The suppliant became a member of the Police Force, with the rank of constable, on 12th August, 1911, and continued in the Force as a constable until he was dismissed on 28th March, 1928. In February, 1928, he was charged by the Commissioner of Police with having made improper use of property of the Government, contrary to Regulation 353, subsection (49), of the Police Regulations of 1919. On 14th February the Inspector of Police at Greymouth held an inquiry into the charge. Power was found guilty and fined the sum of £3, which was deducted by the Department from his wages at the end of February. On 19th March, 1928, he being then at Ross, Power received a telegram from the Inspector at Greymouth informing him that unless he resigned at once the Commissioner intended to dismiss him. He did not resign, and he was dismissed by the Commissioner on 28th March, 1928. Ostler, J., held that the plaintiff had a cause of action against the Crown and that he was entitled to damages.

Solicitor-General (Fair, K.C.) and Taylor for appellant.
Trimmer for respondent.

MacGREGOR, J., delivering the judgment of the Court of Appeal, said the questions of law arising out of the agreed facts were: (1) Whether Power having been fined in accordance with the provisions of Subsections (3) (g) (ii) of Section 4 of the Police Force Amendment Act, 1924, his dismissal by the Commissioner of Police gave rise to any cause of action for damages. (2) If the answer to the first question was in the affirmative, whether the contract of service between the appellant and Power was terminable by reasonable notice of the termination thereof being given to him by the appellant. (3) If the answer to the second question was in the affirmative, whether Power was entitled to recover by way of damages any greater sum than the wages which he would have received as a member of the New Zealand Police Force during such period of reasonable notice.

The first and fundamental question of law to be determined was whether Power's summary dismissal by the Commissioner of Police gave rise to any cause of action by Power for damages for wrongful dismissal. In New Zealand all police officers were servants of the Crown. It was clear law that, except where it was otherwise provided by statute, all public officers and servants of the Crown in England held their appointments at the pleasure of the Crown, and all, in general, were subject to dismissal at any time without cause assigned; nor would an action for wrongful dismissal be entertained: see 7 **Halsbury's Laws of England,** 22; **Thorne v. Government Insurance Commissioner,** 3 N.Z.L.R., 200, 205. The question remained whether it had been in the present case "otherwise provided by statute" in New Zealand. In order to answer that question it was necessary to examine closely the provisions of three statutes relating to the N.Z. Police Force—the Police Force Act, 1908, the Police Force Act, 1913, and the Police Force Amendment Act, 1924. Under the Police Force Act, 1908, the Commissioner has power to dismiss any constable whom he thought remiss or negligent in the execution of his duty. There was no appeal from such a decision, and no machinery providing for a preliminary inquiry in which the constable would have an opportunity of meeting the charge. Then came the Police Force Act, 1913, which repealed the 1908 Act, and made further and more detailed provisions regarding the discipline and dismissal of constables and other police officers. The learned Judge in the Court below expressed the opinion that the Act of 1913 was enacted with the object of giving greater security of tenure to members of the Police Force. Their Honours were unable to agree with that view, which appeared to be based on a misapprehension of the full force and effect of the statute in question. After quoting the provisions of Sections 8 (1), 9 and 16 of the Act of 1913, His Honour said it was clear from those statutory provisions that the 1913 Act, while giving to the Commissioner under Section 9 an original power to dismiss a constable who in his opinion was "unfit to remain in the Force," gave to the Commissioner also an additional power of dismissal of a constable if so recommended by a Superintendent or Inspector after an inquiry held under Section 16 of the Act. The statute remained in that form until the passing of the Police Force Amendment Act, 1924. Section 4 of the Act of 1924 repealed and took the place of Section 16 of the Act of 1913. His Honour read the provisions of paragraphs (f), (g) and (h) of Section 4 (3) of that Act. It would at once be noted that Section 4 (3) of the 1924 Act differed materially in its language from the repealed Section 16 (3) of the 1913 Act. The repealed subsection came into operation "where a constable was accused of misconduct or insubordination, or of any breach of duty, or of *conduct which would render it inexpedient that he should remain in the Force.*" The substituted Section 4 (3) on the other hand applied only "where a constable is charged with misconduct or neglect of duty." It was clear that since 1924 a Superintendent or Inspector had no authority to hold an inquiry under Section 4 (3) into the conduct of a constable who was accused of "conduct which would render it inexpedient that he should remain in the Force." The Commissioner alone had power under Section 9 to deal with a constable of that unsatisfactory type. In the language of Section 9 itself "the Commissioner may at any time dismiss from the Force any constable . . . who *in the opinion of the Commissioner* is remiss or negligent in the execution of his duty or *otherwise unfit to remain in the Force.*" It would appear accordingly that while any Superintendent or Inspector had authority under Section 4 (3) to punish a constable for his misconduct or neglect of duty, the Commissioner himself exercised the absolute power of dismissing a constable whenever "in the opinion of the Commissioner" he was unfit to remain in the Force. The two things, in the opinion of the Court of Appeal, were essentially distinct. If a constable was guilty of misconduct or neglect of duty, he was liable to be punished therefor after an inquiry by his superior officer commanding the district. That punishment might or might not involve a "recommendation" that he be dismissed from the Force. If it did involve dismissal, the recommendation must be reviewed by the Commissioner under Section 4 (3) (h). But the wider question, whether any particular constable (whether charged with an offence under Section 4 (3) or not) was "unfit to remain in the Force," was by Section 9 always retained in the discretion of the Commissioner himself. It was further clear, their Honours thought, that the words of Section 9 "in the opinion of the Commissioner" vested in the Commissioner himself an absolute and uncontrolled discretion to dismiss any constable who in his sole opinion was unfit to remain in the Force: **Powell v. Apollo Candle Co.,** 10 A.C. 282, 291; **Allcroft v. Lord Bishop of London,** (1891) A.C. 666, 678, 679; **The Auditor-General v. Ward,** (1923) N.Z.L.R. 759.

If that construction of the relevant statutory provisions was correct, it was in the opinion of the Court obvious that the respondent could have no cause of action against the Crown, inasmuch as his dismissal under Section 9 was justified by the express terms of the statute. It was contended for the respondent that that construction should not be followed, because to adopt it would mean that the respondent had been punished twice for the same offence. The position was that for an act of misconduct the respondent was fined by an Inspector the sum of £3 under the provisions of Section 4 (3). He was subsequently dismissed from the Force by the Commissioner of Police acting under Section 9. Their Honours did not think that in those circumstances it could be affirmed that he had been "punished" more than once. The fine of £3 was no doubt inflicted as a punishment. But the power of dismissal vested in the Commissioner by Section 9 was not to act as a judicial officer in conducting inquiries and hearing proof of charges and inflicting punishment therefor, but to act summarily in a high administrative capacity in order to keep the whole service

disciplined and efficient by removing unfit constables therefrom. Further, it appeared to their Honours that even if the dismissal and the fine could properly be regarded as separate "punishments," still they were not both inflicted for the same offence. The maxim *Nemo debet bis puniri pro uno delicto*—Broom's Legal Maxims, 9th Edn. 231—did not apply here, inasmuch as the two punishments were not inflicted *pro uno delicto*. Respondent was fined £3 by his Inspector under Section 4 (3) because he had broken one of the Police Regulations. He was subsequently dismissed by the Commissioner because in the opinion of the Commissioner he was unfit to remain in the Force. These two charges were not the same, and depended upon quite different considerations. The test in a criminal case was whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. It was obvious that that test would fail if applied to the facts of the present case. For those reasons their Honours thought that on the true construction of the Police Force Act, 1913 (as amended in 1924) the dismissal of the respondent by the Commissioner gave rise to no cause of action by him for damages against the Crown.

The same result in law must be arrived at if the matter were looked at from a slightly different angle. The present action had been brought by the respondent for damages as on a breach of contract by the Crown. If there were no contract made by the Crown with the respondent, then it was obvious that he could possess no right of action against the Crown in those proceedings. In the judgment of their Honours no contract was ever made by the Crown with the respondent. That seemed to them to follow from the terms of the Police Force Act, 1913, itself. From the language of Section 11 (2) it was, their Honours thought, clear that although the respondent must by taking the oath be deemed to have entered into a written agreement with His Majesty and thereby bound himself to serve him as a constable, there was no corresponding agreement by His Majesty to employ the respondent as a constable or otherwise. The contract so entered into appeared to be a unilateral one only: see **Ryder v. Foley,** 4 C.L.R. 422, 440, 441. The constable was bound to serve the King, but the King was not bound to employ the constable, but might dismiss him at his pleasure and at any time. On his dismissal the agreement was at once determined. If he was so dismissed from office, as his only tenure of that office was during the pleasure of the Crown, an action would not lie for wrongful dismissal against the Crown: **Ryder v. Foley,** 4 C.L.R. 422, an action which bore a remarkable resemblance to the present one.

Counsel for the respondent, however, contended that the summary power to dismiss a constable given by Section 9 of the Act of 1913 had in some way been taken away by the subsequent Section 4 (3) of the 1924 Act, and relied on the decision of the Privy Council in **Gould v. Stuart,** (1896) A.C. 575, in support of that contention. That decision was strongly relied on by the respondent in **Ryder v. Foley** (*cit. sup.*) in support of a similar contention, which, however, found no favour with the High Court. Section 9, in the present case, expressly retained to the Commissioner power at any time to dismiss any constable who in the opinion of the Commissioner was "unfit to remain in the Force." That would seem an extension rather than a curtailment of the summary power of dismissal which appeared to be vested in the Crown at Common Law.

It was further argued by counsel for the respondent that to construe the relevant statutes in favour of the appellant's view would in the result involve certain anomalies, if not hardships. But, as pointed out by Ostler, J., in his judgment, either construction of the statute, as amended in 1924, must give rise to certain difficulties in interpretation. The most remarkable anomaly, however, would be created if their Honours were to construe the statutes as the respondent invited them to do. By Section 8 (1) of the 1913 Act the Governor might at any time discharge the Commissioner of Police if he had been guilty of conduct rendering it unfitting that he should remain in the Force, or was for any reason unfit to remain in the Force. The Commissioner himself was apparently not entitled to any preliminary inquiry, or indeed to be heard in self-defence, but might be summarily dismissed under Section 8 (1). Yet a police constable, if the argument for the respondent were sound, could not be dismissed from the Force in any way unless he was charged with misconduct or breach of duty under Section 4 (3), and until a Superintendent or Inspector after inquiry found the charge to be proved and recommended his dismissal, after which the Commissioner might dismiss him. In other words, if the construction of the statute arrived at by Ostler, J., were the true one, the Commissioner of Police in New Zealand had a much less secure tenure of his office than an ordinary police constable. Their Honours were convinced that that was not the true meaning or effect of the Acts in question. Their Honours understood that **Ryder v. Foley** (*cit. sup.*) was not referred to during the argument before Ostler, J.; had it then been cited the learned Judge in the Court below would in all probability have arrived at the same conclusions as their Honours had expressed.

Appeal allowed.

Solicitors for appellant: **Crown Law Office,** Wellington.
Solicitors for respondent: **Connell and Trimmer,** Whangarei.

Herdman, A.C.J.
MacGregor, J.
Ostler, J.

March 20; 22, 1929.
Wellington.

JAMES v. MABIN.

Practice—Appeal to Court of Appeal—Security—Appellant Giving as Security His Own Bond Without Sureties—Bond Accepted by Registrar of Supreme Court—Bond Held to be Security—Undesirability of Such Form of Security—Rule 22 of Court of Appeal Rules—Rule 595 of Code of Civil Procedure.

Motion to have appeal struck out for non-compliance with the Court of Appeal Rules as to the giving of security. The appellant had given as security his own bond without sureties and had filed an affidavit of justification; the bond had been accepted as security by the Registrar of the Supreme Court at Greymouth.

Myers, K.C., and W. F. Ward in support of motion.
Murdoch and Doogan contra.

HERDMAN, A.C.J. (delivering the judgment of himself and OSTLER, J.), said that Rule 22 provided that if due security be not given in conformity with the Rules, the notice of appeal should be deemed abandoned. In the present case, the point had been taken that due security to the satisfaction of the Registrar had not been given. The case of **Surfdale Estates Ltd. v. Paterson,** (1925) N.Z.L.R. 742, was distinguishable, as it was plain that in that case due security had not been given, whereas in the present case a bond had been executed by appellant who had satisfied the Registrar that he was a substantial man. There was the affidavit of justification in which it appeared that at any rate he was worth £500 after paying debts. It was contended that that bond, being the bond of the appellant, was no security at all and afforded respondent no more protection than he would get from a judgment of the Court of Appeal or a judgment of the Supreme Court if the costs in that Court had not been paid. But the bond was something more than such a judgment. The obligation to perform the bond was in favour of the Registrar of the Court and the respondent was accordingly protected to some extent by a security which the Registrar could sue upon. It was not much, perhaps, but it was something, and it had been lodged in time. In **Taitumu Marangataua v. Patena Kerehi,** 30 N.Z.L.R. 1052, speaking of Rule 22, Williams, J., seemed to have indicated that if the Registrar of the Supreme Court was satisfied with the security that that very fact carried the matter a long way. The Supreme Court could review the decision of the Registrar. It might reduce the amount of the security to be given by an appellant and there was no appeal to the Court of Appeal from the decision of the Supreme Court fixing security. To succeed upon the present motion respondent must show that no security at all had been given. Their Honours were of opinion that he had not gone that length and that the existence of the appellant's bond which had been approved by the Registrar enabled them to say that the notice of appeal had not been abandoned and that there had been a compliance with the Rule. In **Re Logan and the Otago Waste Lands Board,** 2 N.Z.J.R. 179, where an appellant furnished security for appeal by lodging his own bond without sureties, Johnston, J., said: "I do not see anything in principle why the Registrar should not take the bond of a solvent party without sureties." For the guidance of Registrars in future cases their Honours stated that they regarded such a security as unsatisfactory. Respondents should be given some more adequate protection than an appellant's bare obligation.

MACGREGOR, J., said that he agreed with the majority of the Court that in the very special circumstances of the case the appellant ought to be allowed to proceed with the appeal. It was, his Honour thought, needless for him to state the reasons which had in the end enabled him to arrive at that conclusion,

which was no doubt in the interests of substantial justice. At the same time he desired to record his opinion that for the future any appellant to the Court of Appeal who gave security by bond without sureties thereto, contrary to the express provisions of Rule 595 of the Code of Civil Procedure, would run a grave risk of having his appeal struck out for non-compliance with Rule 22 of the Court of Appeal Rules.

Motion dismissed without costs.

Solicitors for appellant: **Hannan and Seddon,** Greymouth.
Solicitors for respondent: **Brandon, Ward and Hislop,** Wellington.

Herdman, A.C.J.
MacGregor, J.
Ostler, J.
Kennedy, J.

March 19; 27, 1929.
Wellington.

WAIMAIRI COUNTY v. JAMES.

Town Planning—County—Refusal by County Council to Issue Permit to Build Shop—Council Purporting to Act under Powers Conferred Upon "Local Authorities" Pending the Preparation and Approval of a "Town Planning" Scheme—"Town Planning" Applicable to Boroughs and Cities as Distinct from "Regional Planning" Applicable to Rural Areas—Section Applicable only to Local Authorities Charged with a Town Planning Scheme—Not Applicable to County Councils—Town Planning Act, 1926, Section 34.

Appeal from the decision of Adams, J., reported 4 N.Z.L.J. 328, where the facts sufficiently appear.

Hutchison for appellants.
Johnston and Upham for respondent.

HERDMAN, A.C.J., delivering the judgment of himself and KENNEDY, J., said that the Town Planning Act in force in New Zealand affected or might affect certain specified local authorities: (1) Cities and boroughs having a population of not less than 1,000 before the 1st of January, 1930; (2) Any other borough required by the Governor-General under Subsection (2) of Section 13 of the Act to prepare and submit a plan before a certain date; (3) Any borough with a population of less than 1,000 which by resolution decided to prepare a town-planning scheme; (4) Certain road boards specially named in Section 14 of the Act; (5) Counties together with certain borough or town districts contained within the county boundaries. The words "borough council" included town board. The Act was designed to provide for the making and enforcement of town and regional planning schemes, so it provided for:—(1) A town planning scheme; (2) A regional scheme; and (3) A "combined scheme," which was a scheme constructed by two or more local authorities having jurisdiction over adjoining districts. Section 3 of the Act declared in language which could not be misunderstood that every "town planning" scheme should have for its general purpose the development of a city or borough. In the same Section it also declared in perfectly plain words that a "regional scheme" should have in relation to a "rural area" to which it related the same general purposes as a town planning scheme possessed in relation to a city or borough. Such a scheme was to be prepared and dealt with in relation to and as complementary of the town planning scheme of any city or borough in the vicinity of the rural area. It would be noted how careful the Legislature had been to distinguish between town planning and regional planning and between cities or boroughs and rural districts. That distinction was preserved throughout the Act. In respect of the council of a borough with a population of a thousand or over compulsion was provided by the statute. Whether such a body liked it or not it must prepare and submit to the town planning board before the 1st January, 1930, a town planning scheme. But in the case of a rural district there was no compulsion unless the Governor-General intervened and called for a regional scheme under Subsection (2) of Section 25, or unless, under Subsection (3), the Governor-General by Order-in-Council required the responsible authority of a rural area to prepare and submit a scheme.

The provision in the Act which had given rise to the litigation was Section 34. In the Court below it was decided that the appellant was not empowered by that Section to refuse a permit to the respondent to build a shop. The correctness of that decision depended upon the construction to be put upon the Section. The Section spoke of a "town planning" scheme, which suggested that its operation was limited to cities and boroughs, but it was contended that the presence in the Section of the words "local authority" indicated that its provisions extended to counties, and that accordingly the appellant could refuse respondent's application for a permit. The Section undoubtedly contemplated that, between the passing of the Act and the preparation and approval of a scheme, a period of time might elapse, during which buildings might be erected or work might be done which would destroy the symmetry and value of a projected planning scheme. The Section spoke of something being done antecedent to the preparation and approval of a scheme and after the commencement of the Act. It was quite certain that the power to be exercised under Section 34 was to be put in force before a planning scheme came into force. But in the case of county councils a scheme might never come into operation. Except upon action taken by the Governor-General in specific instances a regional scheme might never eventuate. Was it likely that the Waitomo County Council or the Mackenzie County Council would trouble about regional planning for the wide spaces over which they exercised jurisdiction? Of what use then would it be to confer upon such bodies the powers contained in Section 34?

The words "town planning" were carefully applied from the beginning to the end of the statute to cities and boroughs, and "regional planning" was the term used in relation to rural areas only. An examination of Section 3 showed that the two systems of planning were deliberately kept apart. Each applied to territory which differed fundamentally in character from the territory controlled by the other. The Section dealt with a "local authority" charged with "town planning," for, later in the Section, the phrase "town planning" was repeated. The word "amenities," too, was used in the Section and the term "amenity" appeared in clause (1) of Section 3, where the purpose of town planning was defined; moreover in Section 3 there was a statement to the effect that upon an appeal to the Town Planning Board the determination of the Board on any question relating to principles of "town planning" should be conclusive and bind the local authority. It was submitted that the term "local authority" used in Section 34 embraced county councils. But county councils had no authority of any kind to prepare a town planning scheme. Even when a county council became a party to a combined scheme under Section 28 its individuality was preserved. In Subsection (5) of Section 28 it was provided that "every local authority exercising jurisdiction in the combined area shall, so far as the scheme relates to its district, have the same powers, duties, and responsibilities with respect to the enforcement and carrying out of the scheme as it would have if the scheme were a town planning scheme or a regional scheme for that district." It was pointed out that if counties were not given the power created by Section 34 a position seemingly anomalous might arise. A borough council bound by law to prepare a scheme might join forces with a county council under no obligation to prepare a scheme. Until the scheme was prepared and approved the borough council might under Section 34 prevent the erection of unsightly buildings and the commencement of disfiguring works, but its companion local body, the county council, could do nothing to protect its territory from defacement. But the county council never could do anything pending the preparation and approval of a scheme. It seemed to their Honours that the Legislature, recognising that during a period of three or four years some persons, unless checked, might successfully frustrate all the efforts of a borough or a city to evolve a plan for the promotion of the "healthfulness, amenity, convenience and advancement" of the city, provided the power created by Section 34 to enable the borough or city to protect its territory. To give such a power to a county council was unnecessary because it might never prepare a regional scheme, and it no doubt recognised that conditions in a city differed widely from conditions in a county. To give a county council power to stop buildings and works in anticipation of a regional scheme which might come into existence fifty years hence, or which, indeed, might never mature, would appear to be unreasonable and dangerous.

It mattered not from what angle Section 34 of the statute was examined. One must either restrict the meaning of the term "local authority" or the meaning of the term "town planning" must be extended so as to include, in addition to town planning schemes, regional or combined schemes. Their Honours had already made it clear that a town planning scheme as defined in the Act was a scheme which a city or borough was obliged to adopt. If a choice had to be made between two alternatives their Honours preferred to make that one which obliged them to retain the meaning of "town planning" so carefully stated in the statute. By doing that their Honours were following

the very obvious lead of the designer of the statute who throughout its various clauses had so carefully distinguished between town planning and other schemes. Their Honours, therefore, came to the conclusion that the judgment of Mr. Justice Adams in the Court below was correct.

MacGREGOR, J., said that he also thought that the appeal should be dismissed. Section 34 admittedly was obscure in its terms, and open to two alternative interpretations. If the Court adopted one of those interpretations (the appellants') the Section would clearly encroach on the rights of the owners of property situate in a county. It was a recognised rule that statutes which encroached on the rights of the subject should be interpreted, if possible, so as to respect such rights: **Maxwell on Statutes**, 6th Edn., 501. His Honour preferred, accordingly, to adopt that construction of Section 34 which respected the rights of the respondent in the present case. His Honour was not satisfied that it was the intention of the Legislature that the appellant should have the right under Section 34 to refuse a permit to the respondent to build a shop on his own land.

Appeal dismissed.

Solicitors for appellant: **J. J. Dougall, Son and Hutchison**, Christchurch.

Solicitors for respondent: **Johnston, Mills and White**, Christchurch.

Herdman, A.C.J.
Adams, J.
Ostler, J.

March 14; 27, 1929.
Wellington.

HORTON v. PUBLIC TRUSTEE.

Will—Construction—"Money"—Bequest to Husband of the Interest upon "All My Money" until only Child became Twenty-one—Gift of "The Whole of the Money" to such Child when he Reached Twenty-one—Money Held Having Regard to Surrounding Circumstances to Comprise Whole of Personal Estate of Testatrix But Not to Include Real Estate—No Assistance in Construction from Context—Quaere Whether Term "Money" may in any Circumstances Include Real Estate—Appeal in Forma Pauperis—Costs.

Appeal from the decision of MacGregor, J., reported, 4 N.Z. L.J. 251, where the facts sufficiently appear.

Von Haast and Cunningham for appellant.
Kelly for Public Trustee.
W. Perry for Oliver George Horton.

ADAMS, J., delivering the judgment of the Court, said that numerous reported cases were cited by counsel on the argument of the appeal, but the earlier authorities had been recently discussed by Peterson, J., in **In re Taylor: Taylor v. Tweedie**, (1922) 1 Ch. 569, and in the same case in the Court of Appeal, (1923) 1 Ch. 99—and their Honours did not find it necessary to refer to them all. In **Taylor's case** the words to be construed were "my money including the money I have now and that which I am entitled to now or at any future time." Lord Sterndale, M.R., who delivered the leading judgment, said that he believed the testatrix wished to dispose of all her estate and thought she had done so when she used the word "money," and that he thought she intended to use it in the colloquial sense in which it is used in such expressions as "What has she done with her money,?" "To whom has she left her money,?" where the expression was meant to apply to all the estate of which the person about whom the expression was used died possessed. Lord Sterndale, in that case, after referring to **In re Skillen**, (1916) 1 Ch. 518, 521; **In re Cadogan**, 25 Ch.D. 154; **In re Buller**, 74 L.T. 406, and **Forth v. Chapman**, 1 P. Wms. 663, 666, and expressing doubt whether the term "money" alone and without the aid of any context was sufficient to pass the whole of the personal estate, said: "If there be a context enlarging the meaning of the word "money" *it may enlarge it to the extent of including the whole of the personal estate or the residue of the personal estate, and it may enlarge it to any point between ready cash only and the point just mentioned.* We were not, however, referred to any in which a *point between those two extremes* has been held to exist." The words italicised appeared to their Honours to indicate that Lord Sterndale considered that real property was excluded from any permissible enlargement of the word "money." On the other hand, Younger, L.J., at p. 110, said: "A gift by a testatrix of her money or of all her money would, in popular language, be the equivalent of a gift of her fortune—of her 'brass,' to use a North-country phrase—of her whole personal estate, perhaps even of her entire property, real and personal." The testatrix in **Taylor's case** left no property. Save for a somewhat obscure reference by Lord Eldon, L.C., in **Gaskell v. Harman**, 11 Ves. 504, the question whether real estate would pass under the term "money" in a will seemed to their Honours to have been considered for the first time by Malins, V.C., in **Prichard v. Prichard**, L.R. 11 Eq. 232. The words used by the testator in that case were: "I declare that the income arising from my principal money shall be paid to my wife . . . and at her death or on her marriage" to be divided among his children. The Vice-Chancellor held that the personalty amounting to about £40,000 was included in the disposition, but that the words could not be extended to the real estate because there was at all times great favour shown by the Court to an heir-at-law, and nothing but express words would take away the inheritance from the heir. In **In re Tribe**, 85 L.J. (Ch.) 79, where a testatrix who had an estate for life in, and a general power of appointment over, a freehold property and personalty, by her will gave "the rest of the money which I die possessed of" to the Truro Cathedral, Eve, J., held that the freehold property did not pass. The same question arose in **In the Goods of Gates**, (1928) P. 128, where the words of the will were: "I leave all my money to . . ." The earlier cases from **Lowe v. Thomas**, (1854) 5 D.M. & G. 315, to and including **In re Taylor** (*cit. sup.*) were cited. Lord Merrivale held that in the absence of any context the will disposed of the whole estate except the equity of redemption and the furniture. His Honour quoted from p. 132 of the judgment and said that in the opinion of the Court that was a statement that real property would not pass under the words "all my money," without more, notwithstanding the alteration of the law by the Administration of Estates Act, 1925, (England). The latest case cited by Mr. Von Haast was **In re Emerson**, (1929) 1 Ch. 128. The words there to be construed were "the residue of money at the time of my death." Tomlin, J., held that the residuary personal estate passed under the gift, but rejecting the argument of counsel based upon the Administration of Estates Act, 1925, (England) held that there was an intestacy as to the real estate. In **In re Mellor**, (1929) W.N. 23, Astbury, J., took a different view of the effect of that Act and held that, inasmuch as a gift of "the remainder of money" following a direction to pay debts would pass all property liable to payment of debts—(**Stocks v. Barre**, John. 54, 56)—the real estate, being made so liable by the Act, passed by the words "the remainder of any money" following that direction. Mr. Justice MacGregor had called attention to expressions of the learned Judges in **Public Trustee v. Sheath**, (1918) N.Z.L.R. 129 (C.A.), which indicated that they held the view that in New Zealand real property might in some cases pass by the word "money."

The present case was not one in which the presumption against intestacy could have much weight, inasmuch as it was clear that in the event of the child dying under the age of 21 practically the whole estate would be undisposed of. Moreover their Honours were not satisfied that the testatrix intended to dispose of her whole estate. It seemed that, if she considered the matter at all, she might well have thought that in the circumstances she had no moral right to give the family home away from her husband or to dispose of it as her own. The surrounding circumstances in the present case included the facts that at the time when the testatrix made her will and at the date of her death she had personal estate consisting of £10 in cash, a sum of £18 due to her, and an interest in the estate of a deceased person in England amounting to £250; that she was also the registered proprietor of a freehold property which had been purchased by the appellant with his own money, but by his direction had been transferred to her because he thought that owing to disparity of age he would be the first to die, and that he had explained this to her at the time. They included also the facts that the freehold property was the family home, and that the will was made when she was in peril of her life, and was written by the doctor in attendance upon her in circumstances of urgency. The only context was in the words of the gift of £10 "out of the estate" to each of the appellant's children in the event of her own child dying under the age of 21. The words were not "my estate" but "the estate," which their Honours thought related to the antecedent words "all my money" in the earlier part of the will and did not in their opinion extend the meaning of that expression. The Court was, therefore, driven, as was Lord Merrivale in **In the Goods of Gates** (*cit. sup.*), to find the meaning of "all my money" with what help could be derived from the surrounding circumstances. Their Honours thought that the rule of construction adopted in **In re Cadogan** (*cit. sup.*) and followed in **In re Bramley** (*cit. sup.*) and **In the Goods of Gates** (*cit. sup.*) should be followed and that in cases of doubtful construction such as the present

one, both context and surrounding circumstances, and, where there was no context, then the surrounding circumstances, were to be considered. Applying that rule their Honours had arrived at the conclusion that the whole of the personal estate passed by the words "all my money" and that the real property was undisposed of. Having arrived at that conclusion, their Honours thought that in the present state of the authorities it was undesirable to express an opinion as to whether in any circumstances real property would pass under the words "my money" or "all my money."

The gift of the personalty to the defendant Oliver George Horton was contingent on his attaining 21. Nothing was said in the will as to the income in the meantime, but the personal estate was given to the appellant "on trust." The question was not referred to in the argument, but their Honours thought that the income was to be held upon the same trusts as the capital. Section 113 of the Trustee Act applied and the appellant would be entitled to apply the income for the child's maintenance, education or benefit during his minority: **In re Adams,** (1893) 1 Ch. 329.

The questions submitted on the originating summons were answered as follows:—

1. The term "all my money" as used in the will comprises the whole of the personal estate of the testatrix and there is an intestacy as to her real property.

3. The defendant Oliver George Horton is entitled to the whole personal estate including the income contingent upon his attaining that age.

The appeal had been prosecuted under an order permitting the appellant to appeal as a poor person. The costs must, accordingly, be dealt with as they were in **Johnson v. Lindsay and Co.,** (1892) A.C. 110: see Court of Appeal Rule 49 and note thereto in **Stout and Sim's Practice and Procedure,** 6th Edn., 441. The solicitors would, therefore, have their costs out of pocket and £15 to cover office expenses including clerks and other matters. Costs to infant defendant £15 15s. out of estate.

Solicitors for appellant: **Luke, Cunningham and Clere,** Wellington.

Solicitors for respondents: **Perry and Perry,** Wellington.

Supreme Court

Smith, J. March 5; 28, 1929.
New Plymouth.

MORE AND BREWSTER v. COMMISSIONER OF STAMP DUTIES.

Revenue—Stamp Duty—Partition—Consideration Paid by Way of Equality—Tenants in Common in Equal Shares—Payment of all Moneys Realised from Portion of Lands and Mortgages to one Tenant in Common with Consent of Co-Tenant—Subsequent Transfer of Remaining Lands and Mortgages in such Manner as to Equalise Distribution—Transfer Dutiable Under Stamp Duties Act, 1923, Section 102 (1).

Case stated under Stamp Duties Act, 1923, to determine whether a certain memorandum of transfer and deed of conveyance presented for stamping effected a partition and were liable for stamp duty under Section 102 of that Act. The appellants, More and Brewster, who were sisters, were the owners as tenants in common in equal shares of certain lands and mortgages. From time to time some of those mortgages were realised. Moneys were also raised by way of overdraft with a bank, upon the security of the common property. With the consent of Brewster, the proceeds of realisation, together with the moneys so raised, were paid to More, in London, to the extent of £16,582 9s. 6d. Certain other common properties were realised to pay off the overdraft to the bank. After such repayment, the appellants remained the owners as tenants in common in equal shares of certain remaining lands and mortgages. On the 26th June, 1928, these were dealt with by a memorandum of transfer and a deed of conveyance whereby an unequal allotment of these lands and mortgages was made. Brewster took in severalty the properties specified in the first, second and fourth schedules to the memorandum of transfer, and More took the two properties specified in the third schedule thereto. The memorandum of transfer contained a recital that More and Brewster were desirous of making a partition and division of the real and personal estate remaining as aforesaid and that they had agreed that the hereditaments and premises described in the first, second and fourth schedules should be taken by and appropriated to Brewster in severalty in lieu of her share therein and that the hereditaments and premises described in the third schedule should be taken by and appropriated to More in severalty in lieu of her share therein . . . The object of the unequal allotment was to compensate Brewster for her half share of the moneys received by More. Accordingly, land and mortgages to the value of £17,625 were vested solely in Brewster, and mortgages to the value of £1,000 were vested solely in More. The result was, therefore, that out of the various properties originally held by the appellants as tenants in common in equal shares, More received a total of £17,582 9s. 6d. (being £16,582 9s. 6d. in cash and £1,000 in mortgages), and Brewster received land and mortgages to the value of £17,625. The memorandum of transfer and the deed of conveyance effecting the transaction were presented for assessment of stamp duty. The Commissioner claimed that the documents effected a partition, and that one-half of the sum of £16,582 9s. 6d., viz. £8,291 4s. 9d., had been paid by way of equality, and he assessed the duty accordingly under Section 102 of the Stamp Duties Act, 1923. The question for determination was whether that assessment was correct.

R. H. Quilliam for appellants.

C. H. Weston for respondent.

SMITH, J., said that he thought it clear that the moneys raised and paid to More became her absolute property. The intention of the parties was that she should apply them as she thought fit, without being liable to any action for an account in respect of them at the suit of her sister. In other words, Brewster had no interest as a tenant in common in those funds. It followed that the proceeds of the realised common property did not remain property held by tenants in common. Brewster could not, if she would, claim to invoke the remedies which one co-tenant would have against the other in the case of the exclusion from or destruction of the common property without the consent of the other. Nor, if she would, could she invoke the legal remedies available to one co-owner against another who had had the sole use of common property. The nature of Brewster's claim against More depended upon the true inference to be drawn from the conduct of the parties. In His Honour's opinion, the true inference was that on 26th June, 1928, More was liable upon an implied contract to pay to Brewster a sum equal to one-half of the total amount received by More. If that were the case, then the parties remained tenants in common in equal shares in the properties remaining unrealised on 26th June, 1928. Mr. Quilliam contended that that was not the true position. He submitted that in effect the whole of the properties originally held by the appellants as tenants in common in equal shares might be treated as one asset *in globo* in which the parties held the legal estate as tenants in common in equal shares, but in which they would hold what he termed the equitable estate in varying proportions according to the extent to which each had received her share of the total common property. That was a novel doctrine. It could have no existence, in His Honour's opinion, unless based upon an agreement of the parties to that effect. There was no evidence of any such agreement. On the contrary, it was clear that the parties themselves regarded their shares in the remaining properties as being their fixed original shares. The words "in lieu of her share therein" contained in the recital to the memorandum of transfer referred clearly to the whole one-half share of each in the properties partitioned. On the date of partition, therefore, More owed Brewster on an implied contract the sum of £8,291 4s. 9d., being an amount equal to one-half of the moneys received by More. At the same time, the appellants remained tenants in common in equal shares of the remaining properties. More did not pay the debt in cash. She discharged her obligation by agreeing to the allotment of the remaining properties in such a way as to settle Brewster's claim by means of the excess of the value of the properties taken by her in severalty over the value of the properties taken by More in severalty.

The claim to stamp the documents effecting that transaction as a partition was made under Section 102 (1) of the Stamp Duties Act, 1923. In His Honour's opinion, the transaction amounted to a partition. The legal term "partition" was applied not only to the division of each separate part of common properties among the co-owners, but also to the allotment among them of the separate parts, as in the present case: see **21 Halsbury's Laws of England,** 1512, Note (c). The partition effected in such a way was not a strict partition, but in making

a partition it was not necessary that an aliquot share of each species of property should be allotted to each of the co-owners: **Peers v. Needham,** 19 Beav. 316. A division or allotment of the property into unequal parts, which were not aliquot parts of the whole, might be made, those owners who took a larger share than their due making compensation by way of equality of partition to those who took less than their due. As explained by Jessel, M.R., in **Porter v. Lopes,** 7 Ch. D. 358, 366, that was a modified sale. It was a sale of part. That raised the question whether for the purposes of the Stamp Duties Act, 1923, the documents should be stamped as a partition or as a conveyance on sale. His Honour thought they must be dealt with as a partition. They did not purport to effect a conveyance of property for valuable consideration. They did purport to allot the properties in unequal shares; and the substantial position was that the consideration for the larger allotment to Brewster was the release of her sister's debt to her amounting to £8,291 4s. 9d. That was a consideration paid by way of equality. Although, in another sense, it was a sale, it was a sale involved in a partition, and of the kind contemplated by Section 102 (1). The document must, therefore, be stamped under that Section.

Solicitors for appellants: **Govett, Quilliam and Hutchen,** New Plymouth.

Solicitors for respondent: **Weston and Billing,** New Plymouth.

Ostler, J. February 13; 16, 1929.
Wellington.

QUINLAN v. WELLINGTON CITY CORPORATION.

Municipal Corporation—Public Works—Building Permit—Mandamus—Injunction—Refusal by Council to Grant Building Permit on Ground that it had Determined to Acquire Whole Land for Public Purposes—No Active Steps to Take Land for More Than Year—Notice of Intention to Take Whole Land for "Tramway and Electrical Purposes"—Subsequent Notice of Intention to Take Whole Land for Construction of Elevators and Machinery for Passenger Traffic—Objection by Owner—Whole Land Not Required for Purposes of Work—Injunction Granted—Quaere Whether Scheme one for Construction of a "Tramway"—Corporation Not Entitled to Refuse Building Permit on Ground that Lands Required for Public Purposes—Mandamus to Corporation to Hear and Determine Application for Permit on Proper Grounds—Tramways Act, 1908—Municipal Corporations Act, 1920, Section 174 (4)n—Reserves, etc., and Public Bodies Empowering Act, 1912, Section 39.

Motion for injunction to restrain defendant Corporation from proceeding to take certain land under the Public Works Act, and for a mandamus to compel the Corporation to grant certain building permits in respect of such land, which plaintiff had applied for, and which had been refused by the Corporation upon the ground that it proposed to take the land. The plaintiff was the registered proprietor of a parcel of land in the City of Wellington known as Flagstaff Hill. The land was divided by a private way running through it in a direction roughly east and west. On the portion south of such private way there were three houses. One was damaged by fire, and on 4th September, 1925, plaintiff applied to the defendant Corporation for a permit to reinstate this house. This permit was refused upon the ground that the Council had determined to acquire the land on which the building stood for public purposes. On 5th November, 1925, plaintiff applied for a permit to erect flats on the portion of her land to the north of the private way. On 12th November, 1925, that permit was also refused upon the ground that the Council had decided to acquire the whole of plaintiff's parcel of land. It was not, however, until 1927 that the Corporation took any active steps to acquire the land. On the 26th January, 1927, it caused to be gazetted and served on plaintiff a notice of intention to take the whole of her land for the purpose of a public work, namely, for "tramway and electrical purposes." On 3rd May, 1927, the Corporation caused a new notice, in substitution for the first, to be gazetted and served, whereby notice was given of intention to take the whole of plaintiff's land, but the public work for which it was to be taken was described as "the construction thereon of an elevator or elevators and machinery for passenger traffic, and such subways, tunnels, shafts and approaches as are required in connection therewith at Flagstaff Hill." The reason for the amendment was that the Corporation had no power to take land for a tramway without first obtaining an Order-in-Council for its construction under the Tramways Act, 1908, whereas it had power to take land for construction of elevators under Section 174 Subsection (4) (n) of the Municipal Corporations Act, 1920, and also under Section 39 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act, 1912. No Order-in-Council for the construction of a tramway had been obtained. On 12th May, 1927, plaintiff gave a written notice of objection to the taking of the whole of the land. The objection was heard by the Corporation on 16th June, 1927, and the Tramways Manager was asked for a report. A comprehensive written report was furnished on 7th July, 1927, as to the proposals for a lift or inclined tramway from Willis Street to the Terrace and beyond. The report indicated that there was not likely to be any need in the immediate future for carrying out the proposed scheme, but that as the City grew in importance the time would come—it might not be for ten or twenty years—when it would be necessary to provide a quick means of access from the centre of the city for residents on the heights and also for students attending Victoria College. The report also went on to suggest that the Council should take plaintiff's land, reinstate the building which it had declined to allow plaintiff to reinstate, and to let it and the two other houses on the property so as to give a return on the capital expended in compensation for the taking of the land until such time as the land would be required for the tramway or lift. On 11th July, 1927, the Town Clerk notified the plaintiff's solicitors in writing that the Council had decided to proceed with the taking of a portion of her land; but the Council had taken no steps to have a new notice gazetted and served up to 24th August, 1927, when the present proceedings were launched. After the commencement of the proceedings the Council appointed a commission of experts to inquire into and report on the question of access to the Eastern and Western Suburbs, and the Commission sent in its report containing a definite proposal for a "cable tramway," but the Corporation was at the date of the hearing of the action in no way committed to the proposal.

Myers, K.C., and O.C. Mazengarb for plaintiff.
O'Shea for defendant Corporation.

OSTLER, J., said that he had already given judgment so far as the prayer for an injunction was concerned. In the course of the argument Mr. O'Shea admitted that the substituted notice gave notice of the intention of the Corporation to take the whole of plaintiff's land; he also admitted that the whole of plaintiff's land was not required for the purpose of the contemplated public work; he further admitted that a corporation had no power at law to take under the Public Works Act a larger area of land than it actually required for the public work. His Honour thought, therefore, that plaintiff was entitled to the injunction for which she asked, and accordingly at the hearing he granted an injunction against the Corporation restraining it from proceeding to take the whole of plaintiff's land.

The question of plaintiff's right to a mandamus was reserved. Counsel for plaintiff put that right upon two grounds. First, they contended that the scheme which the Council seemed likely to adopt was one for the construction of a "tramway" within the meaning of the Tramways Act, 1908, and not for the construction of an elevator or lift. The contention was that as no Order-in-Council had been obtained to construct a tramway, the Corporation had no power to take any land for such a work, and therefore it had no power to refuse either of the applications for a permit. Secondly, they contended that even assuming the Corporation had power to take the land or a part of the land, it had no power in law to refuse to grant the permits asked for upon the ground that they intended to take part of the land, and, therefore, mandamus would lie to compel them to grant the permits.

With regard to the first contention His Honour found it unnecessary for the Court to decide it. It was a very difficult question, upon which there was room for a difference of opinion, and one which should come before a Full Court for decision. In His Honour's opinion, even assuming that the Council when it refused the two permits had the power to take either the whole of plaintiff's land or a part of it, yet it was not entitled at law to refuse the applications upon that ground. It had been decided by the House of Lords that the only ground upon which a local authority could legally refuse a permit to build was that its by-laws or some statutory requirement had not been complied with: see **Robinson v. Barton-Eccles Local Board,** 8 App. Cas. 798. The books were full of instances where mandamus had been granted against local authorities who had refused to

grant the permit applied for on some other ground : see **Reg. v. Preston Corporation,** 3 T.L.R. 665 ; **Reg. v. Newcastle-on-up Tyne Corporation,** 53 J.P. 788 ; **Reg. v. Tynemouth Rural District Council,** (1896) 2 Q.B. 451 ; **Rex v. Bexhill Corporation,** 75 J.P. 385 ; **Rex v. Preston Rural District Council,** 76 J.P. 65. In Glen on Public Health, 14th Edn., Volume 1, 401, a reference was made to the case of **Rex v. West Ham Borough Council,** decided in 1911, which was not reported except in **2 Glen's Local Government Cases 206.** It was stated that in that case a rule *nisi* for a mandamus was granted where the permit had been refused on the ground that the local authority was considering a town planning scheme which might affect the proposed building. In His Honour's opinion such a decision would be in accord with the authorities. A local authority had no power to refuse to grant a permit upon the ground that it intended either at a later date or immediately to take the land to which the permit related for a public work. If the applicant had complied with all the requirements laid down in the authority's own by-laws, and had not contravened any statutory prohibition or requirement, the local authority had no general discretion to refuse to grant the permit, and could not refuse on the ground that it required the land.

Mr. O'Shea contended that, even assuming that the Corporation had no power to refuse to grant the permit on the ground upon which the refusals were based, still as the writ of mandamus was discretionary, the Court ought in its discretion to refuse to grant it. For that proposition he quoted a passage from the judgment of Darling, J., in **Reg. v. Leicester Union,** (1899) 2 Q.B. 632, 637. But in His Honour's opinion if the Court so exercised its discretion in the present case it would be doing a grave injustice to plaintiff. The permits were asked for and refused in 1925. No steps were taken towards acquiring the land until 1927 when the first notice of intention to take was given. During all that period plaintiff was deprived of the beneficial user of her land for a reason which the Corporation was not legally justified in using. If the writ were refused the Council could allow another two years to slip by without doing anything, during which plaintiff would still be deprived of the beneficial user of her land. In His Honour's opinion justice demanded that the writ should issue. The remedy of the Corporation if it desired to take a portion of the land was to act promptly and take the land before the buildings were erected.

In His Honour's opinion, however, plaintiff had not shown in this case that she was entitled to a mandamus directing the Corporation to grant the permits asked for. There was no evidence that in making the applications she complied with the City by-laws and such statutory provisions as were applicable, and there was no evidence that there was any consideration by the Council of whether there was such compliance. The Council merely refused the applications for a reason they were not entitled in law to take into consideration. It must be allowed an opportunity to consider the application upon the grounds which it was entitled to take into consideration.

Writ of mandamus to Corporation to hear and determine both applications for a permit granted.

Solicitors for plaintiff: **Mazengarb, Hay and Macalister,** Wellington.

Solicitor for defendant Corporation: **City Solicitor,** Wellington.

Ostler, J. December 13, 1928 ; March 12, 1929. Wellington.

IN RE RICHTER.

Bankruptcy—Chose in Action—Deaths by Accident Compensation Act—Bankrupt's Right to Damages Under Act Not Passing to Official Assignee.

Motion by Deputy Official Assignee of the estate of one Richter for an order that a sum of £950 paid into Court by Dalgety & Co., Ltd., in an action between Richter and that company formed part of Richter's estate in bankruptcy. On 24th February, 1928, Richter's wife was accidentally killed by a motor car driven by an employee of Dalgety & Co., Ltd. On 19th April, 1928, Richter was adjudicated a bankrupt on his own petition, and on 24th May, 1928, he obtained his discharge. After he had obtained his discharge he commenced an action against Dalgety & Co., Ltd., under the Deaths by Accident Compensation Act, 1908, on behalf of himself and his two infant children. Dalgety & Co., Ltd., paid £950 into Court, and this sum was accepted in full settlement of all claims. An application was then made to the Court to apportion this sum between Richter and his children, and the Court ordered the whole sum to be paid to Richter—(see 4 N.Z.L.J. 283). The Deputy Official Assignee claimed that this sum formed part of the bankrupt's estate.

Myers, K.C., and Fitzherbert for Deputy Official Assignee.
North for Richter.

OSTLER, J., said that in spite of the wide words used in the definition of "property" as defined in Section 2 of the Bankruptcy Act, 1908, it was well settled that it was not all choses in action or valuable things vested in the bankrupt at the time of his bankruptcy that passed to the Official Assignee. A right to sue for a tort which was merely personal and which did not affect the bankrupt's estate did not pass. The principle upon which it could be determined whether a right of action passed to the bankrupt's assignee was stated in the well-known passage from the judgment of Park, B., in **Beckham v. Drake,** 2 H.L.C.627, which His Honour read. The question for decision was whether the statutory right given by the Deaths by Accident Compensation Act, 1908, was a right of action which survived and passed at law to the executor on the death of the person in whom it was vested. That question seemed never to have been decided either in England or in New Zealand or in Australia, but it had been decided in Canada. Unfortunately the report was not available, and the only reference available was in **36 Eng. & Emp. Digest, 142,** where the effect of the case of **McHugh v. Grand Trunk Railway Co.,** (1901), 21 C.L.T. 581, purported to be reported. That case decided that "upon the death of the beneficiary on whose behalf an administrator is bringing an action under the Fatal Accidents Act, 1897, the action comes to an end. It cannot be continued for the benefit of the beneficiary's estate, nor can a new action be brought by the beneficiary's personal representative." In His Honour's opinion that case was correctly decided. Before the enactment of Lord Campbell's Act (9 & 10 Vict. c. 93) the common law was that the right of action for an injury to the person died with the person. It was to remedy the hard state of the law that Lord Campbell's Act was passed, the provisions of which had been adopted in our Deaths by Accident Compensation Act, 1908. In His Honour's opinion the Act could not be construed as conferring on the class of persons benefited a species of property which upon their death would pass by law to their executor. It was intended to give to the classes of persons named a personal right which otherwise they would not have had, and if they died before that personal right had been enforced the right to enforce it would die with them. In His Honour's opinion that was the intention and the effect of the Act. It extended a right of action for tort which otherwise would have died for the benefit of certain defined persons, but did not create a new right of action in or for the benefit of those persons which survived them and passed to their executors. For those reasons His Honour thought the case of **McHugh v. Grand Trunk Railway** (*cit. sup.*) was rightly decided, and that the right of the bankrupt given by the Deaths by Accident Compensation Act, 1908, in respect of the death of his wife was not a right which would have passed to his executor on his death. It was purely a personal right which *moritur cum persona.* That being the case, the right was not of that class of rights which would pass to the bankrupt's assignee upon his bankruptcy.

It was true that a claim under the Deaths by Accident Compensation Act, 1908, could be based only upon pecuniary loss. Unless the person for whose benefit the action was brought could prove present or prospective pecuniary loss by reason of the death in respect of which he sued, he could recover nothing. But the loss of personal comfort caused by the loss of the services of a wife was sufficient evidence of loss of pecuniary benefit : see **Pym v. Great Northern Railway Co.,** 2 B. & S. 759 ; 4 B. & S. 396. In the present case that was all the bankrupt could have proved. But even assuming that the person to whom the statute had given a right of action could prove present pecuniary loss, his cause of action was the same as the deceased person would have had at any rate to this extent, that if the deceased had before his death accepted any compensation in satisfaction of his claim, no claim could be brought by any such person : see **Reed v. Great Eastern Railway Co.,** L.R. 3 Q.B. 555. That consideration seemed to show that the intention of the statute was merely to abrogate the common law rule to the extent of keeping alive for the benefit of individuals of certain limited classes, a cause of action which otherwise would have died with the deceased.

His Honour's attention had been drawn to the case of **United Collieries Ltd. v. Simpson,** (1909) A.C. 383, in which the House of Lords decided that the right of a dependent of a deceased work-

man to make a claim under the Workmens' Compensation Act, 1906, passed to the executor of the sole dependent who had died without having made a claim. Upon a full consideration of the matter His Honour was of opinion that it had no analogy to the question considered in the present judgment. Lord Campbell's Act was passed for the purpose of abrogating to a certain extent the maxim *actio personalis moritur cum persona.* The decision of the House of Lords was based solely on the ground that the Workmen's Compensation Court created a statutory debt by the employer to the dependants of a workman killed in the course of his employment. It was expressly mentioned that the maxim *actio personalis moritur cum persona* had no application. In New Zealand the effect of that decision had been enacted as part of our statute law in Section 56 of the Workers' Compensation Act, 1922, which provided that the right of action given by the Act to the dependant of a deceased workman, should survive the dependant and could be enforced by his representative. But it was also especially provided by Subsection (2) of that Section that the moneys so received by the representative of a deceased dependant should not be available as assets for the payment of his debts and liabilities, so that even though the cause of action survived the dependant it would not pass to the dependant's assignee on his bankruptcy. In the Deaths by Accident Compensation Act there was no statutory provision that the cause of action should survive the death of the persons to whom it was given. The maxim *expressio unius est exclusio alterius* might be applied. For the reasons stated His Honour was of opinion that the right of action which the bankrupt had in respect of his wife's death did not pass to his assignee upon his bankruptcy.

Motion dismissed.

Solicitors for Deputy Official Assignee: **Spratt and Kinmont,** Hawera.

Solicitors for Richter: **Halliwell, Thomson, Horner and North,** Hawera.

Ostler, J. February 22; 24, 1929.
Napier.

MOUNT BURNETT LTD. (IN LIQUIDATION) v. CHAMBERS

Company—Mortgages—Registration—Agreement by Company —"Where Thereunto Required by Bank" to Convey Transfer or Assign All Freehold and Leasehold Property and all other Property Both Present and Future Including the Undertaking and all Called or Uncalled Capital—Provision that any Conveyance Transfer or Assignment to be by way of Mortgage for Securing Immediate Payment and to Contain Immediate Power of Sale and Usual Powers—Agreement to Mortgage Not Registered—Documents of Title to Freehold and Leasehold Property Deposited with Bank—Documents Handed to Guarantors on Payment of Guarantee—Agreement an Equitable Mortgage and Not Merely an Agreement to Give Security in Future—Agreement Severable in so far as it Related to Different Species of Property—Agreement as Applying to Freehold and Leasehold Land Not a Mortgage Requiring Registration Under Companies Act—Legal Mortgage of Specific Property Contemplated—Guarantors Entitled to Retain Documents as Against Liquidator—Companies Act, 1908, Section 130.

Action by liquidator of plaintiff company (in voluntary liquidation) claiming from defendants possession of certain documents of title of the company in respect of certain freehold and leasehold properties of the company. On 27th August, 1913, the defendants who were then directors of the plaintiff company, had, together with two other directors, executed in favour of the Union Bank of Australia, a joint and several guarantee for £5,000 and one year's interest on that amount. By the terms of the guarantee the directors guaranteed to the Bank the payment of all moneys then owing or thereafter to become owing by the company to the Bank. On 9th September, 1913, the company executed an agreement with the Bank under which, in consideration of moneys already advanced by the Bank and future advances the company agreed that it would "at the cost of the company where thereunto required by or on behalf of the Bank its successors and assigns effectually convey and assure, assign, transfer and set over and charge unto the Bank and its assigns all that the freehold and leasehold property of the company and all other property both present and future whatsoever and wheresoever situated of the company and all the company's undertakings and rights and all the capital already called and unpaid and also all the capital uncalled upon the shares of the company already issued and all its uncalled capital in respect of shares to be issued hereafter by the company." The agreement also provided that every such conveyance, assurance, assignment, or transfer and setting over should be by way of mortgage for securing the immediate payment of the amount which might then be due by the company to the Bank and that every such mortgage or charge should be prepared at the expense of the company by the solicitor of the Bank and should contain a power of immediate sale of the premises comprised therein, and all other powers and clauses usually inserted in similar deeds. On 8th July, 1914, the five directors of the company executed in favour of the Bank an additional guarantee for £1,100 and a year's interest thereon whereby they guaranteed payment at the Bank of all moneys then owing or to become owing by the company to the Bank. Subsequently, upon the demand of the Bank the company in pursuance of the terms of the agreement handed to the Bank as they came into existence certain title deeds of freehold and leasehold properties acquired by the company. The company did not execute any mortgage over those properties to the Bank. The agreement to mortgage was not registered in the office of the Registrar of Companies under Section 130 of the Companies Act, 1908. Subsequently the company got into difficulties. The Bank demanded repayment of its advances, and the company not being able to pay went into voluntary liquidation on 30th July, 1927. The Bank then called up the guarantees. On 14th June, 1928, the three defendants paid the amount demanded by the Bank—£6,700 16s. 4d.—and the Bank handed to them the documents of title which had been deposited with it by the company. The liquidator of the company now sued the defendants for possession of those documents, claiming that the agreement to mortgage between the company and the Bank dated 9th September, 1913, was void as against him on the ground that it was not registered as required by Section 130 of the Companies Act, 1908.

Holderness for plaintiff.

Lusk for defendants.

OSTLER, J., after referring to Section 130 (1) of the Companies Act, 1908, and to the definition of "mortgage" appearing in Subsection 11 of that Section, said that the first question argued was whether the agreement of 9th September, 1913, created an equitable mortgage. It was suggested by counsel for defendants that it was merely an agreement that in some future circumstances a security should in the future be created. He relied for that contention on a passage in the judgment of Buckley, J., in **In re Jackson & Bassford Ltd.,** (1906) 2 Ch. 467, 477. In His Honour's opinion that passage had no application to the facts of the present case. His Honour had no doubt that the agreement referred to was a good equitable mortgage. It was given in part consideration of a present debt, and under it the company agreed to give a legal mortgage or mortgages "where thereunto required" by the Bank. It was an agreement enforceable at equity.

The next question was whether the agreement came within the class of mortgages referred to in Section 130 of the Companies Act, 1908. In His Honour's opinion, in so far as the agreement was an agreement to give a mortgage over its freehold and leasehold properties the agreement was not a mortgage within the class of mortgages defined in Section 130, Subsection (11). It was not a mortgage for the purpose of securing an issue of debentures. A careful perusal of the agreement made it plain that the parties had no intention that debentures should be issued. What were contemplated were legal mortgages as and when demanded secured on specific property and containing an immediate power of sale. One of the species of assets which the Bank had a right to call for a mortgage over was the company's uncalled capital It might well be that so far as that was concerned the agreement was void owing to non-registration. But the agreement was clearly severable. It referred to several different species of property, including freeholds and leaseholds. The company agreed as and when called on by the Bank to give mortgages over its freeholds and leaseholds containing an immediate power of sale. Mortgages of land were not within Section 130 of the Companies Act, 1908, although they were within the corresponding section (Section 93) of the English Companies Act of 1908. His Honour, after referring to the dicta of Bowen, L.J., in **Davies v. Rees,** 17 Q.B.D. 408, 411, to the effect that under the apparent form of a single agreement or covenant written on one piece of paper and sealed with one seal there might be several independent contracts or obligations, stated that in his opinion the present agreement was an example of several independent obligations contained in

the one agreement. With regard to the obligation to grant mortgages over its land that created an equitable mortgage over the company's lands, but not a mortgage which required registration under Section 130, and, therefore, such a mortgage was not void for non-registration. The principle was applied in **In re Burdett**, 20 Q.B.D. 310. As the Bank held a good equitable mortgage over the company's freehold and leasehold properties, the defendants, having as guarantors paid off the company's debt to the Bank, were entitled in equity to be subrogated to the rights of the Bank, and thus had all the rights of equitable mortgagees of the properties in question. The defendants were accordingly entitled to a declaration that they were the equitable mortgagees of the lands in question.

Solicitor for plaintiff: **Logan, Williams & White**, Hastings.
Solicitors for defendants: **Kennedy, Lusk & Morling**, Napier.

Smith, J. February 13; 15, 1929.
Palmerston North.

PERRY v. FEILDING CLUB.

Club—Natural Justice—Suspension of Member—Evidence Against Member Charged Not Taken in His Presence—No Opportunity for Cross Examination—Violation of Rules of Natural Justice.

Claim by plaintiff for a declaration that a resolution passed by the Committee of the Feilding Club (Incorporated) purporting to suspend him was null and void and for an order restoring his name as a member of the Club. An injunction and damages were also claimed. The plaintiff had taken out a prohibition order against himself. In view of this fact the rules of the Club were altered by adding to Rule 21 a provision that any member having a prohibition order against him should *ipso facto* cease to be a member of the Club. The Committee of the Club, after this rule was passed, notified the plaintiff that by reason of his conduct he had ceased to be a member of the Club. The application of the new rule retrospectively in this way could not be sustained, and the Committee then sought to rely on another portion of Rule 21 which provided that "Any member wilfully infringing any of the rules or by-laws of the Club or becoming a defaulter to the Club shall be answerable to the Committee who may at their discretion suspend such member, and shall forthwith give him notice by means of a registered letter of their decision." In applying this rule the Club relied on a report of the steward of the Club, confirmed by a member, that the plaintiff had brought liquor into the Club and consumed it, and that later in the day he was intoxicated while on the Club's premises. Pursuant to a resolution of the Committee, a letter was written to the plaintiff notifying him that he had "grossly misconducted" himself within the meaning of Rule 21, and requesting him to attend at a meeting of the Committee to show cause why he should not be dealt with under the rule. The plaintiff duly appeared before the Committee. The President informed the plaintiff of the charges against him. The plaintiff admitted being in the Club but denied that he was intoxicated and said that he wished to have the evidence against him called in his presence so that he could cross-examine the witnesses. This the President refused to do, and the evidence of the plaintiff was then heard. The Committee resolved that the plaintiff be suspended on the ground that he had grossly misconducted himself.

Cooper for plaintiff.
Ongley for defendant.

SMITH, J., in reviewing the facts said that what occurred was that the Committee first heard the evidence against the plaintiff, and then heard the plaintiff himself, the President reporting what was alleged against him according to his (the President's) recollection of the statements made. The Committee resolved that the plaintiff be suspended from membership of the Club, on a charge of having grossly misconducted himself in the Club. Rule 21 provided that a person so suspended might, within 40 days after the posting of the notice of suspension, require the Committee to convene a special general meeting of the Club to consider such suspension, and the Committee was bound to call such meeting. The suspension might be removed by a two-thirds majority, or it might be converted into expulsion by a similar majority. If a two-thirds majority was not obtained, either way, it appeared that the suspension by the Committee continued. The effect of suspension was to debar the member from the use and advantages of the Club.

The first question for decision was whether the Committee had acted within the terms of Rule 21. That rule contemplated as a fact that the member had either wilfully infringed a rule or by-law of the Club or had become a defaulter to the Club, or had grossly misconducted himself either within or without the Club. It was clear that until one of those things was established as a fact against the member, he was not answerable to the Committee for the purposes of suspension. In His Honour's opinion, the rule contemplated two steps: the first, the establishment of a fact which would make the member answerable to the Committee, and the second, the exercise of the Committee's discretion as to whether or not the fact so established was sufficiently serious in all the circumstances to warrant suspension. His Honour saw no reason why both of those steps should not be taken at the one meeting, but it was clear that they might be taken at one or more meetings of the Committee. Unless it plainly appeared upon the true construction of the rules, that the Committee had an absolute power of determining *ex parte* whether or not a member had been guilty of gross misconduct, the establishment of gross misconduct against a member necessitated an inquiry, and that inquiry must be conducted in accordance with the principles of natural justice: **Fisher v. Keane**, 11 Ch. D. 353, **Labouchere v. Wharncliffe**, 13 Ch. D. 346. His Honour could find nothing in the rules of the defendant Club conferring any such power upon the Committee. The indication of such a power should be very plain. It might be said that Rule 54 gave the Committee absolute power of interpretation, but there had been no interpretation of Rule 21 by the Committee acting under Rule 54, and even if there had been, any interpretation contrary to the principles of natural justice would not be effective. There must, therefore, be in the first place an inquiry under Rule 21 to establish or to disprove an allegation of the kinds specified in the rule. His Honour was not satisfied that the principles of natural justice required that in every case the person charged under Rule 21 must have the opportunity of examining all persons who were willing to testify that the member had become, on one or other of the grounds specified, answerable to the Committee. If, for example, it was alleged that he had become a defaulter to the Club, the requirements of natural justice might be satisfied in any particular case by enquiries conducted by the Committee from officers of the Club and from the member himself, the one independently of the other. There might also be other cases in which the principles of natural justice were satisfied so long as a distinct charge was made, and the person charged had an opportunity of meeting it, although he was not present during the whole of the inquiries and had not the opportunity of cross-examining the witnesses against him: see **Johnson v. Jockey Club of South Africa**, referred to in English and Empire Digest, Volume 8, 510, note 29 (iii). But circumstances altered cases. Where the Club concerned was a gentlemen's social Club, where the charge was one of gross misconduct, where the member denied the charge and was prepared to face an inquiry, it was, His Honour thought, a principle of natural justice that he should be present when those who alleged the acts of gross misconduct against him gave their evidence before the Committee, and that he should have the right to cross-examine them. The allegation of gross misconduct against a member of a gentlemen's Club was a most serious matter. Without the right to be present and to cross-examine, his character and reputation might be perilously exposed to the activities of others, including the servants of the Club, one or more of whom might entertain towards him feelings of malice, envy and all uncharitableness. His Honour stated that, in his opinion, it was a principle of natural justice that when gross misconduct was charged and denied, the accused person should have the right to be present when the charges were heard and to cross-examine. On any other basis, the Committee of a Club might, in such a case, be made the innocent engine of a grievous injustice.

Mr. Ongley had submitted that when the exercise of a power of suspension only was in question, a less rigorous procedure need be followed than when the exercise of a power to expel or to call on a member to resign was involved. **Clark v. Young**, (1927) N.Z.L.R. 348, cited in support of that proposition had no application to the present case. In His Honour's view the Committee's power to suspend was almost equivalent to expulsion, and seemed to have much the same effect. His Honour thought that the principles of natural justice applicable to the case of expulsion were applicable to the action of the Committee of the defendant Club proposing to exercise its discretion as to suspension.

Mr. Ongley further contended that as the Rule provided that a member might appeal to a general meeting of the Club there was no need for the Committee to hear the member before reaching its own conclusion, and he cited **Dawkins v. Antrobus**, 17 Ch. D. 615, in support. In that case, however, the expelled

member declined to give any explanation to the Committee nor did he appear at the meeting of the Club which the Committee was bound to call under the Rules. It was clear that under those circumstances the principles of natural justice required only that the Committee should make a fair and *bona fide* inquiry, and that the meeting which expelled him should act in the same manner. In the present case the plaintiff was prepared for an inquiry, and he was entitled to meet and cross-examine the witnesses against him on the charge of gross misconduct. The Committee, therefore, in arriving at the facts, did not follow the principles of natural justice applicable to the case. It followed that the suspension of the plaintiff must be held to be invalid.

Solicitors for plaintiff: **Cooper, Rapley and Rutherfurd,** Palmerston North.

Solicitors for defendant Club: **Gifford, Moore, Ongley and Tremaine,** Palmerston North.

Smith, J. March 8; 28, 1929.
New Plymouth.

IN RE MARTINI: OFFICIAL ASSIGNEE v. GREY.

Solicitor—Settled Account—Re-opening—Application by Official Assignee to Re-open Accounts Stated Between a Bankrupt and his Solicitor—Fiduciary Relationship Between Parties to Settled Accounts—Sufficient Cause Shown for Re-opening Accounts—Accounts Inaccurate—Lump Sum Charges Included—Necessity for Agreement as to Charges Containing Sufficient Information to Enable Court to Consider Whether Agreement Fair and Reasonable—Items in Settled Accounts Not Sufficient—No Independent Advice—Matters Taken Into Consideration by Court in Determining Whether Accounts Should be Re-opened or Merely Surcharged and Falsified—Accounts Re-opened—Law Practitioners Act, 1908, Section 26.

Motion by Official Assignee for an order re-opening all settled accounts (if any) between the bankrupt (Martini) and the defendant, George Grey, a solicitor, relating to the amount owing under certain memoranda of mortgage given by the bankrupt to the defendant, and for accounts and inquiries. Martini was adjudicated bankrupt on 18th February, 1928. The defendant, in addition to doing legal work for the bankrupt, had financed him. An account current existed between them. Mortgages securing certain advances were given by the bankrupt to the defendant on 28th April, 1927, 26th August, 1927, and 27th September, 1927. A statement dated 14th October, 1927, relating to the account current, made out between the bankrupt and the firm of Grey & Grey, solicitors, New Plymouth, of which the defendant was a member, was signed by the bankrupt and the defendant as an "agreed statement as correct." The balance shown to be due was £2,312 10s. 1d. No interest was charged in that statement. The bankrupt then executed a memorandum of mortgage to secure the sum of £2,300. The mortgage contained a recital that by an account stated dated 14th October, 1927, agreed on between the mortgagor and the mortgagee, there was owing the sum of £2,300. That recital was incorrect in that the amount shown in the statement was £2,312 10s. 1d. The bankrupt on 31st October, 1927, subscribed the following statement upon an account purporting to be dated 10th October, 1927, and marked "E. & O.E.":—"Account stated I agree that this is a correct statement between Mr. Geo. Grey and myself of the moneys owing to him at 31 Oct., 1927.—H. L. Martini." That statement showed a debit on 23rd August, 1927, of £109 in lieu of £100 for the same item in the previous statement. The statement of 31st October, 1927, showed a debit balance of £2,373 15s. 9d. on the account current, and that was represented by the previous amount of £2,312 10s. 1d. plus an additional advance of £10 on the 22nd October, and items charged for interest on the various sums advanced. The defendant did not prove in the bankruptcy, but elected to stand on his securities. The bankrupt was publicly examined on the 29th January, 1929. At his examination he stated that the defendant did not produce any statement of accounts to him when he signed the mortgages in April and September, 1927. He admitted that he gave an unregistered mortgage to the defendant on 14th October, 1927, which showed the defendant's debt at £2,300 but swore that he was not shown any statement of accounts at that date. He said that he had made a rough account between the defendant and himself showing that the sum of £2,300 was owing by him. The defendant claimed that the bankrupt was fully informed of the accounts claimed, that the accounts in question were settled accounts and agreed to as correct.

The account current between the bankrupt and the defendant contained a debit of £150 on 23rd August, 1927, and a debit of £400 on 30th September, 1927. The bankrupt apparently indicated that these were for costs. As to the £150, the bankrupt said that he could not say what the costs would be, that he had no bill for them, and that he had no recollection of agreeing to the sum of £150. As to the £400, he said that he thought he had agreed to that as a lump sum for costs. The defendant said that the bankrupt was fully aware of the debits in the statement as to legal costs and had agreed to same.

The statement of accounts, obtained with difficulty by the Official Assignee from the defendant on 18th July, 1928, explained the two amounts of £150 and £400 as further advances by the defendant to the bankrupt to enable the bankrupt to settle costs due, under lump sum agreements, to the firm of Grey & Grey. That statement omitted an item of £58 10s. 10d. shown by bankrupt's books to be due by the defendant to the bankrupt, which the bankrupt, at his public examination, said was owing to him in connection with a building for Mr. Grey in Glen Road. He said that the amount might have been paid by cheque, but there was no trace of any such cheque. The defendant denied that this sum was owing. The bankrupt did not seek to re-open the accounts. It was the Official Assignee in Bankruptcy, representing his estate, who did so.

Billing for Official Assignee.
Nicholson for defendant.

SMITH, J., said that the Official Assignee must be treated by the Court as the true representative of the bankrupt's affairs, and, as such, entitled to investigate those affairs irrespective of the bankrupt's present attitude. In His Honour's opinion the rights of the Official Assignee and of the defendant were dependent simply upon the real position which existed between the bankrupt and the defendant prior to bankruptcy. It followed that the Official Assignee was entitled to rely upon any fiduciary relationship which existed between the defendant and the bankrupt.

The plaintiff relied upon the following grounds for the re-opening of the accounts: (1) That the relationship existing between the bankrupt and the defendant was that of solicitor and client, and therefore fiduciary; (2) That the bankrupt was ignorant of the true position of the accounts, and had no proper advice or explanation thereof; (3) That the accounts were in general incomplete and erroneous; (4) That the bankrupt had not received credit for the sum of £58 10s. 0d.; (5) That no agreements existed to show that the sums of £150 and £400 were proper lump sum payments for costs; (6) That the mortgage of 14th October, 1927, was taken for £2,300, whereas the exact amount on defendant's showing was £2,312 10s. 1d.; (7) That interest was not included in the account of the 14th October, and that the account was obviously incomplete at that date; (8) That the accounts were not really settled in that they were marked "E. & O.E."; (9) That the defendant was loath to give any explanation to the plaintiff.

As to the relationship between the parties, it was in His Honour's opinion clear that the transactions took place between the bankrupt and the defendant acting both as his solicitor and financier. The defendant could not separate himself as financier from himself as a member of the firm of Grey & Grey, bankrupt's solicitors. The relationship between the defendant and the bankrupt was a fiduciary relationship.

The next question was as to the position of the accounts between the defendant and bankrupt. It was not easy to regard them as finally settled when they were marked "E. & O.E.," but the proper construction might be that they were so marked until bankrupt had perused them and that they were settled when he signed them as correct. His Honour assumed in defendant's favour that the accounts ought to be treated as settled accounts. An account settled between solicitor and client would be re-opened if sufficient cause was shown: **Lawless v. Mansfield,** 1 D. & War. 557. In **Blagrave v. Routh,** 2 K. & J. 509, Wood, V.C., seemed to have thought that the bare relationship of solicitor and client was sufficient to enable the accounts to be set aside. That view was corrected by Stuart, V.C., in **Morgan v. Higgins,** 1 Giff. 270, where he pointed out that sufficient cause must be shown. **Waters v. Taylor,** 2 My. & Cr. 526, seemed to be an authority for the proposition that as between solicitor and client, where there had been acquiescence in accounts on the client's part for a long period of years (in that case from 26 to 16 years), then there must either be proof of improper dealing on the part of the solicitor, or there must be allegation and proof of sufficient particular errors. His Honour

thought, however, that the true rule for the guidance of the Court in a case such as the present was expressed by the Lord Chancellor in **Lawless v. Mansfield,** 4 Ir. Eq. R. 113, 129.

It was necessary, therefore, to inquire whether, upon the whole, a sufficient case did appear to induce the Court to open the accounts. In His Honour's opinion it did, and for the following reasons :—

(1) With respect to the item of £58 10s. 0d. a *prima facie* case had been made out against the defendant, since there was no explanation save a bare denial to displace the inference to be drawn from the bankrupt's books and his statement at his public examination, or to show how the amount was set off or settled by the defendant.

(2) As to the sums of £150 and £400, his Honour was of opinion that the defendant, treated as the bankrupt's solicitor, ought to be able to show an agreement or agreements sufficient to satisfy Section 26 of the Law Practitioners Act, 1908. That Section referred to an agreement in writing respecting the amount and manner of payment of the whole or any part or future services done or to be done by the solicitor, subject to the provision that if the agreement appeared to a Judge to be unfair or unreasonable he might reduce the amount agreed to be payable under such agreement. His Honour referred to **Morgan v. Higgins,** 1 Giff. 270, and said that an agreement, to satisfy the requirements of Section 26, should show the nature of the arrangement between the parties sufficiently to enable the Court to consider whether the agreement was fair and reasonable, or otherwise. The mere inclusion of the items themselves in a settled account did not, in his Honour's opinion, amount to such an agreement : compare **Pownall v. Stanley,** 22 N.Z.L.R. 922. The present case was very different from the case in which an agreement was formally entered into with proper knowledge on both sides, as in **Stedman v. Collett,** 17 Beav. 608.

(3) It was clear that the recital in the mortgage as to the amount of the settled account was incorrect. The error was in favour of the bankrupt, but an error so generously made might betoken other errors against the bankrupt.

(4) The bankrupt had no independent advice. His Honour thought that he must have been in a serious financial position in October, 1927. It was true that he might have consulted another solicitor, but there was no evidence that he had any independent advice or that defendant ever advised bankrupt to have the accounts perused by an independent party. His Honour referred to **Lawless v. Mansfield,** (*cit. sup.*) at p. 127.

(5) The bankrupt's statements at his public examination showed (notwithstanding the statements in his affidavit) that he had, as a fact, only a hazy idea as to whether the accounts signed by him were really correct or not. An inference which His Honour drew from the foregoing circumstances was that before the execution of the mortgage of the 14th October, 1927, the bankrupt was ready to agree to the accounts submitted by defendant without any proper examination, in the hope that defendant would further assist him.

The next question was as to the nature of the relief to be granted. By reason of the relationship of the parties, and the character of the matters into which the Official Assignee was entitled to inquire, His Honour thought that errors might be expected to appear in all of the accounts : see **Coleman v. Mellersh,** 2 Mac. & G. 309. That being so, did the justice of the case require that the Official Assignee should merely have liberty to surcharge and falsify, or that the accounts should be re-opened ? The present attitude of the bankrupt showed that it would be difficult for the Official Assignee to surcharge and falsify effectively, for the onus would then be upon the Official Assignee to prove his case in respect of each item challenged : see **Daniell's Chancery Practice,** 7th Edn., Vol. I, 420, and **Pitt v. Cholmondeley,** 2 Ves. Senr. 566. That element distinguished the case from that of **Cheese v. Keen,** (1908) 1 Ch. 245, where the client himself was granted only liberty to surcharge and falsify the accounts, in circumstances somewhat similar to those existing in the present case. His Honour referred to **Coleman v. Mellersh,** 2 Mac. & G. 309, at 314, 315, per Lord Cottenham. **Williamson v. Barbour,** 9 Ch. D. 529 was not in conflict with that decision, and in **Gething v. Keighley,** 9 Ch.D. 547, Jessell, M.R., at page 550, expressed his judgment consistently with it. In the present case, the accounting party was the solicitor of the party to be charged, and the circumstances showed, in His Honour's opinion, that the bankrupt was greatly under his influence in all matters of finance. The accounts went back to 1926 only, and it could not be an extensive matter to have them retaken. A solicitor, as an officer of the Court, who had kept proper books of account, should have no real difficulty in complying with such an order. The case was essentially different from that of **In re Webb, Lambert v. Still,** (1894), 1 Ch. 73, where the accounts had been standing for many years. His Honour thought that the accounts should be reopened. An order was made accordingly. Attention was directed to the form of order in **Lawless v. Mansfield** (*cit. sup.*).

Solicitors for plaintiff : **Weston and Billing,** New Plymouth.
Solicitors for defendants : **Grey and Grey,** New Plymouth.

Kennedy, J. February 27 ; March 7, 1929.
Auckland.

BLAIR v. MARTIN.

Solicitor—Principal and Agent—Sale by Clerk of Firm of Solicitors to Client of Firm of Second Mortgage Owned by Clerk—Interest Not Disclosed—Interest in Conflict with Duty—Obligation of Clerk to Whom Matter Delegated Same as That of Solicitor—Sale Set Aside.

Action to set aside a sale of a mortgage upon the ground that the defendant, at the time of entering into the transaction, was in a fiduciary relationship to the plaintiff, and failed to disclose that the defendant himself was the owner of the mortgage sold to the plaintiff. The facts as found by the learned Judge were that the defendant, a senior clerk in the office of Bennett and Jacobsen, a firm of solicitors, was, in 1925, required to find a suitable investment for the plaintiff, a client of that firm. His principals had been accustomed, for 18 months prior thereto, to delegate to that clerk the plaintiff's legal work. The defendant offered to the plaintiff a second mortgage owned by himself and recommended that second mortgage as a good and sound investment, without disclosing to the plaintiff the fact that he himself owned such second mortgage. No transfer of the second mortgage was executed, nor was there any record of any such transfer having been prepared. The defendant, nevertheless, when he knew or ought to have known that no transfer had been completed by him, caused £360 of the plaintiff's moneys in his principal's trust account to be applied to his own purposes.

Interest was collected on the second mortgage by Bennett and Jacobsen and paid out by them to the plaintiff until January, 1927. The interest then fell into arrear. On 30th September, 1927, the first mortgagee sold the property subject to that mortgage through the Registrar of the Supreme Court and bought in at the estimated value and the second mortgagee lost thereafter his charge upon the land. The defendant in his evidence stated that he discussed with the plaintiff the action which the first mortgagee proposed to take and advised the plaintiff not to take over the first mortgage. In January, 1928, Mr. Bennett and the plaintiff became aware for the first time that the second mortgage, which the defendant had purported to sell to the plaintiff, was a second mortgage owned by the defendant himself.

Sellar for plaintiff.
Mackay for defendant.

KENNEDY, J., in these circumstances held that the plaintiff was entitled to have the transaction set aside. He would be entitled to that relief, whether in procuring a suitable investment Bennett and Jacobsen were acting as solicitors for the plaintiff, or whether they were acting merely as agents and not as solicitors. The plaintiff, because of where he found the defendant and because of his past associations with him as a clerk in the employ of Bennett and Jacobsen, reposed confidence in him. In his Honour's opinion the defendant, when he proceeded to submit investments to the plaintiff, was in a fiduciary relationship to the plaintiff and his relationship to the plaintiff was, under the circumstances, none the less fiduciary because he was a clerk in the service of Bennett and Jacobsen. When the defendant was requested to find a suitable investment for the plaintiff, he was in fact instructed as a member of the staff of Bennett & Jacobsen ; and when he sold his own mortgage, without disclosing his interest, he was guilty of a breach of duty, and none the less because he was a clerk, and not a principal. If the defendant had been merely an agent to find an investment, he could not, without breach of duty to his principal, have sold his own property without disclosing his interest. He could not be allowed to assume a position in which his duty to his principal, and his own self interest might conflict. In the present case it appeared that the defendant was desirous of realising his second mortgage ; and he had every motive of self interest to represent that mortgage as a good and sound investment, although in the events which had happened, there might be

some doubt whether the investment really was a good and sound one.

The defendant had pleaded that when he offered the second mortgage for sale, his act was that of his employers; but if it would have been improper for Bennett and Jacobsen, without disclosing their interest in a mortgage, to sell it to their client, who had required them to procure a suitable investment, it would be equally improper for a senior clerk, to whom they delegated the work of procuring and recommending a suitable investment, to sell his own mortgage without disclosing his interest. The defendant even though a clerk in Bennett and Jacobsen's employ should not, without the fullest disclosure, assume towards the plaintiff a position in which his own interest might conflict with his duty to his employers and to the plaintiff. The general rule was that no agent was permitted, as such, to enter into any transaction in which his own interests conflicted with his duty to his principal, unless the principal, with a full knowledge of the nature and extent of the agent's interest, assented thereto; and that where a transaction was entered into by an agent in violation of that rule, his non-disclosure would vitiate the transaction, however fair it might have been in all other respects. The reasons for the rule were explained by Lord Langdale, M.R., in **Gillett v. Peppercorne,** 3 Beav. 78, 83. His Honour also referred to the observations of Lord O'Hagan, in **McPherson v. Watt,** 3 App. Cas. 254, 266, and of Lord Parmoor in **Demerara Bauxite Co. v. Louise Hubbard,** (1923) A.C. 673, 681, where the need for *uberrimae fides* and for the absence of any conflict of duty and interest were discussed with reference to the special relationship of solicitor and client. Those cases each rel ted to a purchase by a solicitor from his client, but the same considerations which there applied also applied to a sale by a solicitor to his client. The obligations of a clerk in the services of a solicitor, to whom the solicitor had delegated a matter or to whom the solicitor's client went direct, were no less in the matter upon which the clerk proceeded than the obligations of the solicitor: **Hobday v. Peters,** 28 Beav. 349. The solicitor's clerk would in those circumstances, although there was no privity of contract between him and the client, stand in a fiduciary relation to the client—**Powell and Thomas v. Evan Jones and Co.,** (1905) 1 K.B. 11—and therefore would be bound before selling his own property to the client to make full disclosure to him. The sale of the second mortgage by the defendant to the plaintiff was, therefore, set aside. Judgment for plaintiff.

Solicitors for plaintiff: **Sellar, Gardiner and Bone,** Auckland.

Solicitors for defendant: **Stanton, Johnstone and Spence,** Auckland.

Kennedy, J. February 25; March 27, 1929. Auckland.

HOLY TRINITY (OTAHUHU) PARISH TRUST BOARD v. GENERAL TRUST BOARD OF THE DIOCESE OF AUCKLAND.

Charitable Trust—Cy-pres Doctrine—Funds Held Upon Trust for Erection of Church in Accordance with Provisions of Trust Deed—Church Not Being Erected in Accordance with Provisions of Trust Deed—Not Impossible to Carry Out Provisions of Trust Deed—Mere Inexpediency—Some Provisions Not Mere Matters of Detail—Cy-pres Doctrine Not Applicable—Possible Remedy under Section 15 of Religious, Educational and Charitable Trusts Amendment Act, 1908, and Section 5 of Amendment Act of 1928.

Originating summons issued by plaintiff to determine whether the defendant should pay a certain fund held upon the trusts declared in a trust deed towards the cost of building a new church being built in Otahuhu, although the provisions and conditions of the said deed had not been wholly complied with. In 1907 a sum of £242 10s. 0d. had been subscribed in the Parish of Otahuhu with the object of establishing a fund for the building of a new church. That sum was paid to the defendant Board and that body duly declared the trusts on which that sum was held. The trust deed provided that the defendant should stand possessed of the trust fund "for the erection and furnishing of a permanent church in Otahuhu in lieu of the present Parish Church of Holy Trinity." It provided that the new church was to be capable of seating at least 350 persons, to be built of brick, stone, or other material of a permanent nature, as a complete building, and not as part of a building, and at a cost of not less than £3,000. The building of the new church was, however, not to be commenced until at least two-thirds of the cost of the building and furnishings was available out of the trust fund. There were also provisions to the effect that the erection of the new church should be proceeded with and the fund be available when the building committee had decided on the erection of a new church, given notice to the defendant, called for competitive designs and specifications, decided upon a design and specifications, and given notice thereof to the defendant. The new church was to be erected under the supervision of a duly qualified architect under the control and management of the building committee, through whom the defendant was to pay all moneys as the building progressed. The building committee was to consist of seven members and special provision was made in the deed for the election and retirement by rotation of members of the building committee. The trust deed was mislaid and a new church was commenced and almost completed before the trust deed was discovered. The new church was, in fact, being constructed on the site of the old church. It would hold 400 adult members. It was built as a complete building, with materials of a permanent nature, and its cost would exceed the minimum laid down by the trust deed. Owing to ignorance of the provisions of the trust deed, however, its provisions had not been wholly complied with. The new church was commenced before two-thirds of the cost of such building and furnishings was available out of the trust fund. The cost of the new building and furnishings was £7,749 10s. 6d., whereas the trust fund amounted to £912 4s. 2d. The building committee consisted of thirty-three, and not seven, members and no provision had been made for retirement by rotation in manner provided by the trust deed. Competitive designs were not called for. The defendant was not notified, although it was in actual fact aware, of the steps being taken by the plaintiff to erect the new church.

Rose for plaintiff.

Cocker for defendant.

KENNEDY, J., said that it was admitted that all the terms of the trust deed had not been complied with and particularly the provision that the building of the new church should not be commenced until at least two-thirds of the cost of such building and furnishings was available out of the trust fund. The conditions of the trust deed had not, therefore, been literally complied with and the trust fund could not, in conformity with the trust deed, be applied towards the building of the new church being erected.

Counsel for the plaintiff urged that the main object of the trust was the building of a new church at Otahuhu and that the other provisions of the trust deed were subsidiary to that object, and that, the subsidiary object having become impossible, the main object should be carried out by payment of the trust fund to the building committee erecting the new church. His Honour was not prepared to say that the conditions attached to the payment of the trust fund had become impossible. His Honour apprehended that it might still be possible for all the conditions of the trust deed to be complied with, although it might, under the circumstances, be inexpedient the all the conditions be insisted on. Counsel for the defendant submitted that His Honour should apply the doctrine of *cy-pres* as laid down by Arden, M.R., in **Attorney-General v. Boultbee,** 2 Ves. Jun. 379, 387. If His Honour were satisfied that the church being erected, and no other, was the church referred to in the trust deed, so that the general intention would be attained, but that the general intention would be frustrated unless the conditions, not complied with, were modified or removed, His Honour should, if those conditions were mere matters of detail, be prepared to modify or remove them on the present application: **In re Robinson,** (1923) 2 Ch. 332. Several of the conditions not complied with might well be treated as being mere matters of detail to be dealt with on this application, without a scheme being prepared. But the condition that the fund was not to be dealt with until it reached two-thirds of the cost of the building and furnishings—in the present case £5,166 7s. 0d.—whereas it stood at £912 4s. 2d., was not a condition which, in the circumstances of the case, should be treated as a mere matter of detail not necessitating a scheme. His Honour thought, therefore, that he should do no more on the present application than interpret the trust deed, leaving it to the parties, if they were so advised, to seek authority for the proposed payment of the trust fund under Section 15 of the Religious Educational and Charitable Trusts Act, 1908, as amended by the Religious Educational and Charitable Trusts Amendment Act, 1928, which enabled property, held for a particular purpose of a charitable nature, to be applied *cy-pres* not only when it became impossible or impracticable, but also when it became merely inexpedient to carry out the trusts upon which that property was held.

Solicitors for plaintiff: **Jackson, Russell, Tunks and West,** Auckland.

Solicitors for defendant: **Hesketh, Richmond, Adams and Cocker.**

Second Annual Legal Conference

HELD AT WELLINGTON, 3rd, 4th and 5th April, 1929.

FULL REPORT OF PROCEEDINGS AND PAPERS.

The Second Annual Legal Conference was held at Wellington in the Conference Hall of the Dominion Farmers' Institute Building, on Wednesday, Thursday and Friday, the 3rd, 4th and 5th April. A full report of the proceedings and of the papers read is published below.

The Committee constituted by the Council of the Wellington District Law Society to take charge of all arrangements with regard to the Conference consisted of: Chairman, Mr. C. G. White (President, Wellington District Law Society), Conference Secretary, Mr. W. E. Leicester; Committee, Messrs. A. Gray, K.C. (President New Zealand Law Society), M. Myers, K.C.; H. H. Cornish, H. E. Evans, L. H. Herd, H. F. Johnston, P. Levi, M. M. F. Luckie, A. J. Mazengarb, H. F. O'Leary, D. Perry, W. Perry, F. C. Spratt, C. A. L. Treadwell, H. F. Von Haast, G. G. G. Watson, and A. A. Wylie.

The following list of members attending the Conference is taken from the signed Roll Book, but it is quite possible that some practitioners attended the Conference without so recording their names.

Auckland District Law Society.

O. W. Bayly
W. H. Cocker
N. E. Crimp
M. M. Flynn
A. H. Johnstone
C. T. Keegan
D. J. Kerruish
M. G. McArthur
T. W. McCown
J. Stanton
R. P. Towle
F. L. G. West
R. L. Ziman

Canterbury District Law Society.

P. P. J. Amodeo
D. Bates
E. S. Bowie
G. S. Branthwaite
A. C. Cottrell
J. Dolph
A. T. Donnelly
M. J. Gresson
W. M. Hamilton
W. J. Hunter
J. D. Hutchison
W. B. T. Leete
A. D. McRae
D. S. Murchison
C. V. Quigley
A. S. Taylor
C. S. Thomas
R. Twyneham
D. E. Wanklyn
H. C. D. van Asch
W. A. White
F. S. Wilding
A. F. Wright

Gisborne District Law Society.

J. Blair
D. E. Chrisp
F. W. Nolan
J. G. Nolan
G. Bradley Smith

Hamilton District Law Society.

H. D. C. Adams
H. J. Ferguson
H. M. Hammond
E. M. Mackersey
J. Reid
D. Seymour
W. Tudhope

Hawke's Bay District Law Society.

W. E. Bate
C. V. Chamberlain
H. de Denne
C. Duff
E. T. Gifford
E. J. W. Hallett
C. G. E. Harker
H. Holderness
F. P. Kelly
D. B. Kent
I. L. Kight
V. J. Langley
A. E. Lawry
H. B. Lusk
A. H. D. Mayne
W. J. McKay
J. Morling
S. H. Morrison
H. R. Moss
T. E. O'Dowd
E. Sandeman
E. V. Simpson
C. C. Sorrell
W. G. Wood

Marlborough District Law Society.

W. T. Churchward
R. Gibson
A. C. Nathan
C. T. Smith

Nelson District Law Society.

C. R. Fell
J. P. Hayes
S. H. Moynagh
W. Nicholson
W. R. S. Owen
W. V. Rout
G. Samuel

Otago District Law Society.

F. B. Adams
C. B. Barrowclough
H. L. Cook
E. A. Duncan
A. James
A. C. Stephens
W. D. Taylor
A. H. Tonkinson

Southland District Law Society.

F. G. Hall-Jones
H. J. Macalister

Taranaki District Law Society.

A. G. Anderson
A. Coleman
T. B. Crump
W. C. Deem
A. C. Fookes
L. C. Hughes
R. C. Hughes
R. V. Kay
S. Macalister
W. Middleton
C. Monaghan
L. M. Moss
W. H. Moss
I. W. B. Roy
G. H. Sheat
G. M. Spence
L. A. Taylor
P. Thomson
R. R. Tyrer
C. White

Wanganui District Law Society.

A. A. Barton
M. C. Barton
A. D. Brodie
P. M. Brooker
C. P. Brown
C. S. Brown
F. J. Christensen
L. Cohen
G. W. Currie
C. L. Curtis
W. A. Izard
H. M. Keesing
R. Mackay
W. H. Maclean
E. O. Murray
V. B. Willis

Westland District Law Society.

J. J. Molony
L. E. Morgan
I. Patterson
A. A. Wilson

Wellington District Law Society.

Prof. J. Adamson
H. E. Anderson
C. H. Arndt
A. H. Barnett
M. O. Barnett
C. O. Bell
C. W. D. Bell
J. R. E. Bennett
J. D. Brosnan
W. B. Brown
R. C. Burton
J. W. Card
T. P. Cleary
F. T. Clere

Prominent Personalities at the Conference

The HON. T. K. SIDEY.
Attorney-General

MR. A. GRAY, K.C.
President of New Zealand Law Society,
Chairman of the Conference

MR. C. G. WHITE.
President of the Wellington District Law Society,
Chairman of the Conference Committee

MR. W. E. LEICESTER.
Conference Secretary

Photos by S. P. Andrew

P. B. Cooke
H. Cooper
H. H. Cornish
F. J. Courtney
A. B. Croker
M. J. Crombie
W. H. Cunningham
A. E. Currie
H. H. Daniell
D. M. Dickson
Mrs. Annie Down
A. T. Duncan
A. M. Dunkley
H. E. Evans
A. Fair, K.C.
Sir J. G. Findlay, K.C.
A. W. Free
J. J. Garbett
J. Graham
F. C. Grant
J. A. Grant
F. Grogar
E. P. Hay
W. Heine
L. H. Herd
E. Hogg
D. R. Hoggard
F. Holdsworth
D. Jackson
P. W. Jackson
H. J. V. James
M. B. James
H. F. Johnston
E. A. R. Jones
T. Jordan
A. G. Jorgensen
H. Jowett
P. Keesing
W. E. Leicester
P. Levi
M. M. F. Luckie
A. J. Luke
A. K. S. Mackenzie
F. M. Martin
T. F. Martin
J. Mason
A. J. Mazengarb
O. C. Mazengarb
H. McCormick
F. E. McDonald
J. J. McGrath
G. I. McGregor
H. McIntyre
H. McSherry
A. R. Meek
J. Meltzer
T. G. Morgan
M. Myers, K.C.
G. A. Nicholls
C. W. Nielsen
H. F. O'Leary
P. J. O'Regan
E. Parry
J. T. Paul
J. C. Peacock
D. Perry
W. Perry
W. B. Rainey
H. C. Robinson
R. R. Scott
A. B. Sievwright
E. S. Smith
G. H. Smith
F. C. Spratt
S. G. Stephenson
Rt. Hon. Sir R. Stout
G. H. Swan
C. W. Tanner
G. Toogood
L. A. Tracy
C. A. L. Treadwell
C. H. Treadwell
C. W. Tringham
C. G. Turner
J. W. Ward
G. G. G. Watson
R. H. Webb
C. G. White
J. D. Willis
E. C. Wiren
S. A. Wiren
A. A. Wylie

FIRST DAY.

Wednesday, April 3rd, 1929.

MR. C. G. WHITE (President of the Wellington District Law Society) in welcoming members, said he regretted to announce that His Excellency, the Governor-General, who was to have opened the Conference at 11 a.m., would not be present until after noon, owing to the fact that the train by which he was travelling from Auckland had been delayed. He was pleased to say that the Conference was privileged to have the presence of the Rt. Hon. Sir Robert Stout. That gentleman's presence showed the keen interest he still took in matters relating to the profession. He proposed to move that Mr. A. Gray, K.C., President of the New Zealand Law Society, who acted as Chairman at the previous Conference held in Christchurch, should be elected Chairman on the present occasion.

The motion was seconded by MR. M. M. F. LUCKIE, and carried unanimously.

MR. A. GRAY, K.C., then took the chair.

THE CHAIRMAN, addressing the Conference, said: It gives me very much pleasure to meet you all again a . to see some new faces. I hope the Conference will be as successful as that held in Christchurch, and I also hope the weather will improve considerably before we disperse. We are obliged to alter the order of proceedings a little in consequence of the delay to the train by which His Excellency the Governor-General is travelling. As Mr. White has already told you, His Excellency cannot be here till the afternoon, and in the meantime I will ask the Hon. Mr. Sidey, Attorney-General, to give us his inaugural address, for which he has chosen the title, "Legal Education."

INAUGURAL ADDRESS.

(The Attorney-General).

THE HON. T. K. SIDEY (Attorney-General) then read the following inaugural address on the subject of "Legal Education":—

INTRODUCTORY.

The first thing I wish to do is to express my grateful acknowledgements to the Conference for its kind reception, and, at the same time, to express my thanks to the Chairman for his having, in his capacity as President of the New Zealand Law Society, already waited upon me and offered me the assistance of the Society in the discharge of my duties as Attorney-General. I hope to be able to secure the goodwill and confidence of the profession.

I desire also to thank those who are responsible for organising this Conference for the honour of the invitation to deliver the inaugural address. I congratulate the Conference Committee and the Conference itself upon the large and representative attendance, which must mean that the success of the Second Annual Conference is already assured.

The subject on which I propose to speak to you is one about which there is room for difference of opinion. It is one upon which finality has not yet been, and possibly may never be, reached because of changing conditions, but its great importance both to the profession and to the public is my excuse for venturing to say a few words to you to-day on the question of legal education.

EDUCATION IN OTHER PROFESSIONS.

Before addressing myself directly to the question of education in the profession of law, let me draw your attention to what has taken place in other professions.

There was a time when those who desired to qualify for the profession of medicine apprenticed themselves to a medical practitioner in active practice. Apprenticeship in this profession has long since been superseded by training in a medical school, and no one to-day would dream of going back to the old conditions. In the dental profession, legislation was first passed in this country in 1880, and from that time till 1904 the mode of qualifying for the profession of dentistry was by apprenticeship, followed by an examination. I am very familiar with what took place in 1904 and with the conditions then existing in the dental profession and the necessity for legislation because the Dentists Act of that year (which, with only slight amendments, still remains the law of the country) was prepared and introduced as a private member's Bill by myself. The effect of the Act of 1904 was to abolish apprenticeship in the dental profession and substitute a School of

Dentistry for the purpose of both theoretical and practical instruction.

In the profession of engineering, apprenticeship has almost, if not quite, disappeared, and it is fast disappearing in the profession of architecture. The School of Engineering at Canterbury College provides a full course for the degree of Bachelor of Engineering and a partial course is given at Auckland University College. A School of Architecture has recently been established at Auckland. In the case of both of these professions, however, the University, before granting a degree, requires evidence of practical experience in addition to the instruction given in the school. In mechanical and electrical engineering students must have spent 18 months in approved workshops ; and in civil engineering 9 months in workshops and 9 months under a civil engineer in actual practice. A candidate for the degree of Bachelor of Architecture must have been engaged for at least 12 months in practical work in an architect's office.

The same feature of professional education may be further illustrated by what has taken place in the case of our public school teachers. At one time the teacher had to serve a four years' pupil-teachership. Pupil-teachership has been abolished, and to-day a probationer, although he spends his first year in the Public Schools, has not the same responsibility as the pupil teacher had, and his two subsequent years are spent at a training college, where he gets practical teaching experience in certain schools associated with the College for that purpose. Under the new system the teacher will not acquire his educational experience to the extent that he formerly did at the expense of his pupils. This trend of education is going beyond the professions. It is extending to the trades. In some countries trade schools, both for theory and practice, have already superseded apprenticeship with satisfactory results.

Considerations Suggested by this Trend of Education.

There are certain considerations which are suggested by this trend of education to which I have been directing attention. The following are some of these considerations :—

(1) The protection of the public. It is in the public interest that measures should be taken to ensure that those who hold themselves out as capable of undertaking certain services are able to render them efficiently. The justification for the institution by the State of a register and a qualifying test of the fitness of those whose names are to be therein recorded is that the public may be protected from being imposed upon by persons who have not the qualifications which they profess to have, and who gain their experience at the expense of those who employ them.

(2) The business of a private practitioner in any profession is not carried on for the purpose of training or teaching students or apprentices. A satisfactory training may be obtained under one practitioner, but a very indifferent training under another. The practical experience acquired may depend, not only on the amount and nature of the business done, but upon the opportunities offered to the student. Mere length of time in the service of a practitioner is not necessarily a measure of the experience acquired. The student may be kept for an unreasonable length of time on quite unimportant duties, or on one class of work ; nor can knowledge of practical work always be satisfactorily tested by written examinations.

(3) It is because such disabilities as I have mentioned attach to service under a private practitioner that the State, having set up a register for the protection of the public, has, in the public interest and at the public expense, taken, in the professions above mentioned, the further step of substituting for apprenticeship training in schools specially equipped and adapted for the purpose both of theoretical and of practical instruction.

(4) Whenever proposals are made regarding the privileges of those who are on, or are to be placed on, a register, and especially regarding the qualifications for registration, the cry of "close corporation" is almost invariably raised. There might be some justification for objection on that ground if it were proposed to make distinctions on account of sex, class, or creed, or if it were proposed to place artificial restrictions on the number of new entrants, or even where it could be shown that the proposals imposed on new entrants unnecessary expense, but objection on that ground cannot be justifiably taken where the only test of entrance to a profession is one of ability. It is true that qualification at a school may increase the expense of entering a profession, especially to those who have to leave home to attend the school, but, on the other hand, this country is liberally endowed with free places at our secondary schools and bursaries and scholarships for those attending our University Colleges, and it has to be remembered that in former times high premiums were frequently paid for apprenticeship to private practitioners.

Analogies in the Legal Profession.

Let us now turn our attention to education in the profession of law. In comparing what has taken place in the legal profession with what has taken place in other professions, the first point of analogy that I shall mention is this : in every case where legislation has been passed instituting for the first time a register of members of a profession, provision has always been made for persons who are then actually in business being placed on the register without examination. It was as far back as the year 1844 that the Supreme Court of New Zealand was established. A Supreme Court Ordinance in that year enacted that persons entitled to practise before the Court as barristers or solicitors included those who had then established themselves in practice.

The next point of analogy is that, just as in the case of other professions, there was a stage when a knowledge of the principles and practice of the profession was obtained by apprenticeship to a private practitioner, so in the case of law a system of apprenticeship or contract of service as a clerk in the office of a legal practitioner was imposed as a statutory condition of admission to the Bar.

It is at the next stage that the analogy ceases. In the case of other professions, when apprenticeship was discontinued, it was the system of training in a school that took its place, and provision was made to ensure that students were trained in the practice as well as the theory of their profession ; but, in the case of law, when in 1882 apprenticeship (or the system of articles) was abolished, nothing was done to provide that those who were to be admitted as qualified to practise law should have had any previous experience in the practical work of their profession.

The Act of 1882 prescribed two modes of entering the profession for persons resident in New Zealand. The first by passing such an examination as may be prescribed by the Judges ; and the second, by taking the LL.B. degree of the New Zealand University.

With regard to the first mode, the words of the statute have never been construed, and I think rightly, as entitling the Judges to require as a condition of admission to the profession evidence of having served for any period in the office of a practising lawyer.

Law Schools and Practical Instruction.

With regard to the other mode of admission—that by obtaining the University degree—I propose at this point to discuss the question whether it is possible in a school of law to give the student as efficient training in the practical work of his profession as he can get in a lawyer's office.

So far as conveyancing is concerned, I do not see how that question can be answered otherwise than in the affirmative. It should be possible in a law school to give a more systematic, thorough and comprehensive training in the drawing up of documents of all kinds and in office work generally than can ordinarily be given in an office. As regards the Common Law Branch of legal business, there is one respect in which the school has the advantage over the office. Not only is it possible for the school to instruct the student in the preparation of cases for trial, but it can also train him in the conduct of his case. The office does not give the student any experience in conducting cases in Court, for the simple reason that the law does not permit him to practise in Court until after it certifies that he is qualified to do so. Practice in Court is and always has been in this country of necessity acquired more or less at the expense of the public, and no doubt in greater degree where the student commences to practise on his own account the moment he is admitted, even although he has had office experience, because in such cases he is without the probable assistance and advice of an older member of the office staff.

In a large office where a clerk has shown special aptitude in one branch, say that of conveyancing, it will be to the interest of the practitioner to keep him there. He may get little experience at Common Law work, and, speaking generally, the lawyer's office is subject to the same disabilities as those to which I have referred when speaking of other professions.

On the other hand, there is one respect in which the school is at a disadvantage as compared with the office in giving the lawyer his practical training. Medical and dental students come into touch with humanity and get their practical experience in either public hospitals or a hospital attached to and under the same control as the school, but in the law school the student does not come into touch with the public. In the conveyancing department of an office he meets clients from whom he receives instructions and whom he interrogates to elicit all the information he requires. In the Common Law department, if given the opportunity, he interrogates those who are to give evidence in the Courts, and from such interrogation forms his estimate as to their credibility.

Law Schools in the United States.

To judge of the value of training in a law school the country from which we shall learn most is the United States. As far back as forty years ago the late Lord Bryce, when writing on the Commonwealth of America, referred to the laxity that then existed in the admission of lawyers to practice. Since that time a great deal has been done and is being done by the American Bar Association, through its Council of Legal Education in conjunction with the Association of American Law Schools, to raise the standard required for admission. Even forty years ago, however, Lord Bryce expressed the view that the level of legal attainment in some cities of the United States was as high as, if not higher than, among either the barristers or the solicitors of London, and attributed this fact to the extraordinary excellence of many of the law schools. "I do not know," he said, "if there is anything in which America has advanced more beyond the Mother Country than in the provision she makes for legal education."

I have in my possession a catalogue of the Yale School of Law of thirty years ago. The syllabus, even at that time, included practical instruction in conveyancing and pleading. The student was required to draft contracts, wills, and documents relating to transactions in real property. Further, to quote from the catalogue: "Public Moot Courts are regularly held, at which one of the professors presides as judge, and the students, acting as counsel in the argument of cases, are required to draw the necessary pleadings according to Common Law or Equity forms, as the case may be. Occasionally, also, cases are tried by students before a jury of their own number in a court regularly organised with a full complement of judicial, clerical and executive officers, where the proceedings are conducted in the same manner as in ordinary courts of law." Among the elective subjects were commercial accounts with practical instruction in book-keeping, and also elocution, lectures and practice. To-day the syllabus includes the subjects of legal ethics and legal bibliography. Even in the early period a good deal of the work in the classes consisted of questions and answers and discussion. To-day instruction is almost wholly conducted by the use of what is known as the Case System, to which I shall refer later. All students may be called upon to serve either as witnesses or jurors in the practice courts.

Opinions Regarding U.S. Law Schools.

A test of the work of the law school may be made by ascertaining whether the student immediately on his graduation is competent to and actually does take such a position as that of *locum tenens* for a practising lawyer. Graduates direct from the medical and dental schools frequently take such positions. To elicit information on this point I addressed a note to those in control in some of the American schools of law. The replies received were of a general nature. The Registrar of one school of law writes:—

> "I doubt whether a student immediately upon graduation from the law school is ever fully qualified to practise law. As is true in most other professions, a certain amount of experience is desirable, depending upon the individual case."

A Professor in another school writes:—

> "In the courses of study provided there is included a year in legal bibliography, use of law books and brief making, these courses demanding two hours' recitation and discussion each week in addition to the preparation for the same. Further, in the last year the student is required to take three credits in procedure in civil actions, and conducts trials by jury and appeal in a Moot Court under the direct supervision of a professor in charge of the practice course. As the courses in Common Law pleading, code pleading, and evidence are completed in the first and second years and these practice or procedure courses are conducted pursuant to the statutes and general law relating to trials, it is apparent that

the student gets an organised and systematised training not possible in the haphazard experience of an office in years . . . . The modern tendency is clearly in the direction of offering practice courses in the law schools as they have become convinced that the organised trading in a law school is more efficient and economical than the loose and scattered training in an office. In other words, the same justification exists for these courses as exists for the law school offering a training in substantive law rather than in the office."

"Our graduates usually have little difficulty in the office practice. This has been borne out by observations of the students who have directly entered the practice from the law school."

My correspondent, however, goes on to say that many students contemplate entering offices after graduation, and adds :—

"It must be admitted that as education generally is experience, there are many things in the experience of practice, such as contact with the public and the Court, that can only be secured subsequent to the formal education of the law school."

The Secretary of Harvard Law School is clearly of the opinion that the graduates of the school are well qualified to practise on graduation. He states that they are sought after before graduation and receive fair salaries from the start. He writes as follows :—

"I may say that the leading law offices in all parts of the country apply to us for men in the graduating class as early as December, and practically all of our men are placed for the subsequent year before they receive their degrees, and take up the work immediately after. They receive salaries of from $1,200 to $2,400 for the first year, with assurance of a sustantial advance the following year."

In America the requirements for admission to the practice of law vary in different States. In some cases legal preparation is obtained entirely in a law school, in other cases either partly in a law school and partly in an office or entirely in an office. In most cases there is a professional examination other than that conducted by the University, but in some States graduates of certain law schools are exempted from this examination. Exception has been taken to this, but not on the ground of want of office experience, but on the principle that every candidate for admission should pass an examination by a body other than the faculty of the school of which he is a graduate. One correspondent considers that "the practice of preparing for the law by study and work in a lawyer's office is obsolete in the United States."

Law Schools in New Zealand.

Having glanced at the work of the law schools in the United States, let us now turn to the law schools in New Zealand. On the passing of the Law Practitioners Act, 1882, which recognised the LL.B. degree as sufficient qualification for admission to practice both as a barrister and a solicitor, little, if anything, was done by the University Colleges to organise law schools so as to give students training in the practical work of their profession, and teaching was limited to one or two subjects. About twenty years later the Government (by making special grants in aid) decided in effect that each of the Colleges should specialise in certain branches of study and that specialisation in law should be undertaken by Wellington. Little more, however, was done at Victoria College than the establishment of two professorships. Even if the law school at Victoria College had at that time been organised for the purpose of meeting all the requirements of a practising lawyer, it is doubtful whether it would have been practicable to oblige all students to take even a portion of their course at Wellington, although, no doubt, Victoria College would under such circumstances have attracted many students from other centres.

In recent years a good deal more has been done by the schools of law to equip students for the practice of their profession. Lectureships have been established in every subject of the LL.B. degree course, including conveyancing and procedure, and the students are given practical work to do in both of these subjects. In the Auckland School there has been since 1925 for degree students a course extending over three years in conveyancing and advocacy. Book-keeping is prescribed as a subject for the professional course in law. Why it has not been also included as a subject for the degree course I am unable to understand. A knowledge of book-keeping is not only required for the carrying on of a lawyer's own business, but he requires it for general purposes. Every practising lawyer may at any time be called upon to examine the books of third parties, as in cases of insolvency and in disputes arising out of commercial transactions. Notwithstanding what is now being done in our schools of law, it will not be contended that they do yet adequately equip the legal practitioner for the practical work of his profession. Students on graduation without office experience cannot command situations in law offices to-day, but frequently find themselves in a somewhat difficult position in seeking to acquire such experience after they have attained adult age.

Practical Politics.

If it is conceded that it is possible for a law school to give adequate practical training the logical and ideal course is to equip just as many schools as the conditions and circumstances of the country demand, and if the time is not ripe for the equipment of more than one school, then only one should be organised. The question, however, must be regarded from a practical point of view. There are to-day four schools of law. It is not practicable to-day to require either that all law students must take their training in one school, or even in two schools, or that the Government should find funds to fully staff, organise and equip all four schools. Until, therefore, the time comes for the equipment of the four schools, whether by the Government or as the result of private benefaction, it appears that legal education will be defective in that it does not make sufficient provision for practical training. Having arrived at that conclusion, you will naturally ask me whether I have any proposal to make. May I put this question to the Conference : Does the legal profession not consider that the time has now arrived, if it is not long overdue, for this profession to follow those of medicine and dentistry by eliminating the dual authority that controls the standard of admission to the profession of law and by placing in the hands of the New Zealand University the sole control of the legal course ? If the University were given sole responsibility for the training of our practising lawyers it would, no doubt, take such steps as it thought sufficient to ensure that those who were qualified to practise furnished some evidence of practical experience insofar as that could not be obtained in the schools of law,

just as it does now in the case of engineering and architecture. The above step would be the more easily taken because all the examinations required for entering the legal profession are now conducted by the University. The restrictions due to school location would not be nearly so great as in the case of medicine and dentistry. In each of these cases, and also in the case of engineering and architecture, there is only one school in the Dominion giving the full course, whereas in the case of law there is a school in each of the four large centres. If the scheme here suggested were given effect to it would at the same time be desirable to make provision for a qualification for admission by University certificate or diploma that need not be of the same standard as that of a degree.

My proposal may be summarised as follows :—

(1) That the University should have the sole responsibility of determining the educational qualifications of candidates for admission to the legal profession.

(2) That the University Colleges would undertake the training of law students in theory and practice, and it would be for the Council of the New Zealand University to prescribe what additional practical experience (if any) in an office would be required, and

(3) That the Judges or the Court would still retain the right to approve or disapprove of applicants on other than educational grounds.

In submitting this proposal I ought to explain that it emanates solely from myself. It has not been made to me by anyone, nor have I discussed it with any member of the Ministry. I have no authority to make it on behalf of the Government, but do so entirely on my own responsibility. What is the alternative to this proposal? I do not consider the reversion to articles as within the domain of practical politics. The most that might be asked for is that authority should be given to the Judges to require a minimum of three years' service in the office of a practising lawyer subsequent to passing the general knowledge examination. The proposal to make such a condition statutory may arouse opposition, and it appears to me to be more likely to do so than the course which I suggest, and which, therefore, in my opinion, offers a greater prospect of being acceptable to Parliament. Such an amendment of the law may prove of great value. But let me remind the Conference that there is not the remotest chance of securing such legislation unless there is absolute unanimity in its favour on the part of Bench and Bar.

Before concluding this address there are two matters to which I should like to refer—both of them are relevant to my subject. The first is the "Case Method," or system, of instruction. This system is contrasted with what may be called the text-book system, which it has superseded in all the leading law schools of America. By way of explanation, it is pointed out that the rules and principles of law set forth in the text-books are very largely based upon the opinions of the Judges in decided cases. Instead of teaching these legal principles and referring students to the cases illustrating them, the reverse process is adopted. Cases are studied and discussed in the class, and rules and principles of law are deduced from them. The system originated in the Harvard Law School, and I shall quote from some of their publications in further explanation of the system. One quotation reads as follows :—

"An epoch-making event, not merely in the history of the Harvard Law School, but in that of legal instruction in the country at large, was the appointment, in 1870, of Christopher Columbus Langdell as Dean of the School. Before his administration eminent jurists had taught the students by lectures supplemented by the study of legal treatises. Professor Langdell, though bred under this system, saw that, while it might give in easily accessible form such principles of law and practice as could be specifically formulated, it did not give training, and therefore facility in the actual methods of the best legal practice. Professor Langdell introduced into his own courses—whence it spread to those of the other teachers—a system of instruction whereby the student was trained to use as original authorities the published decisions of the Courts. From the reports the teacher collected cases adapted to show the development of a legal doctrine, set his students preparing five or six cases a day, and then at the following lecture, by statement, discussion, and criticism in the classroom, forced the students to extricate for themselves the legal principles which their fathers had taken second-hand.

"By 1890 the young lawyers trained at Harvard in the early seventies had made their mark in their profession. It was found that the Harvard-trained lawyer was in his practice sound and eminently successful. The attendance in the Law School began to increase rapidly, and the Harvard case system spread throughout the law schools of the country."

The following is another quotation :—

"Instead of reading legal text-books or listening to lectures on the law, the student meets in the Law School the "Case Method" of study. As the name implies, this is the study of the actual Court decisions. Legal treatises and lectures are themselves based largely on the decided cases, so that when the student undertakes a study of the cases he goes into the very laboratory of the law—he sees how certain facts create legal situations, what principles of law are involved, and how a Court applies the principles to the various situations.

"In learning law from a treatise, one starts off with a general principle given by the author and applies it to a special set of facts. There is a rule of law at the start, but one must learn to what cases it applies. Under the "Case Method" the process is reversed; the student has a number of decided cases before him from which the general rule of law is to be obtained. In the "Case Method" the student acquires a much greater knowledge of the practical workings of the law, and the constant association with genuine cases rather than with abstract ideas helps him better to remember the legal principles involved.

"In class a student is called on for a statement of the facts of a case, the Court's holding, and the reason given for it. In the subsequent discussion the principle of law involved in the decision is worked out, something may be said of the history and development of it, to what extent it is followed by other Courts, and light thrown on its application to analogous legal situations illustrated by hypothetical cases."

The following reference to the "Case System" occurs in the catalogue of the Washington School of Law :—

"This method of teaching law, which has been approved by experience and which is now employed in the leading law schools of the country, has the threefold merit of enabling the student to acquire a thorough and practical knowledge of legal principles, to develop the power of independent legal reasoning and to become familiar with those processes of legal thinking which have determined the form and character of our jurisprudence and which will govern its future development."

I have a copy of last year's annual examination papers of the Harvard Law School. The whole of the questions in every subject, except jurisprudence, take the form of cases stated, and the candidate is required to "analyse the facts and apply to them the principles of law he has learnt from the decisions."

I am aware that the introduction of this system as a practical proposition in this country would take time and would require the preparation of publications with cases arranged for the purpose. I would, however, commend the system to the consideration of our teachers in law.

Another matter to which I propose to refer is that of

General Culture.

I have listened to inaugural speeches addressed to students entering other professions and have heard them, especially the medical students, urged to increase their general knowledge by studying subjects of a cultural nature, and, if possible, to take an arts degree prior to entering upon their medical course. In no profession is such advice more appropriate than in that of the legal profession, because there is no human interest with which this profession is not concerned and with which it may not come into touch. The more widely the lawyer extends his general information the more does he increase his stock-in-trade for his practice. At the last annual provincial meeting of the Law Society in England the President, Mr. R. M. Welsford, made a plea for the study by the law student of subjects not strictly legal. He urged that the standard of the general knowledge examination should be raised, and that it should include papers on history and modern languages as compulsory subjects.

The American Bar Association some years ago adopted a resolution to the effect that every candidate for admission to practice should give evidence of graduation from a law school which required as a condition of admission to the school a minimum of two years' study in a University College. Many law schools have adopted that standard. Some schools require four years and a Degree of Bachelor. The Harvard Law School only admits holders of a B.A. or an equivalent academic degree who have obtained such a degree with a creditable record in College. The Yale School of Law requires a similar qualification and in addition a law aptitude examination.

The subjects which appear to me specially suitable as cultural subjects for the lawyer are such subjects as economics, philosophy, sociology, history, English language and literature, but in the study of subjects not strictly legal (other than the compulsory subjects for the general knowledge examination) I should leave the student free to follow his own bent, allowing him to select subjects in which he feels a special interest, except that I am of opinion that there should be a greater obligation on the student than there is at present to study English, and in particular English composition. If it is not considered desirable to make English compulsory beyond the matriculation standard, it may be found possible to require the student to take a course beyond that standard in English composition. The writing and speaking of correct English is a very necessary qualification for a legal practitioner.

The question to be considered is how far is it practicable, whether through the general knowledge examination or at a subsequent stage, to oblige or encourage the student to extend his general knowledge by the study of cultural subjects.

Conclusion.

If the proposal made in this address were adopted the University would be freer than at present to consider and deal with such questions as the two I have referred to above.

The proposal is calculated to give a fillip to the work of the law schools and to foster a spirit of rivalry between them which would be to the advantage of legal education. Their activities would only be limited by the funds at their disposal, but there would be an incentive to increase their resources.

It is thought by some that the atmosphere of the office is necessary to inspire the student with an appreciation of the traditions of the profession. The proposal submitted may mean, at least for a time, that office experience would be made a requirement for the practitioner; but apart from that, such traditions would be inspired by the schools in this profession just as in those of other professions. Traditions will grow around the schools themselves as they grow in importance and their graduates make their mark in the profession or in the country. Every lawyer with a New Zealand qualification would have qualified at one of the schools. How this proposal will be regarded I do not know, but I feel sure that if given effect to it will prove itself to be the most important step taken in relation to the legal profession since 1882.

I again express my thanks for the honour of being entrusted with the inaugural address, and wish the Conference every success.

SIR JOHN FINDLAY, K.C. (Wellington): Mr. Chairman, Ladies and Gentlemen, I have been asked to discharge the pleasant duty of moving a hearty vote of thanks to the Attorney-General for the ideal address he has just delivered. I think this country is fortunate in having at the head of the legal profession one so imbued with the higher aspirations of our profession, one so sensitive to its proper ideals, one so eager to promote its efficiency and its advantages. For that reason alone, apart altogether from politics, I hope the present Attorney-General will long continue to occupy and adorn the office he at present holds. Speaking as one who at one time trod his path, and knows something of its difficulties, I know that one must bear with the utmost patience any proposals made for the betterment and improvement of the legal profession. We have in Parliament—if I may say so without profanity—a number of men who care no more for the legal profession than they care for a cabbage garden. They are not animated by the larger view that has been voiced by the Attorney-General. I go so far as to say that the standard of ideals—aye, the very future—of a nation depends on the worth and position of its legal profession. I am, not, however, going to make a long speech

now—I have to make one in a little while, and that will bore you quite as much as you will care to be bored—but I do feel confident that I have your authority for offering to the Attorney-General our thanks and admiration for the splendid address to which we have just listened. I am sorry that the storm was raging during a considerable portion of the time it was being delivered, so that some of us did not hear all the points touched on. I understand, however, that it is to be published, and what we have lost owing to the gale we shall get in our studies.

THE CHAIRMAN: It is not proposed to have a discussion on the Attorney-General's address, although inevitably some of the points raised by him will be considered and discussed when dealing with some of the remits to be considered later on. I ask you to carry by acclamation the vote of thanks proposed by Sir John Findlay to the Attorney-General for his interesting, able and convincing address.

The vote was then put to the Conference and carried by acclamation.

THE ATTORNEY-GENERAL: Mr. Chairman, Ladies and Gentlemen, I want to say how much I appreciate the very kind and generous reception you have given to me and the paper I have just read. I have to acknowledge also the exceedingly kind references of my old friend, Sir John Findlay. I can remember the days when we sat together in the same class-room at Otago University and crossed swords with one another in the debating society there—how long ago I hardly care to remember. At that time there were some six or seven contemporary students, all of whom subsequently found their way into Parliament. I am sorry if every one of you was not able to hear everything I said. Possibly I was anxious to read more quickly than I should have done, because I was afraid I was going to keep you too long. At the same time, although the paper will not be discussed at present, I hope an expression of opinion may subsequently be obtained from the Conference on the proposals I have submitted in the address. I have again to express my very grateful thanks to you for the kind reception you have given me this morning.

THE CHAIRMAN: Before calling on Sir John Findlay to deliver his paper, I would like to take the sense of the Conference upon the question of whether or not the papers which will be read shall be followed by discussion immediately afterwards. We have a long programme to get through, and to-day will be a comparatively short day in which we can pay attention to the serious work of the Conference. It has been suggested that it would be better to hear the papers read, discuss the remits as they come before us, and, if there is time at the end of the discussion of the remits, have a discussion on the papers read. The objection to that, of course, is that you would have six or seven papers to carry in your mind, and you may have lost a hold on the matter dealt with. However, it is for the Conference to decide. Perhaps some gentleman will move a motion on the subject.

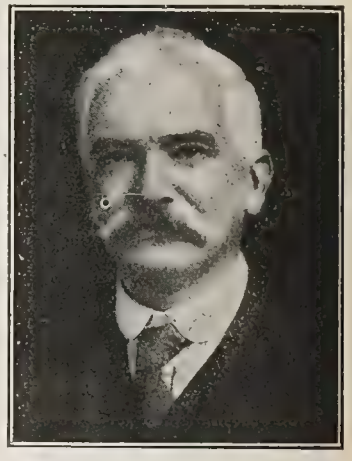
MR. M. MYERS, K.C. (Wellington): I move that we adopt the first proposal you suggested, namely, that the discussion of the papers should not be taken immediately after their reading, but that it should be taken after the remits have been disposed of.

The motion was seconded by MR. C. G. WHITE and carried.

"THE ETIQUETTE OF THE LEGAL PROFESSION."

(Sir John Findlay, K.C.)

SIR JOHN FINDLAY, K.C. (Wellington) then read the following paper on "The Etiquette of the Legal Profession":—



The legal system of a nation, especially the part of it that does not owe its origin to Statute, embodies much of that nation's history, its Governmental and constitutional development, and above all, it embodies the spirit of the people, their racial and hereditary qualities, the principles and ideals upon or in pursuit of which the nation has grown and achieved greatness, and it is acknowledged that no legal system shows all this more than our own. But the history of our legal system is not my allotted topic, which is confined to that of the etiquette of the profession.

The word "etiquette" is of somewhat vague import. The best definition and chief explanation of it I have found is that it is a term for ceremonial usage, the rules of behaviour observed in society, more particularly the formal rule of ceremony to be observed at Court functions, etc., the procedure established with regard to precedence and in organised bodies such as the society of law or medicine, a code of etiquette which the members must preserve as protecting the dignity of the profession and preventing injury to its members.

The old French word *estiquette*, or *estiquet*, meant a label or ticket—the true English derivative. The ultimate origin, however, is Teutonic, from "*sticken*," to post, stick, affix.

Cotgrave explains its French origin as a "*billet*" for the benefit or advantage of him that receives it, a form of introduction, and also as a notice affixed at the gate of a Court or Law. The development of the meaning in French from a label to ceremonial rule is not difficult to conjecture, but as the New English Dictionary points out, the real history of this development has not been clearly established. A politician has somewhere been defined as a fallen lawyer, and as one who was once among the fallen, I strongly suspect that the chief meaning of the word "etiquette" derivatively was due to the influences of politics combined with those of the Church.

The definite separation of Law from Theology was not effected until after the Middle Ages, and the lawyer-priest flourished in his fictions, forms and unscrupulousness as late as Shakespeare.

Shakespeare's conception of the extent to which the lawyer was a man of forms and fictions may be gathered from the grave-diggers' scene in Hamlet. You will remember that the grave-diggers in opening an old grave have thrown up a number of skulls, whose possessors have been long laid to rest, and Hamlet, picking up one of these skulls, asks Horatio, "There's another, why may not that be the skull of a lawyer? Where be his quiditities now, his quillets, his cases, his tenures

and his tricks. Why does he suffer this rude knave now to knock him about the sconce with a dirty shovel and will not tell him of his action of battery?"

Early law and politics were closely associated, and with the origin of the word "etiquette" in French, as a billet, a ticket or label, it is strongly suggested to me at least that the origin of the word "etiquette" was due to political and theological influences.

It is quite relevant to my topic to point out, as Sir Henry Maine has done, that in primitive times the priest and the lawyer were the same person. Their professions, he avers, were identical, for all early law was sacerdotalised and the lawyer was the priest and the priest the lawyer who interpreted it. Hence among the ancient Celts, Romans, and Greeks we find the first beginnings of the legal profession in the sacred calling of the priesthood, and the lawyers of England had the same origin. Early legal transactions indeed were themselves religious ceremonies.

What, for instance, is the true origin of that almost superstitious regard for forms, that implicit faith in texts, that strict observance of rigid rules which has been so often satirised in lawyers? The answer is furnished by Sir Henry Maine and other historians.

They show, as I have said, that the earliest legal transactions were religious ceremonies, the making of a will, the taking of a wife, the buying of a piece of land, and even the sale of a horse were effected by sacerdotal forms and rites. To the ancient priesthood, as indeed to many a modern priest, form was a fetish and a tyrant. From this thraldom the legal profession has steadily separated itself, and what remains now of this early subjection is but the admitted influence of its early origin.

The ceremony of the sale of a horse is not in our day marked by any religious feature, and if a man desires it he may get a title to a wife, even to-day, with less expense and form than a title to a cabbage garden.

The definite separation, as I have said, of law from theology was not effected until after the Middle Ages, and this is summed up by one of the most eminent jurists in the last century in the words, "On the whole the canonist exercised as much influence on the course of legal development in Europe as the legist or civilian." Hence then to theological sources should be mainly ascribed that devotion to ancient terms and forms which so long impeded the rationalising of our legal system.

From the influences, however, from the cramping effect of ceremonials, rigid confession of faith and inflexible creeds, the profession is now nearly completely emancipated.

These observations are made to impress the fact that at one time form and ceremony dominated legal proceedings and were even down to trifling details essential to the validity of the transaction.

The whole trend of modern law has been to diminish to a disappearing point the requisites of form and ceremony. Steadily we see the substance of a transaction, the intent and meaning of the parties to it, becoming the determining factors, and our legal system to-day mainly owing to a wider outlook, to the larger sense of justice and to a recognition of how much more important in the affairs of man is substance than form or ceremony, approximates closely the *jus naturale*.

What remains in our system in the shape of procedure and formality can nearly all be justified, either upon rational grounds or upon grounds of public good, and public and individual protection. What, however, mainly distinguishes the legal ceremony and etiquette of ancient times from the legal ceremony and etiquette of to-day is the degree in each case respectively of their legal enforceability.

Nothing marks the development of modern law and modern legal practice so much as the decline in the extent of the enforceability of its formalism. The spirit that has inspired this decline is expressed in the old phrase: "The form killeth, whilst the spirit giveth life."

Our whole system and its profession has climbed from narrower conceptions of the value of forms to a wider and clearer conception of the requirements and dictates of justice. Not only the judgments of our Judges in recent years, but our statutory enactments, mark how much and how anxiously substantial right and justice are defended from defeat by mere form and technicality.

I have said that the word "etiquette" is one of wide and vagué import, and I want to deal with it now in its widest significance. I want to discuss legal etiquette in a sense higher and greater than the mere polite manners of the profession.

I would impress the meaning of the word as including all those honourable rules and obligations, practices and proceedings which, whilst themselves not enforceable as law, are nevertheless the most effective machinery by which our legal system may be made smoothly operative and substantially effective.

Etiquette, in the sense I have just used it, is a species of conventional law, and as the late Judge Salmond says in his work on Jurisprudence: "By conventional law is meant any rule or system of rules agreed upon by persons for the regulation of their conduct towards each other." Agreement is a law for the parties to it, and he gives as examples the rules and regulations of clubs and other societies. He says: "In many cases conventional law is also civil law, for the rules which persons, by mutual agreement, lay down for members themselves, are often enforced by the State. But whether or not these conventional rules thus receive recognition and enforcement as part of the law of the land, they at any rate constitute law in the wider sense of a rule of human actions."

The article on Barristers in Halsbury's "Laws of England," Vol. 2, an article consisting of 66 pages, is headed in these words:—

> "N.B.—It is important to observe throughout this article that the statement as to the practice and the rules and regulations of the profession are statements of matters of *etiquette* only, and are not rules of law or binding as such."

And the article reminds the reader of the same fact in paragraph 616 in these words:—

> "The Council (i.e., the General Council of the Bar) meets during the sittings of the Courts. There are four Standing Committees, namely, the Executive Committee, the Committee on matters relating to professional conduct, the Committee on the business and procedure of the Courts and the Committee on Court buildings. Special Committees are appointed from time to time as required. The Council has continued up to the present time to act as the representative of the Bar and to answer neces-

sary questions and lay down rules relating to etiquette and practice of the profession, though it possesses no direct disciplinary powers. Its rules are only matters of etiquette, and not of law, and are not binding outside the profession. It also examines and reports on current legislation."

The article further impresses the distinction between rules of etiquette and rules of law, on page 404, where it deals with retainers (see paragraph 676).

"The practice as regards retainers is regulated by certain rules which were prepared in 1892 by the Bar Committee and approved by the Attorney-General of the day and the Council of the Incorporated Law Society. It must be pointed out, however, that these rules are rules of etiquette only, and not rules of law. The effect of these rules and of the interpretation which has been put upon them by the General Council of the Bar is as follows :—

"Retainers are either general or special. A general retainer is either ordinary or limited. An ordinary retainer applies to the Supreme Court and to the House of Lords.

"A limited general retainer applies to those Courts to which it is expressed to be limited. A separate general retainer must be given for the Privy Council and also for Parliamentary Committees. Subject to the rules, a general retainer lasts for the joint lives of the client and counsel unless it is forfeited or extinguished. If counsel who has accepted a general retainer from one party is offered a special retainer or a brief by another party, the party who has given the general retainer is entitled to reasonable notice before the offered special retainer or brief is accepted. If a special retainer or a brief is offered to counsel by a party other than the party from whom he has accepted a general retainer, counsel, after giving notice to the party from whom he has accepted the general retainer or the offer of the special retainer or brief, may accept the special retainer or brief unless a special retainer or a brief be given within a reasonable time by the party from whom he has accepted the general retainer. Where the general retainer has been given and a brief is not delivered to the retained counsel in any action or other proceeding in which the party giving the general retainer is concerned, and to which it applies, or a special retainer or brief is not given within a reasonable time after a notice has been given by the counsel holding a general retainer that a special retainer or brief has been offered to him by another party, the general retainer is forfeited. But the holding of a general retainer does not entitle a King's Counsel to the delivery of a brief on occasions when it is usual to instruct a junior only. When a general retainer has been given for one person, and he is a party to a proceeding with others, and appears separately, the retainer applies to that proceeding; but if he appears jointly with others the retainer does not apply. A general retainer is not binding on counsel unless it is accepted by him."

I regret the length of this extract, but upon careful perusal it seems to me to set out and explain the nature and operation of a rule of professional etiquette better than can possibly be done by general definitions and descriptions.

I do not desire to give any further examples of such rules of etiquette, as to do so would exceed my time limit, and it will be remembered, as I have said, that the article in question fills 66 pages of Halsbury.

Of course it will not be forgotten *by this audience* that our profession, its practice and its conduct, is under the supervision and, if necessary, the discipline prescribed by the Law Practitioners Act, 1908. Experience has shown that the provision for District Law Societies, of a New Zealand Law Society, and of the right of a Society to bring a delinquent practitioner before the Supreme Court, have provided the machinery perhaps wholly adequate, for enforcing the obligations of strict professional propriety upon all the members of the profession in this country.

The wide powers of the Court to punish delinquency are perhaps ample. If the etiquette of the profession in New Zealand leaves room for stricter rules in some minor cases of practice, these stricter rules might well be formulated and adopted by the Law Societies with the approval of the Attorney-General, and so passed and approved, it is highly unlikely that these stricter rules would be ignored by members of the profession.

It is impossible, however, for me in this paper to give illustrations of the stricter rules I would suggest. That is a matter which would be more fitly discussed before some satisfactorily appointed Committee or Law Council.

It will be remembered that I quoted the late Judge Salmond's work on Jurisprudence as to what he says upon conventional law. He says whether they receive recognition and enforcement as part of the law of the land or not, they at any rate constitute law in the wide sense of a rule of human action.

It is in this sense that the etiquette of the legal profession in New Zealand must be understood, and it is a fair matter for observation that our legal profession has submitted cheerfully and loyally to a code which has not, directly at least, the enforceability of the law of the land. This has always seemed to me an admirable form of government. It is really the collective control of a profession by the professional members themselves. It has made for all that is best in our profession, and I take leave to think, in conclusion, that if other callings and professions were collectively controlled in much the same way as our legal profession, it would be all the better for the reputation of these other callings and professions, and also for the individual members thereof. The disciplinary powers already given in various of our statutes to councils appointed by members of different callings and professions have resulted, I think, in substantial benefit to the public and to these callings and professions themselves. If the actions of a man in any trade or calling which, while not transgressing any law of the land, are yet unconscionable, unprofessional and unjustifiable, it would be a good thing if provision were made in every practicable case for a Council appointed by the members of the calling or profession in question to enquire into charges against members of such unconscionable, dishonourable, or unprofessional action, with a view to visiting upon the delinquent some form of discipline which would act, in the majority of cases at least, as a deterrent. Machinery for this purpose, of course, is a matter for the Legislature, but so much could, I think, be said for an extension of our own system of professional control that I do not think there would be much difficulty in obtaining the required legislative authority.

To do this and to more clearly understand the statement that the practice, rules and regulations of the profession are matters of etiquette, and not rules of law binding as such, we have to look to the origin of that practice and of those rules and regulations. Up to recent times there was in England no organisation of the whole body of the English Bar. Each circuit had one organisation of its own in a circuit mess. There was also a kind of organisation of barristers practising in the Chancery Courts. In December, 1883, a meeting of the English Bar was held, when it was resolved that a body to be called the Bar Committee should be constituted to "collect and express the opinions of the members of the Bar on matters affecting the profession and to take such action thereon as may be expedient." The Committee, which was composed of persons elected by the whole Bar, and was supported by voluntary contributions, continued to act until 1894.

In 1892 the Committee prepared certain rules for regulating the practice as to retainers which were approved by the Attorney-General of the day and the Council of the Incorporated Law Society, and are still in force.

In 1894 the place of the Bar Committee was taken by the General Council of the Bar, a consultative and advisory body constituted by regulations approved by the Bar in general meetings. These regulations provided that the Council should be the accredited representative of the Bar and that its duty should be to deal with all matters affecting the profession and to take such action thereon as might be deemed expedient. The Council is recognised as representative of the Bar by the Judges and the Legislature.

In New Zealand we have no body or bodies exactly corresponding to the English General Bar Council, but we have bodies entrusted with all the main powers and functions of that body.

By the Law Practitioners Act, 1908, provision is made for the creation of District Law Societies. Section 62 provides for the admission of members and Section 63 provides for the conduct of prosecutions. Section 67 provides for a New Zealand Law Society, and says that all practitioners who for the time being are members of any District Law Society shall for ever hereafter be and be called one body politic and corporate in deed and in law by the name and style of the New Zealand Law Society.

Section 77 provides that at any general meeting of the New Zealand Law Society it shall be lawful for the members present to make such by-laws, rules and orders as the majority of them think fit for (*inter alia*) the regulation and good government of the Society and of the members and affairs thereof, and generally for carrying the objects for which the Society is formed into force and complete effect, with power to impose reasonable fines to be contained in such by-laws on the offenders for non-performance of or disobedience to the same.

These statutory provisions and the steps which have been taken under them have provided an effective control and discipline of the members of the profession. Hence it will be seen that the government and control of the profession in New Zealand is substantially the same as that in England.

It has occurred to me in concluding this paper that I should give this explicit reference to our Statute to show the parallel between the control of the profession in England and its control in New Zealand.

THE CHAIRMAN: It has been suggested, with a view to saving time, that, instead of moving a formal vote of thanks to each reader of a paper as it is read, we should give a comprehensive vote of thanks at the end of the proceedings to all who have been kind enough to deliver addresses.

REMIT.

Solicitors' Guarantee Fund.

The following remit was moved by MR. W. J. HUNTER (Christchurch):

(a)" That this Conference urges the New Zealand Law Society to do all in its power to ensure that the amendment to the Law Practitioners Act, 1908, dealing with a Solicitors' Guarantee Fund, be passed into law at the first available session of Parliament.

(b)" That a deputation from the Conference wait upon the Hon. the Attorney-General and urge that the above-mentioned Bill be taken up as a Government measure." (CANTERBURY).

THE CHAIRMAN: Perhaps it will shorten the discussion if I make a statement on the subject. Those gentlemen who were present at the last Conference will remember that there was a very full discussion of this much vexed question of a Solicitors' Guarantee Fund, or indemnity. A committee was set up, to consist of the President and Vice-President of the New Zealand Law Society, and delegates to be appointed by each of the District Law Societies, who were to meet in Wellington, discuss the various schemes proposed, and adopt some proposal to be embodied in the form of legislation. After the District Societies appointed their delegates, the committee met in Wellington in May of last year, and as a result of their efforts a Bill was prepared by Mr. Levi and printed. It was then sent to the District Societies for comments and expressions of their opinions. Every District Society, without exception, I think, held a special meeting of its members, especially to consider the proposed Bill, and a number of suggestions and amendments were sent in for the consideration of the committee. The committee met again and considered thoroughly these suggestions and amendments, when a proposal was made by one of the District Societies that we should re-cast our Bill and not print in such detail the proposals the committee had determined on. The Bill took the form of an amendment in the Law Practitioners Act, empowering the New Zealand Law Society to institute a fund, one of the provisions enabling the Society to make a compulsory levy—I think the amount was fixed at five guineas per annum—on every practising solicitor in New Zealand, with the idea of building up a fund which in course of time would amount to a considerable sum. There were other provisions also. The Hamilton Society suggested that we should be more general in our proposals in the Bill, so as to avoid the possibility of some member of Parliament moving an adverse motion which would take the control of the matter out of our hands. This new proposal seemed a good one, and the committee were willing to adopt it subject to taking the opinion of Sir Francis Bell, and the Attorney-General (Mr. Rolleston). It had been arranged that the Bill should be introduced in the Legislative Council by the Hon. Mr. MacGregor. The committee discussed the matter with Sir Francis Bell and the Hon. Mr. Rolleston, and they were both of the opinion that the new proposals of the Hamilton Society were an improvement, and we decided then to go on with the new scheme. That scheme did not commit us to any particular kind of fund, and the Bill

in its amended form went through the Legislative Council "flying." Sir Francis Bell helped us with the Bill—not as a member of the Government, because it was not a Government measure—and it duly passed its third reading. It was then sent to the House of Representatives, but there we "met a snag." There was some delay in getting the Bill introduced in the Lower House. Mr. Lee, the Member of Oamaru, kindly took charge of it, and it was eventually put on the Order Paper—a long way down. At this time the session was drawing to a close, and the Government had taken Wednesdays—the usual day for private members' Bills—for Government business, and there seemed little chance of the Bill rising to the surface again. I waited on the Prime Minister and he arranged that if we would agree to the Bill being read a second time *pro forma* and referred to the Statutes Revision Committee, that might be done. We agreed, and the Bill was read a second time and referred to that Committee. But that Committee, after considering it, determined that it was too late in the session to give it serious consideration, and recommended that the Bill should not be allowed to proceed. Those of us who attended for the purpose of giving evidence learned that there would be considerable opposition on the part of at least one member of the Statutes Revision Committee, in the direction of seeing that the fund, if established, should be controlled by the Government. That is the present position. At the last meeting of the New Zealand Law Society, held about a fortnight ago, a resolution was carried that the Society should take the necessary steps to have the Bill re-introduced, and we intend to ask the present Attorney-General for his help in that direction.

Mr. W. J. HUNTER (Christchurch) in moving the adoption of the remit, said: I think the remit which has just been moved by Canterbury is possibly the most important which will come before you—at any rate that is my view of the matter. The remarks of the Chairman will necessarily have the effect of shortening what I have to say to you. The proposal which was put before the Conference in Christchurch, last year, was brought forward by Taranaki, and was to the effect that the Conference approved of the scheme which had been brought forward by Canterbury, that is, Mr. Hamilton's scheme of a joint stock company, to which members of the legal profession should contribute by way of taking up shares. However, after conferring with some of the members of the Conference, the Taranaki mover decided to amend his resolution, and put it to the Conference that the Conference approves of the principle of forming a Solicitors' Guarantee Fund. Several practitioners present expressed objections to such a scheme, and there was one great difficulty, namely, that Mr. J. B. Johnston, from Auckland, told the Conference plainly that Auckland was absolutely opposed to the principles proposed to be embodied in the Bill. However, the resolution in its amended form was carried, there being only one dissentient, and, as the Chairman has said, a committee was set up, and the committee met for the very purpose of formulating a final scheme and seeing it carried into effect. The committee apparently saw fit to drop Mr. Hamilton's scheme as either impracticable or too difficult to ensure getting the necessary legislation from Parliament. The result of its deliberations was, as the Chairman has told us, the Bill which subsequently passed through the Legislative Council and was lost in the House of Representatives. The point I wish to make is that the Conference affirmed the principle. It set up a committee and the committee resolved on a Bill. We have had the Bill before us and have studied it. It is, I submit, too late now to suggest that another scheme should take its place, and I also submit that we should simply stultify ourselves if we go back on the labours of the committee we set up to finally deal with this matter. I have heard since I came to the Conference that at the last meeting of the New Zealand Law Society it was resolved that the Government should be urged to proceed with the Bill with the object of getting it passed into law, and, after conferring with Mr. Lusk, of Hawke's Bay, and Mr. Spence, of Taranaki, I think it would be of material assistance to the Law Society in achieving that object if it had behind it the overwhelming vote of this Conference, as the voice of the profession from the North Cape to the Bluff. Let me deal with one or two possible objections, though I do not intend to thrash out the old questions which we have all heard discussed, and which have really been settled. I suggest that the need for protection of the public, and of the profession, from a few weaklings in the profession, is as great as ever in spite of the fact that during the past year three or four members of the profession have been struck off the rolls. (Laughter). I see your point gentlemen. The Bill, I think provides amply for dealing with cases of that nature. The terms of the Bill are very wide, and I take it that it is perfectly clear that the measure would not deal with offences committed in the past. It will provide, however, machinery under which any man who is accepted and allowed to practise as a lawyer will have to show a absolutely clean sheet so far as his accounts are concerned, before he comes under the ambit of the Bill at all. I take it that is perfectly clear. The Act would prescribe what claims might be made upon it and paid by the Society out of the fund, and it would not be liable to pay claims for any moneys embezzled before the Act came into force. Safety for the future seems to lie in proper book-keeping and a proper auditing of accounts. In that connection I may say here that I do not think any system of audit can be satisfactory which allows the practitioner himself to choose any public accountant to audit his books. However, these matters can be safely left in the hands of the New Zealand Law Society. What I want to do is to strengthen the hands of that Society in going on with the Bill and having it passed into law. It may be said that there is some apprehension in the profession that the Bill will be so altered in Parliament as to make it no longer satisfactory to the profession. I can only speak of one instance of that which has come under my notice. I interviewed a well known member of the Labour party in Parliament in connection with the matter and discussed it with him. After he had read the Bill he said to me, "What objection can there be to a body of professional men taxing themselves so as to prevent any losses to the public caused through the action of some members of the profession who ought not to be members of the profession at all?" He told me quite frankly that if the Prime Minister would put the Bill on the Order Paper and give it a fair run he was sure it would pass. It may be that in Wellington some members of the profession are more closely in touch with thought in Parliament than we are who are outside Wellington, but I do suggest to the members of the New Zealand Law Society that they should not be timid about this matter, because in my opinion no member of Parliament can justify to his constituents opposition to this Bill. We are not alone in New Zealand in having to deal with

this question. A similar problem is confronting the profession in England and in Australia. It only happens that we in New Zealand, through what legislation we have, are placed in such a position that it is more imperative for us to have this measure passed than it is in the other countries. I urge that we should stand by the committee who worked so hard in this matter, and I ask the Conference to pass this remit by an overwhelming majority.

MR. A. C. COTTRELL (Christchurch): I think it must be patent to all of us that it is advisable to proceed with the amending of the Law Practitioners Act in the direction indicated by this remit. In the past we have jogged along quietly, and we are still going along in a way which is not in the best interests of either the public or the profession. The time has arrived when we should act at once and not allow the matter to drag on from session to session. I therefore have much pleasure in seconding the adoption of the remit, and would urge every member to give it earnest consideration so that we may get the Law Society to press the matter forward, and we should also endeavour to obtain the assistance of the Attorney-General.

On being put to the Conference, the adoption of the remit was unanimously agreed to.

The Conference then adjourned for the purpose of attending the Civic Reception.

CIVIC RECEPTION.

At 12.15 p.m. the members attending the Conference were accorded a Civic Reception at the Town Hall.

HIS WORSHIP THE MAYOR (Mr. G. A. Troup) addressing the members, said: We have met to-day in order that I as Mayor of the City may extend a civic welcome to the members of your honourable and learned profession—that of the law. Of the many professions to which I have had the privilege of extending civic welcomes—and I have now included them all in the list—there is not one that does not lay claim to great antiquity of origin. I doubt, however, if any of them have made claims to ante-date the days of Eden, when the "shalt's" and the "shalt nots"—when the things permitted and the things forbidden to our earliest ancestors—had their origin. If further antiquity were desired it would not be difficult to prove that law is associated with all creative forces, that it is the dominant and guiding factor not only in the creation, evolution and preservation of life in all its forms, but also lies behind all of nature's forces, for there can be no order in nature without nature's law to govern and control it. Likewise in human life, and more especially in its aggregation in countries and cities, law is absolutely necessary for its government and control. Every human being, man, woman and child, is subject to law. We talk of freedom, but no man is free. It may be argued that such freedom as man has, is obtained by virtue of the law, although Chrysostom says:—

> "The enslaved are the fittest to be governed by laws and free men by custom,"

and Montesquieu declared that:

> "Every nation is free in proportion to the number of its written laws."

Fortunately these are points that I, as Mayor of the City, am not called upon to decide. Now, it is apparent to me, and it must be still more apparent to all of you, that the profession which helps in the first place to make the laws, which in the next place interprets them, and in the third place administers them, is a body that one must take very serious notice of; and, when one remembers that the profession of law embraces the greatest intellects of time and place, it can be readily understood how even Mayors of cities have to be circumspect and sometimes even quail in their presence. I can say very truly that of the many men I have met in the course of a fairly long life I do not think, speaking generally, that any professional body will compare in reasoning power, in orderly thinking, in clarity of speech, and in sound judgment, with those belonging to the legal profession. Two things about the profession have occasioned me surprise—the first thing that very few of the members carry banners or beat drums, and the second is the reserve, restraint and repose almost invariably associated with the sound lawyer—which never fails to command respect. I have also been greatly impressed with the discipline which your Society exercises, which is not only a deterrent but also an incentive and an inspiration much needed in democracies. Above all, it gives to the public a sense of security and confidence. It is well that this should be so, considering the very great power and trust which is placed in your hands, carrying with it also very great responsibility. It is also pleasing to find that the profession of the law as practised in New Zealand is rarely used as a shield and covert to defend lawlessness or defeat the ends of justice. I cannot imagine a greater mistake than for a member of a profession, whose very existence depends upon the law and all that it stands for, endeavouring to defeat the ends of justice. When the ends of justice are circumvented by legal technicalities or procedure, the body politic suffers as well as the profession, and I think that legal victories unjustly obtained by such means may be worse than defeats. Respect for our Courts will be in proportion to the fair methods employed by the lawyers and the justice meted out by the Judges, and it is all-important that this respect should not be in any degree lowered in the public mind. Now, as Mayor of the City, I find myself very subject to law. The liberties I formerly enjoyed have gone—I am tied hand and foot by all manner of legal enactments. Statute law controls my every action. I cannot shelter behind common law, and all the time I have to walk warily and constitutionally. Sometimes I long for greater freedom, although I think I am more often thankful for the restrictions placed upon not only myself but members of my Council. I am astonished to find how well the limitations are known by some members of your profession in this City. If ever I feel inclined to stray from the gravel paths by which my civic movements are defined and confined to the inviting soft pastures which I could roam at pleasure, it is not long before I hear some warning voice call, "Keep off the grass." Lawyers tell me that the principles of law are very few and easily mastered, but that legal enactments are legion. Oliver Goldsmith has said:—

> "Numerous written laws are a sign of a degenerate community and are frequently not the consequence of vicious morals but the causes."

If this be so then we must be a very degenerate community in New Zealand, for our statutes are already very numerous. What they will be in another fifty years one trembles to think. Will any lawyer be able to hold them in his little head? Like Oliver Goldsmith's schoolmaster in "The Deserted Village," it will be stated of the New Zealand lawyer:—

> "And still they gazed, and still the wonder grew
> How one small head could carry all he knew."

One small head will certainly never carry all the volumes of law to be produced during the next fifty years, if Parliament goes on at the present rate of production. But I must stop—time to a lawyer is the whole essence of the contract, and even civic welcomes must conform to that condition. Let me conclude by saying that it is a great pleasure to me in my official capacity as Mayor of the City to extend to you all, together with your ladies, a very hearty welcome. Not only on account of the position I hold, but also on account of the many friendships I have with so many of the members of your profession, I can truly say that this welcome is very pleasing for me to make. Wellington is supposed to be the centre of law in New Zealand—not that its people are more litigious than those of other cities, but rather because the subject of law has been specialised at the University, where lawyers are turned out in considerable numbers. The City is very much indebted to the legal profession, of which many of its Mayors and Councillors have been members. Sir Francis Bell, who has been of very great assistance to me since I have been Mayor of the City, was himself the Mayor in past years. Mr. A. de B. Brandon and the Hon. Mr. T. M. Wilford were also Mayors of the City. At the present time we have two lawyers on our City Council—Councillors Luckie and Hislop—and many of our Councillors in the past have been lawyers. Apart from this the profession generally has extended to the Council and to myself in particular during my term of office a helping hand which I have greatly appreciated. Very rarely has any attempt been made to "bleed" the public through the Council, or in the raising of obstacles to prevent the carrying out of necessary public works. The community has a claim upon all the learned professions, and it is pleasing to note in how many ways this claim is being increasingly recognised, begetting not only a community spirit, but also a civic pride. In the name of the City I extend to you a hearty welcome, and I sincerely trust that your Conference will be a great success, that the profession will benefit, and that each delegate will return satisfied that he has had a profitable and pleasant time.

THE HON. T. K. SIDEY (Attorney-General): Mr. Mayor, Mr. President of the Law Society, Ladies and Gentlemen, I have been asked to extend to you a welcome on behalf of the Government. I do so in the unavoidable absence of the Prime Minister, who was to have been present this morning, but who is engaged at a meeting of the Executive Council. On behalf of the Government I may say that it appreciates very highly the great services rendered to the community by the legal profession—much higher, I am sure, than many people think. The Mayor spoke of the aims of the legal profession. Well, if there is one thing which distinguishes man as a member of a civilised State from man as a cave-dweller, it is law and order—the greatest characteristics of modern civilisation. I am glad to acknowledge the indebtedness as expressed to members of the legal profession. I am afraid, however, that our members never think of carrying all our statutes in their heads. However, I can say that members of our profession have at all times exercised great influence in the State, and do exercise it to-day. My duty at present is to express on behalf of the Government the hope that the Conference—both ladies and gentlemen—will have a very profitable and enjoyable time, and I would like to add also on behalf of the Government that while there may be exceptional difficulties—which I need not here mention—in relation to the proposed legislation under present conditions, I am sure that whatever resolutions are carried by the Conference bearing on the desirability of introducing legislation, they will receive every possible consideration at the hands of the Government. I wish the Conference every success.

MR. M. M. F. LUCKIE, speaking on behalf of the Councillors of Wellington City, said: I do not intend to weary you by a long speech, especially after you have listened to such an eloquent address from the Mayor—I was going to say, "from my learned leader"—the like of which I think has never before been given by a layman to a body of lawyers, and one which I venture to say no other layman could have given so well. I suppose there has never before been gathered together in Wellington such a galaxy of legal talent as that now assembled here. I desire, on behalf of the Councillors of the City of Wellington, to again extend to you a hearty welcome to Wellington, and I trust that the warmth of our welcome will to some extent make up for the bleakness of the weather. I again wish to say, on behalf of the City, we welcome you and trust that our own deliberations will be for the advantage not only of the community as a whole, but for ourselves as a profession.

MR. A. GRAY, K.C.: I am glad to have the opportunity of returning thanks on behalf of the legal profession generally, and of the Conference in particular, for the kind words of welcome the Mayor has extended, and for the encouraging words of the Attorney-General and Councillor Luckie. I think that, fortified with the special goodwill which these gentlemen have bestowed on us, we can go forward with our work with renewed vigour and with the feeling that we have the appreciation of those best able to judge when we have concluded our labours. This is the second occasion on which a Legal Conference has been held—the last one being held twelve months ago in Christchurch. Visitors were delighted with that City, as, I am sure, visitors will be delighted with Wellington. I conclude by again expressing thanks on behalf of the Conference for the hearty welcome extended by the Mayor to the lawyers.

MR. C. G. WHITE (President Wellington District Law Society): I am sure we all greatly appreciate the fact that the Mayor has been good enough to extend to us a civic welcome. The Mayor referred to the fact that the City should be thankful for the fact that in years gone by illustrious members of the legal profession have occupied the Mayoral chair, and in this connection I am glad that he referred to Sir Francis Bell, who undoubtedly did yeoman service while he was Mayor of Wellington. Mr. A. de B. Brandon, to whom the Mayor also referred, also made good use of his office, because I understand he took away something with him when he retired—he having been presented by the Councillors with a silver cradle. The Wellington City Council is unique in the fact that it has a legal department entirely to itself. I do not know that any other municipality in New Zealand possesses a similar department. The department in Wellington is presided over by Mr. O'Shea. I suppose the only objection we have is that he is sometimes inclined to apply the doctrine that "the King can do no wrong" to the Corporation. Still, we bear him no animosity, and I merely rose to say that I join sincerely with Mr. Gray in thanking the Mayor for extending to us the very kind welcome he has given us to-day.

MR. M. J. GRESSON (Christchurch): I have been asked on behalf of visiting members to express our thanks for what Wellington has done, but unfortunately I am rather embarrassed by the remarks of the previous speakers. Councillor Luckie says you do not want to hear another lawyer, and the Mayor has told you that time is of the essence of the contract. I do not, therefore, propose to take up any great length of your time. The Mayor said he had never known of a lawyer beating the drum. That may be so, but I assure him there may be some who know how to blow their own trumpets. What I really wish to say, however, is that I heartily concur in the expressions of appreciation of the Mayor, the City Council, and the Attorney-General for their cordial welcome to us. To the Conference Committee also I would like to express our real appreciation for the great hospitality it has shown to us.

The Conference resumed at 2.15 p.m.

THE CHAIRMAN said: His Excellency the Governor-General at considerable personal inconvenience has come all the way from Auckland specially to address you this afternoon. This is another instance of the interest His Excellency has always displayed in matters affecting the civic and social life of this Dominion. We are very grateful to His Excellency for having made the journey in such uncongenial weather to greet us here and to give us a few words of encouragement. I will now ask His Excellency to address you.

GOVERNOR-GENERAL'S ADDRESS.

HIS EXCELLENCY THE GOVERNOR-GENERAL who was greeted with loud applause on rising, said: Mr. President, Ladies and Gentlemen,—First of all I owe you a thousand apologies for not having kept my engagement this morning. It was really not so much my fault as the fault of the Minister of Railways, whom I hoped to meet here this morning and tell him really my opinion. I am only sorry, gentlemen, to think that one effect has been to convert what I am afraid would have been a very poor prologue to an equally very poor tag at the end of the first act. I assure you that I have been put to no trouble or inconvenience in coming here to address you. On the contrary, I have counted it a great honour and privilege to have received the invitation, although I confess I accepted it with the natural diffidence that any layman might feel in addressing an audience of experts on one particular subject at least. I asked one of your members for some advice and guidance as to what I should say on an occasion like this, and all the help he could give me was to suggest that I should relate some of my own experiences with the law and law-givers. Well, that did not lead me very far, but it did lead me to search into my family history to see whether there were any grounds on which I could claim any possible connection—however far-fetched—with the profession which you represent. I am bound to say that my first investigation into our family history was not entirely satisfactory. It went back so far as the 16th century, and the records of the town of Ayr, in Scotland,—I think it was in 1576—showed that no less than thirteen of my clan were haled before the sheriff one Monday morning in a bunch, charged with what I suppose nowadays would be called highway robbery and assault. Thirteen of them! But it says a great deal for the respect in which the family was held—because they were no worse than their neighbours—or possibly for the awe which they inspired in those days, that they were only bound over to keep the peace! My next investigation was a little more satisfactory. I noted that one of the first of my line was an eminent advocate, as we call them in Scotland, and that his son was a Judge of the Court of Session, under the name of Lord Kilkerran, one of the most respected of the Scottish Judges of that day. His was a particularly busy life, though I do not like to believe that his decisions are very often quoted nowadays—still they were sufficiently voluminous to fill three pretty long shelves in the family library, and there they exist to this day. His second son was also raised to the Scottish Bench under the title of Lord Hermand, and he was quite an interesting person in those days. He was one of the Scottish Judges noted, I believe, not only for their learning, but more especially for their conviviality, and Lord Hermand—whose portrait we have at home—was one who could hold his own in the best of society in those days, not only on the Bench but in the relaxation which occurred at night time. His pride was, as history tells us, to appear punctually on the Bench every morning at 9 o'clock absolutely free from any trace of the somewhat excessive carousals of those days. There are two stories told of him which might amuse you, and possibly his example in connection with the first story might well be followed in the Courts at the present day. He was slightly irritable in the morning, and on one occasion there was a slight disturbance in Court. The Judge asked what the noise was about, and the reply was "There's a man wanting out, my Lord." "Let him bide in," said the Judge. Shortly afterwards a noise was heard outside the Court, and again the Judge asked the cause of it. "There's a man wanting in, my Lord," was the answer. "Let him bide out," said the Judge. But the story I like best is that in which he once tried a man charged with murder. The man pleaded in excuse that he had been drinking with his friend during the night. He had got very drunk, and in a drunken quarrel had murdered his friend. The Judge's charge to the jury was this: "A sorry fellow, gentlemen. You hear what his plea is—he got drunk and he killed his friend when he was drunk. Good heavens! if he would do that when he was drunk what would he not do when sober!" And he proceeded to hang him. My last story is that my great-grandfather on one side was Lord Justice John Boyle, who presided at the trial of those famous, or infamous, murderers, Burke and Hare.

Of my own dealings in the law I have none, except, I am happy to say, in the wilds of Africa. On one occasion I arrived at a certain village very far in the interior of Africa, and sat down under a palm tree to administer justice. The first case was this: A, the complainant, stated that in his village the law was that the fishing rights in the river which flowed by were hereditary so long as the crocodiles which infested the river were kept in order; but that if any accident happened the law was that the fishing rights passed from the owner to the next-of-kin of the victim of the crocodiles. That was the law. The facts were that B was the owner of the fishing rights in this particular village and that the complainant's (A's) father had attempted to cross the river two weeks previously and had been eaten by the crocodiles. Therefore, in accordance with the law, he claimed the fishing rights from B. B was called on, and he admitted the law, and he admitted the facts, but he said that A made his father drunk, and induced him to go into the river in that condition, well knowing

that he would be eaten by the crocodiles. My decision on that case is no doubt recorded somewhere, but I cannot recall at the moment just what it was. Gentlemen, I have said enough to show you that if circumstances had been different there would have been enough hereditary excuse for my having entered your profession. If I had done so, however, I do not feel that I should have attained sufficient eminence to be addressing you this morning. A few weeks ago I was addressing the Medical Conference and it occurs to me that there are certain points of similarity in the two bodies—medical and legal. I think it was the other day that Mr. Justice Branson, in London, remarked on that similarity in the functions of the two professions, in that he said it was the primary function of each one to investigate the evidence of things which they could hear and see, to bring them to the knowledge of things which they could neither hear nor see. Whether that is right or wrong I do not know. But there are other points of similarity. To begin with, the dictum of an expert in either profession is one that commands universal respect and if it is disregarded the consequences are apt to be very disagreeable. There is another point of comparison at any rate—if not of similarity—in this: that in the medical profession the verdict is given by an individual, as a rule, on certain facts, whereas in your profession, if I may say so, the verdict that we laymen are most intimately acquainted with is given not by an individual but by a body of men, and, I would say, not so much on the facts as on the interpretation of the eloquence which counsel can convey to those who have to judge. But there is one point of similarity which no one will dispute—that is, that the two professions are both among the most honourable professions in the world. I suppose there is no profession which more than yours has a higher standard of integrity or a higher tradition for scrupulous honesty and directness of purpose. That is your boast—that is your pride—which you will jealously guard and which you are careful to preserve. There is one other point about your profession and it is this, that I know of no profession in which under what is supposed popularly to be a dry and stern exterior there is concealed more universal kindliness of nature, and I, as one of the great body of laymen, have had many charming experiences of that particular trait.

Now, as I say, I am not quite sure of the qualifications I have for addressing you, but I think that what was at the back of my mind in doing so was that I wished particularly to show honour to your profession and interest in your deliberations. It was that alone which induced me to make a special journey from Auckland to have the pleasure of addressing you, because, after all, your share in Empire building is directly or indirectly to administer justice, to preserve honest right and impartial justice between man and man. I may say that one of your members not half-an-hour ago told me that that was a pernicious heresy—that the duty of the lawyer was to win his case for his client. However, I like to put it on higher ground than that. The tradition of justice is one of the proudest boasts in the English constitution and the great tradition of our race, and I do believe and hope that your deliberations here will strengthen your appreciation of that great heritage which has been handed down to you, which you are here to preserve, and which I know you propose to use every effort in advancing and handing on untarnished to your successors. Before I close, I would not like to go away without making reference to one great member of your profession who is not with us to-day. I refer to the late Sir Charles Skerrett, Chief Justice. Whether or not history will acclaim the late Chief Justice as a great lawyer or as a great Judge, I am not competent to say. You and others who come after you, who can judge of those things, will settle that point. But this one can say, and everyone will say, that he was a man who carefully preserved—whether at Bar or on Bench—the very highest traditions of your profession, who was scrupulously fair, honest and straightforward, who was a great sportsman in the best sense of the word—a sportsman such as New Zealand loves—and who has left a record behind him which will bear fruit for many a day, a man greatly loved, respected, and deeply mourned. And if I might sum up his life in a few lines I think these lines would be typical:—

> "And so to live that when the sun of our existence sinks in death, memorials sweet of kindness done may shrine our names in memories of life, and the blest seeds we scatter bloom a hundred-fold in days to come."

I feel sure that that is true of Sir Charles Skerrett, and that in his life of patience, high courage, and strict integrity he has left a mark on this generation of New Zealanders which will bear fruit for many years to come.

Now I would have liked, in the natural course of events, to have finished—I am sure with thunders of applause—in declaring this Conference opened, but as you have succeeded in opening it without me I can only assure you of the very great pleasure it has given me to come here and to thank you for giving me a quarter-of-an-hour in which to express the wish that your deliberations will tend to the advancement of the profession of which you are members and of which you have every reason to be so proud.

THE CHAIRMAN: We have all listened with the greatest interest and pleasure to what His Excellency has said, and we appreciate more than ever his coming all the way from Auckland to take part in our proceedings. We would have liked His Excellency to stay a little longer, so that he might have given us more of those words of wisdom to which we have listened. I cannot help thinking that if his lot in life had been, instead of the profession of arms, the profession of the law, he would have obtained an equally eminent position in the law. I am sure we all deeply appreciate the sympathetic reference which His Excellency has made to our late Chief Justice. We feel, as His Excellency does, that the late Sir Charles Skerrett was a man of high ideals and one who, in his profession, set an example which all of us should be proud to follow. His loss is deeply felt by all of us and indeed by the whole community. I ask you now, gentlemen, to accord His Excellency, by acclamation, a hearty vote of thanks for the address he has given you and for his kind consideration and courtesy in coming down to meet us.

A vote of thanks was then carried by acclamation and three cheers were given for His Excellency.

"THE CROWN IN BUSINESS: CONSIDERED FROM THE CONSTITUTIONAL AND LEGAL VIEWPOINTS."

(Mr. R. L. Ziman).

MR. R. L. ZIMAN (Auckland) then read the following paper on: "The Crown in Business: Considered from the Constitutional and Legal Viewpoints":—

In this happy country, we are able to enjoy the best of food and that in abundance. Possibly it was this fact which caused our legislators to conceive the idea that our legislative diet should be on the same liberal

scale. Whatever the reason, the Legislature endows us each year with a Statute Book beside whose gross proportions the Statute Book of the Imperial Parliament appears but a tiny sylph.

Now, amid its "mass-production" methods, our Legislature appears not to have had the time—and not to have had the facilities—for adequate consideration of the constitutional effect of the laws it enacts. This circumstance has not infrequently been deplored: for it is a well recognised fact that, in the consideration of national problems, the study of constitutional history, and especially the history of the British Constitution—that wonderful story of gradual achievement of "a freedom slowly broadening down from precedent to precedent"—is of considerable assistance.

It will be an advantage, then, to consider very briefly the history and constitutional position of that very versatile entity sometimes called "the Crown" and, sometimes, "His Majesty." For this purpose there is no need to go further back than the Norman conquest, which effected a complete change in the system of government in England. William was not merely in the position of a victor ruling a conquered people; but feudalism—which was based on the holding of land subject to certain obligations of fealty and service—at once made the King the supreme landowner, and invested the relation of King and subject with a contractual character—a right on the one side to service, on the other to protection. Then, through the ages, we find periods of evolution and change. The development of the itinerant Justices under Henry II; of a Parliament representing the three estates of the Realm—the Barons, the Clergy and the Commons—under Edward I; the disruption caused by the Wars of the Roses; the development in Tudor days of a strong Royal Government fitting in with the strength of character of the Tudor Sovereigns; the conflict between King and Parliament in the reigns of the Stuarts culminating in the two Revolutions; the subsequent gradual development of modern Parliamentary institutions; the securing of the independence of the Judges; later (in the reign of George I) the King ceasing to attend Cabinet meetings, thus instituting the Cabinet system which now obtains—the Ministers governing through the Crown—instead of the pre-existing method of the King governing through his Ministers. And so we come to the present day, when the King is merely the instrument of government, the power being, in fact, exercised by Parliament and Cabinet; but, right through, "the Crown" remains the symbol and instrument of the authority of the State.

Thus tracing the history of the term "the Crown" from the Conquest through the ages, we find that, at the outset, it meant the State in the person of the King himself exercising the functions of Government; and that, though the seat of power has changed, "the Crown" still represents the State in its corporate capacity. The term "the Crown" is, in some ways, puzzling, as it means the State in its corporate capacity not only in Great Britain—the centre of the Empire—but also the State in its corporate capacity in many divisions of that Empire. The Crown, under that name or the synonymous term "His Majesty," is thus an entity of great dignity and importance. It is the most important factor in the national life of the Empire itself and also of many divisions of the Empire. The term in another sense is also applicable to the most honoured person in all that Empire—His Majesty the King himself; and its importance in that connection has recently been widened by the change, informally effected, whereby the component parts of the Empire—though still by statute technically subject to the Imperial Parliament—have, in fact, been elevated to the rank of a Commonwealth of Free Nations, united by one common factor, the Crown. In the words of a recent writer, (Sir John Marriott: "How we are Governed," published 1928, at p. 29)—"That vast Commonwealth with its variety of governments and diversity of peoples demands a symbol of unity, and it finds that symbol in our hereditary Kingship." It is therefore of the utmost importance that nothing be done in the name of the Crown—and that no legislation be extant—which may tend to cause the Crown to be looked on as other than the central, the most important, and the most honoured factor in our national life.

How, then, does this tally with the position when trading Departments are set up in the name of the Crown? If His Majesty's name be used in that connection, it follows that he must of necessity be made a party to much litigation concerning the transactions of those Departments; and, in the eloquent words of the late Mr. Justice Alpers, in *Tasman Fruit Growers' Association v. The King*, reported (1927) N.Z.L.R. at p. 532:—

> "It does not stand with the honour and dignity of His Majesty the King that he should so frequently appear in his Courts, *eo nomine*, as a litigant in connection with these many Government Departments."

Now it will be useful for a moment to consider what are the functions of the State in its corporate capacity. Sir John Salmond (Jurisprudence, 7th Edn. p. 139) has defined the primary functions of the State as follows:—

> "It is possible to distinguish among the multitudinous operations of Government two which are set apart as primary and essential. These two are *war* and *the administration of justice* . . . The fundamental purpose and end of political society is defence against external enemies, and the maintenance of peaceable and orderly relations within the community itself. . . . War and the administration of justice . . . are merely two different species of a single genus. . . . Each consists in the exercise of the organised physical force of the community and in each case this force is made use of to the same end namely, the maintenance of the just rights of the community and its members."

Later in the same work, the secondary functions of the State are indicated as follows:—

> "The secondary functions of the State may be divided into two classes: the first consists of those which serve to secure the sufficient fulfilment of the primary functions, and the chief of these are . . . legislation and taxation. The remaining class of

secondary functions comprises all other forms of activity which are, for any reason, deemed specially fit to be undertaken by the State."

Included in "the remaining class of secondary functions" so indicated are two main subclasses namely: social services, such as the provision of education and maintenance of the public health—and the trading activities of the State. Consideration of the Constitutional position of the social services is beyond the scope of this paper and no further reference will be made thereto; but it will be of assistance to contrast the position of the State's trading activities with that of its primary functions.

Now with regard to the primary functions—war and the administration of justice—it is clear from history that these were exercised by the King himself in the first instance and have, in the course of historical development, come to be exercised by the Crown as representing the State in its corporate capacity; and in regard to those primary functions it appears clear that the prerogative rights of the Crown are reasonably necessary. For example, when the Nation is at war, the whole energies of the State must of necessity be bent to the successful prosecution of that war; and it is essential that the Executive have that freedom of action which the Royal prerogative gives. The same principle would appear to apply in the administration of justice. The State, as administering justice between its subjects, must of necessity have full and unquestioned freedom to enforce the law; and for this purpose again the prerogative rights of the Crown appear reasonably necessary. So, also, with the first class of secondary functions, the chief of which are legislation and taxation. In connection with these, it appears reasonably necessary that the State have the extra power and freedom of action which the Royal prerogative gives.

When, however, we come to the trading activities of the State, very different considerations apply. It will, at this stage, be an advantage to point out some of the principal prerogative rights of the Crown and other privileges at present enjoyed by Government trading Departments. These privileges appear to come under a number of heads. One of great importance is a principle whereby the Crown is exempted from the operation of many statutes. The old Common Law rule in regard to this need not be considered as it is superseded by a statutory provision in wider terms now contained in "The Acts Interpretation Act, 1924," Section 5 (k):—

> "No provision in any Act shall in any manner affect the rights of His Majesty his heirs or successors unless it is expressly stated therein that His Majesty shall be bound thereby."

The exemptions which this enactment gives the Crown are numerous and important. Instances are: exemption of the Crown from much industrial legislation, e.g., the Factories Act; the Shops and Offices Act; the Inspection of Machinery Act; and (except for special provisions affecting Railway and State coal-mine employees) the whole of the provisions of the Industrial Conciliation and Arbitration Act. Again the Crown, when a shipowner, is exempted from the stringent provisions of the Shipping and Seamen Acts as to the number and qualification of officers, engineers, and other members of the crew, equipment, and the provisions regarding registration fees and light and other dues payable thereunder. Similarly, the Crown is not bound by the Harbours Act, and exempt from payment of harbour dues and compliance with harbour bylaws.

Another important exemption gained by the Crown under the same principle is freedom from taxing statutes, e.g., those imposing land and income tax and stamp duties on purchases. Under this heading it is also to be remembered that most business enterprises of any magnitude are necessarily carried on as incorporated companies, not only to gain the advantage of limited liability, but also in order to comply with the provisions of the Companies Act which prohibit more than a limited number of persons from trading in partnership. If a company be formed, it has to pay registration fees and annual license duties, which are not payable by State Departments carrying on the same class of business.

Then again the Crown is exempted from almost the whole of the legislation relating to Local Government; and, as is well known, is not slow to take advantage of the fact that it need not pay rates and is not bound by bylaws made by local authorities.

Many enactments of great commercial importance are not binding on the Crown; for example, some only of the provisions of the Bankruptcy Act bind the Crown, with the result that a Government Department, if a creditor in a bankrupt estate, is, in some respects, in a privileged position. The Act provides:—

> "Save as herein provided the provisions of this Act relating to the remedies against the property of the debtor, the priority of debts, the effect of a composition and the effect of a discharge shall bind the Crown."

The Crown is only bound by those provisions expressly mentioned, and the remaining provisions do not bind it. For instance, in *Official Assignee v. The King*, (1922) N.Z.L.R. 265, it was held that the provisions of the Act relating to fraudulent preference do not bind the Crown; so that a Government Department is in the privileged position of being able to retain a payment which, if made to any other creditor, would be set aside as a fraudulent preference. Under the Companies Acts, the position is even more unsatisfactory. The Crown is not bound by any of the provisions of the Acts governing the distribution of the assets of an insolvent company, with the result that the Courts are bound to apply the old principle—that where the rights of the Crown and those of a subject are in conflict or concur, the rights of the Crown shall prevail. Thus, in the case before Mr. Justice Alpers already referred to, where the Crown and another creditor of about the same amount proved and the assets of the company realised only sufficient to pay one debt, the Court, while pointing out the injustice, found itself bound, in the existing state of the law, to hold that the Crown took all.

It would be impossible in a single paper to consider all the statutory exemptions which the Crown enjoys; but sufficient illustrations have been given to show their vast and far-reaching importance.

Another important commercial advantage enjoyed by the Crown is in relation to patents. Section 32 of "The Patents, Designs and Trade Marks Act, 1921-22" (derived from the Imperial Acts of 1907 and 1919) gives any Government Department *the right* by itself or by such of its agents contractors or others as may be authorised in writing by the Minister in charge of that Department, to make use or exercise any patented

invention for the service of the Crown. Provision is then made for the *subsequent* settling of the compensation payable to the patentee either by agreement or by the Court, which may refer the matter to arbitration. The section also provides that, where the invention the subject of a patent has, before the date of a patent, been duly recorded in a document or been tried by or on behalf of any Government Department (not having been communicated by the applicant for patent or the patentee) then any Government Department may use the invention.

Coming now to the consideration of actions by or against the Crown, we find that the Crown is in a privileged position in both cases. In actions brought by the Crown, it may be said generally that the Crown has all the rights of an ordinary plaintiff and certain privileges in addition. One such privilege of vast importance is that no counter-claim can be lodged in an action by the Crown (*Secretary of State for War v. Esdaile*, (1893) 27 I.L.T. 70, which has been followed in New Zealand). The leverage this gives to the Government Department is clearly enormous. The Department has a ready means of enforcing its claim, but the opposite party, although he may have a perfectly just counter-claim, has only the imperfect remedy of petition of right to enforce it; and, as will be shown later, there is no obligation on the Crown to obey the judgment on a petition of right. The position stands thus: that the Crown can enforce its claim but cannot be compelled to pay a perfectly just counter-claim. The Crown Suits Act also confers on the Crown, in many cases, certain special methods of securing and recovering debts due to the Crown.

Coming now to actions against the Crown, we find at the outset that the classes of cases in which proceedings can be brought is limited. The only procedure in ordinary cases is by petition of right, and the Crown Suits Amendment Act, 1910, defines clearly the causes of action available against the Crown on a petition of right namely:—

(1) Breach of contract, express or implied.

(2) Any cause of action in respect of which a petition of right will lie against His Majesty at Common Law.

These may be defined briefly to extend to claims for property wrongfully taken or withheld or the value thereof and to claims for damages, liquidated or unliquidated, for breach of contract.

(3) Any wrong or injury which is independent of contract and for which an action for damages would lie if the defendant were a subject of His Majesty; but no claim lies against the Crown in respect of assault, false imprisonment, malicious prosecution or erroneous judicial process, *or* libel or slander, *or* any cause of action in which malicious motive is an essential element.

These exemptions are clearly of great commercial importance; for instance, if a State trading Department should in one of its publications libel a trading competitor who might thereby be ruined, no action lies against the Department. The Deaths by Accidents Compensation Act is made applicable against the Crown, as also are the provisions of the Workers Compensation Act relating to common employment; but there is the very important limitation that no claim for a larger sum than £2,000 can be made in respect of the death of any person or in respect of any personal injuries suffered by any person. The significance of this is obvious. If an innocent third party suffer death or injury by the wrongful act of an ordinary trading company, the amount of damages which may be awarded is unlimited. In a case against a Government Department under exactly similar circumstances, the limit of such damages is £2,000.

Coming now to the remedies available against a Government Department, there are some exceptional cases in which a mandamus to compel an officer to carry out a duty imposed on him by statute lies; but in nearly all cases the remedy is confined to a claim for damages or for restitution of property in the hands of the Crown. If a person suffer injury to himself or his property by reason of the wrongful acts of an ordinary trading company, he may apply to the Supreme Court for an injunction, but no such remedy is available against the Crown. In such a case, the Department can, if it chooses, continue the wrongful act, leaving the aggrieved party to pursue the dilatory and uncertain remedy of a petition of right claiming damages. Similarly, a receiver cannot be obtained in an action against the Crown. Nor can a co-defendant be joined with the Crown (*Zimmerman v. The King*, (1927) N.Z.L.R. 115).

Let us now trace briefly the course of an action by way of petition of right. The Crown is committing a wrongful act and refuses to desist or pay compensation. The injured party wishes to obtain redress. He must, in the first instance, give one month's notice in writing to a Law Officer stating explicitly the claim or demand and the nature of the relief sought. This is a more serious matter than may at first appear. All of us know that in the preliminary stages of an action it is not infrequently found that the original statement of the claim or demand and of the nature of the relief sought turns out to be inaccurate or that it is desirable to make an alteration therein; and the Courts as a matter of justice allow, in ordinary actions, very liberal rights of amendment. For instance, it is well settled that a plaintiff in an ordinary action may substitute for the original cause of action an alternative cause of action by which he claims to recover the same sum as was originally claimed or he may introduce an alternative cause of action founded on the same circumstances in addition to the original cause of action (*Stout and Sim*, notes to R. 144). None of these amendments are available in a claim against the Crown by way of petition of right. The petitioner is tied down to the statement of his claim and the nature of the relief sought, as set forth in the notice: (*Official Assignee v. The King*, (1922) N.Z.L.R. 265). Having given his notice, the claimant must, within twelve months after the claim or demand arose, file his petition and send a copy to a Law Officer. This limitation of time may result in serious hardship; for example, in a case of a concealed fraud or other wrong of which the injured party does not become aware until after the twelve months has expired, he will be left without remedy. Except by special consent of a Law Officer, the action cannot be brought in the Magistrates' Court but must be in the Supreme Court, however small the amount claimed may be. After service of the petition, the next step is for a Law Officer to file a defence. In an ordinary action after the filing of the defence it is usual to obtain discovery of documents and sometimes to administer interrogatories; and all of us know how useful these processes are. Many a time has the truth been unveiled by means of the documents which a party has been compelled to disclose under an order of dis-

covery. Here again, however, we find difficulties in the way of the claimant. It may be that the Department has many documents not covered by State privilege; but, through the mere technicality of the inaccessibility of the Crown, no order of discovery can be made against a Government Department: (*Thomas v. The Queen*, (1874) L.R. 10 Q.B. 44). Such orders are, of course, readily made and enforced against ordinary trading companies; and the Crown itself has the right to obtain discovery of documents from the plaintiff: (*Tomline v. The Queen*, (1879) 4 Ex. D. 252). For the same technical reason that an order of discovery of documents cannot be made against the Crown, the petitioner is also unable to administer interrogatories.

Coming then to the trial, with these and other incidental disadvantages, the petitioner may or may not succeed in obtaining a judgment. Assuming he does, his troubles are by no means over. The Crown, if the matter is of sufficient moment, can appeal to the Court of Appeal, and again from the Court of Appeal to the Privy Council and thus hold the petitioner at bay and put him to great further expense. Suppose, however, that in the end the judgment goes in favour of the petitioner, what does he receive? Merely a certificate as to the amount awarded. The judgment does not carry interest, even if payment, by reason of appeals or other means, be delayed for years: (*Broad v. The King*, (1916) N.Z. L.R. 609). The same case decided also that there is no obligation on the Crown to pay. At least one instance is on record in which the Government did refuse to pay. It was an action for damages caused to the owners of a property adjoining a State coal depot, by reason of the escape of coal dust from that depot. The case was heard in the ordinary way by a Judge and jury in the Supreme Court and judgment given against the Crown; but the Government refused to pay on the extraordinary and, from a legal point of view, quite untenable ground that the plaintiff company had established their business adjacent to the coal depot with a knowledge of the nuisance.

Apart altogether from the hardships entailed to individuals by these privileges enjoyed by State trading Departments, the existence of such privileges is detrimental to the Nation as a whole from two points of view: firstly, by reason of their obvious injustice and the rankling sense of dissatisfaction which they cause, they tend to undermine that traditional respect for and obedience to the law, which is one of the outstanding sources of strength of the British Nation; secondly, they tend to undermine the authority of the Courts. Now, in this Dominion, the Supreme Court is an institution which enjoys universal respect and is trusted by all the people; and it is obviously a serious matter if the Judges of that Court are forced by the law into the position of giving judgments which are obviously unjust or if the judgments of that Court can be flouted by the Executive. The position was well stated by the present Earl of Halsbury in a recent article dealing with the analagous subject of the surrender of judicial powers to the bureaucracy:—

> "The whole basis of our Constitution lies in the division of the functions exercised by the Legislature, the Executive and the Judiciary. These three bodies have been likened to the legs of a tripod. United, the whole edifice stands. If one is destroyed, the other two fall of their own accord."

The trading Departments have by legislation acquired enormous privileges of which illustrations have been given, but how? Not by direct grant so that Parliament realised what it was doing; but by the simple and ingenious indirect method of establishing trading activities in the name of the Crown; and it is notable how the majority of the Departments, realising undoubtedly the advantages of carrying on in the name of the Crown, have managed to entrench themselves in that position. For instance, the Railways Department was at one time under Commissioners; then under a Minister, and for many years contracts of carriage of passengers and goods were made in the name of the Minister and actions for breach of those contracts lay against him. Accordingly, in *Barrett v. Minister of Railways*, 21 N.Z.L.R. 511, it was held that the Minister, being within the reach of the Court, an order of discovery could be made under which the Minister was bound to disclose all documents of a commercial nature—the only privilege being in regard to those specially relating to the affairs of State. Now in "The Crown Suits Amendment Act, 1910," the effect of this decision was overridden by a brief section and Schedule substituting the term "the Crown" for "the Minister" in the relevant sections of the Government Railways Act. On perusal of the reports of the debates in Parliament on that Bill, it is obvious that none of the Members who considered the Bill realised this particular effect of it. It was merely indicated that the intention was to put the Railway Department on a similar footing to other Departments, without any explanation of the material additional difficulties thereby placed in the way of persons seeking redress against the Department. The Government Life Insurance Department was at one time carried on in the name of a Commissioner who could sue and be sued, and against whom, on the principle of *Barrett v. Minister of Railways*, discovery could have been obtained. Subsequently an incorporated association of the policy-holders was formed to carry on the business of the Department. That association would, except where otherwise expressly provided, be subject to the ordinary laws relating to similar insurance associations. Later, however, the association was abolished and all subsequent transactions were made by the Commissioner in the name and on behalf of the Crown. In some cases, for example the State Advances Office and the State Fire Insurance Office, the official head of the Department is created a corporation sole with power to sue and be sued, so that, in these cases, there is some diminution, but not by any means elimination, of the privileges of the Crown; but, subject to these exceptions, the general tendency of the trading Departments has been to carry on their transactions in the name of the Crown either under express statutory authority or by extending the activities of an existing Department already conducted in the name of the Crown.

One cannot blame the public servants for this state of affairs. Their individual duty is merely to do the best they can to promote the success of their individual Departments. Legal practitioners who, perhaps more than any other section of the community, come into contact with members of the Public Service, will agree that the average Public Servant is very reasonable and courteous, but is in duty bound to be zealous in safeguarding the interests of the Department to which he belongs. It is the legislation and the legislative system which is at fault. The present unsatisfactory position appears to have arisen through failure on the part of the Legislature, and the public, over a long period of years to give due consideration to the constitutional and legal effects of legislation.

Now, when we trace the course of trading in England under the British Constitution, we find (except in time of war) quite a different tendency right through history. There are numerous instances during the centuries of the Crown aiding or even taking a share in trading ventures: for example, Drake's Expeditions, Raleigh's Expeditions, the East India Company, the other great Chartered Companies, the purchase of the Suez Canal shares and, in recent years, large parcels of shares in the Cunard Steamship Company and the Anglo-Persian Oil Company. Similarly, the Canadian Government owns the shares in The Canadian Government Merchant Marine Limited (a company subject to the ordinary law and which accordingly was recently, as a defendant in our Courts, treated in all respects on the same footing as any similar privately-owned steamship company); and in New Zealand we have the historic instance of the State assisting and acquiring shares in the Bank of New Zealand. Now, in all these instances, the State either aided or took all or a substantial portion of the shares in the enterprise; but in none of them was the enterprise carried on in the name of the Crown or in the name of the State itself. It is a reasonable inference, therefore, that it is not according to British Constitutional practice for the Crown to embark in trade in its own name; but that there is no Constitutional objection to the State aiding or taking shares in a trading corporation. The only important apparent exception to that principle in Britain before the Great War appears to have been the Post Office; but this for historical and other reasons stands on a special footing. James I established—and Charles I extended—the Post Office to meet the needs of merchants. It was in the first instance a monopoly established by the Sovereign as a personal source of revenue for himself and his friends. It was only at a considerably later period, when it was well established, that Parliament intervened and appropriated the postal revenue to public purposes and made the Post Office itself a Department of the public service. Furthermore *in its essentials* the Post Office is a social service—providing for the people amenities not available from any other source—and not a trading enterprise. Of recent years its activities have extended considerably, and these newer ventures (e.g., the Post Office Savings Bank), though somewhat in the nature of trading, appear designed, not as competitive ventures, but rather as providing for the poorer section of the community services not otherwise available to them.

During the Great War trading departments of far-reaching scope were set up in Great Britain to meet the National emergency, for example, the Ministry of Food and the Ministry of Shipping. But these Departments have since been completely wound up. And so we find that, even with the enormous extension of State activities during and since the Great War, the constitutional policy in Britain appears to be still the same; for instance, the Government lately deemed it advisable to establish an institution for providing financial assistance to farmers. The scheme was carried out, not by establishing a new State Department or enlarging an existing one, but by means of a special corporation associated with the Bank of England, and to which the State has granted special financial assistance. Similarly when, after the Great War, it was found necessary to take special steps to build up the dye industry—which had previously been in German hands—this was accomplished by establishing a special Dyestuffs Corporation, assisted by the State in various ways, and especially by the appointment temporarily to its chairmanship of one of the greatest Judges and scientists of the day—the late Lord Moulton.

Coming now to the difficulties created by the present system of State trading in New Zealand, it is fair to state that in isolated instances an anomaly has already been removed; for example, some Departments now pay income tax. In other instances, a sort of compromise has been offered, the Department paying some dues and refusing to pay others. Departments are naturally tenacious, and one may, without trenching at all on the political field, suggest that if the problem be attacked piecemeal it will be impossible during existing lives to achieve the application of adequate remedies; also that the piecemeal mode of attack may lead to serious difficulties in other directions; for instance, if a complaint be made that a State trading Department is competing unfairly with a group of private traders in the same business, an easy way out of the difficulty may appear to be an agreement regulating prices. That, however, may lead to dissatisfaction on the part of the public, who may feel that their interests are being sacrificed; and it will do nothing to eliminate the public injustice, and the constitutional dangers, caused by trading Departments availing themselves of the prerogative rights of the Crown. It is also clearly an undesirable principle that justice and fair dealing should depend on political pressure instead of on the strong arm of the law; that A, who can exert sufficient political pressure, should be able to have his particular grievance remedied, while B, who cannot exert that pressure, is left without a remedy, instead of both being able to claim justice as of right, and being able, if necessary, to procure its enforcement through the Courts. On the other hand, it may be suggested that the prerogative rights should be taken away from all State Departments. That, however, may be going too far. As already mentioned, these prerogative rights may be essential in carrying on the primary functions of the State in waging war and administering justice, and the incidental operations of legislation and taxation.

Now, on considering the nature of a trading Department, it can readily be seen that such a Department is more akin to an ordinary trading or industrial corporation than to a Department of State; and this view has received judicial expression. In *Food Controller v. Cork*, (1923) A.C. 647—a case in which the Ministry of Food claimed preference over other creditors of an insolvent company—Lord Atkinson said, at page 659:—

> "I concur with the Master of the Rolls in thinking that the expressions 'Crown debts' and 'debts due to the Crown' are unfortunate expressions inasmuch as they suggest—at least to the uninitiated—that the Sovereign claims the right to be paid debts due to him to the exclusion of the rights of his subjects, either for his own use or for the public use as determined by him. Ages ago, these words would be considered to apply to taxes or suchlike, but now, and especially during the War, when the different Departments of Government became more like great trading and industrial corporations than anything else, it is obvious that it leads to misunderstanding when the trade debts due to these Corporations are sought, by the exercise of the Royal prerogative, to be recovered in priority to those due to subject creditors."

Does not the logical solution of the problem appear, therefore, to be to convert the trading Departments

in law into what they already are in fact, viz.: trading and industrial corporations and to endow them with exactly the same rights and liabilities as trading and industrial corporations owned by private individuals, unless Parliament, in its wisdom, thinks fit expressly to grant any such State trading corporation special privileges? It would appear only right that the process in this respect be reversed; that, instead of starting off by endowing a trading activity of the State by implication with all the privileges of the Crown, the starting point should be that such State trading activity should *prima facie* be on the same footing as the ordinary trading company and not be granted any privilege without special cause shown. This plan follows the sound practical precedents already established in England of the great trading corporations mentioned, in Canada of The Canadian Government Merchant Marine Limited, and in New Zealand of the Bank of New Zealand. For example, it has never been suggested and cannot be suggested that the Bank of New Zealand has in law any privilege denied to other Banks. Although the State is a large shareholder the Bank is, as regards the outside world, in exactly the same legal position as any other Bank.

There is, moreover, judicial guidance for the plan indicated, namely, the judgment of the Judicial Committee of the Privy Council (delivered by Lord Haldane) in *Metropolitan Meat Industry Board v. Sheedy and Ors*, (1927) A.C. 899 (on appeal from the Supreme Court of New South Wales).

The Meat Industry Act, 1915, of New South Wales provided for the maintenance and control of slaughterhouses, cattle sale-yards and meat markets in Sydney and the adjoining district and established appellant Board to administer the Act. The members of the Board (which was incorporated by the Act) were to be appointed by the Governor, who had power to veto certain of its actions. The Board had wide powers which it exercised at its discretion. Any power of interference which a Minister of the Crown possessed was not such as to make the acts of administration his acts. Moneys received by the Board were not paid into the general funds of the State, but to its own fund.

Held that a debt due to the Board was not a debt due to the Crown and that a claim to priority in the liquidation of the debtor Company could not be supported.

Following the principles so laid down, the Board of the State trading or industrial corporation should have wide discretionary powers of its own, and its receipts should not go into the general revenue of the State, but should go to its own funds. The objective is to ensure that such corporation, although its capital be provided by the State, shall in law be deemed to be operating on its own behalf and not as a mere agent of or trustee for the Crown,—but that the Crown have the same rights as the shareholders of an ordinary trading corporation.

It is beyond the province of this paper to say one word for or against State trading; but one may reasonably mention three principles compliance with which appears necessary to put the matter on a proper footing:—

(1) That the State trading activity be carried on under conditions which give it no unfair advantage in law over private traders in the same line;

(2) That the State trading activity be so carried on that its results are capable of accurate comparison with those of private enterprise in the same line. This clearly cannot be the case when the State Department is endowed with so many privileges, prerogatives and exemptions;

(3) That the State trading activity be carried on in such form as not to work any hardship on individuals having no association with it: for instance, it is difficult to defend a system whereby when a person is injured or killed by reason of negligent driving of a vehicle in the service of a State trading Department, such person or his dependents can claim less compensation and be put to more difficulty in enforcing payment thereof than if he had been injured by a vehicle belonging to an ordinary trading company.

It appears to be practicable to comply with these three principles by following the plan already indicated.

One further observation only I should like to make affecting not only this problem, but all important legislative projects, viz.: that it would be a very great benefit to our country if some machinery—not necessarily official—were available whereby the constitutional aspect and the bearing on the existing law of all suggested new legislation of importance could be carefully and impartially examined beforehand. The introduction of such a system would perhaps lessen the volume of legislation, but how many of us would regret that?

May I humbly but earnestly commend these suggestions to your consideration as containing germs of ideas whereby our profession may perhaps assist in promoting the constitutional stability of the Dominion and the contentment and happiness of its people?

REMIT.

Actions by or against Government Departments.

"That the recovery of debt or damages by or against a Government Department should be placed upon the same footing in all respects as the recovery of a debt or damages by or against private traders, and that the institution of and the defending of proceedings by or against Government trading departments in the name of His Majesty is an abuse of the Royal prerogative, and enables Government trading departments to come into Court with the enormous leverage of the Royal prerogative, to the detriment of and with injustice to private traders; and that the Crown Suits Act and the law generally be altered so that actions by or against a Government Department may be instituted by or against such Department in the name of such Department and not in the name of His Majesty the King." (CANTERBURY).

MR. A. F. WRIGHT (Christchurch) in moving the adoption of the remit, said: After listening to the very able and thoughtful paper read by Mr. Ziman, it is unnecessary for me to say anything in support of the remit which stands in my name. I think the remit is rather a long one, and after hearing Mr. Ziman's paper I propose to insert the word, "trading" between the words "Government" and "Department," because Mr. Ziman emphasised that aspect of the matter in his paper. The constitutional aspect of this matter is a subject in which I have taken a very keen interest during the last few years, and I think the whole community—not only the legal community, but the mercantile community

as well—is indebted to Mr. Ziman for his able, thoughtful and lucid paper. I may say that the Chambers of Commerce of this country for the last three or four years have been passing remits asking that Government trading departments shall be placed on the same footing as private traders. Mr. Ziman in approaching this matter from a constitutional point of view has placed it in a different light—he has placed it in such a light that it must produce results, and, I think, must place these Government departments on the same plane as private traders. We are not the only men who suffer from this evil. And it is affecting the mercantile communities in other countries. In 1921 a committee was set up in England to go into the question of the Crown Suits Act, and they have been deliberating on that matter now for six or seven years. Last December a Bill was introduced into the English House of Commons, having for its object the placing of State trading departments on exactly the same footing as private traders. The Bill has received the support of the Associated Chambers of Commerce, the Corporation of the City of London, the Liverpool Chamber of Commerce, the Liverpool Shipowners' Association, the Law Society, and the City of London Solicitors' Company, and the Bar Council of England. At the last meeting of the Associated Chambers of Commerce held in this city of Wellington Sir Francis Bell was present, and various matters affecting the interests of the commercial community which required redress were pointed out to him—one being the Companies Act and another the Crown Suits Act. Sir Francis Bell pointed out that the commercial community was not sufficiently represented in Parliament, and that the House was often at a loss in framing its legislation. At our last Legal Conference it was said that we should not take too limited a view of our duties as lawyers to the general public, and here I think is a subject in which Mr. Ziman has rendered very great service in so pointedly calling attention to the matter. If members would care to go further into the question of claims by and against the Crown, I may say that the matter has been ably discussed by Professor V. Keith, in the "Journal of Comparative International Law" in November last, where he deals with the whole subject and shows the present position of matters. Professor J. H. Morgan, one of our very eminent constitutional writers, has been ably discussed by Professor V. Keith in the *Journal of Comparative International Law*, in November last, where he deals with the whole subject and shows the present position of matters. Professor J. H. Morgan, one of our very eminent constitutional writers, has attacked the subject in a brilliant introduction in Mr. Robertson's book on "*Public Bodies and Legal Liability.*" You will see, therefore, that not only is New Zealand faced with this problem, but probably we feel it the more acutely because where in the Old Land the State engages in one department of trade, here the State engages in a hundred. The evil is, therefore, all the more acute with us. Eminent Judges like Lord Shaw of Dunfermline have again and again called attention to the unfair use of the Royal prerogative in trading departments, showing how the use of that prerogative is detrimental to the Crown, and he says in very trenchant words that it will be an evil day if once again that Royal prerogative gets into association with executive acts without clear statutory authority. One could not perhaps say that in the Government trading departments of New Zealand the Royal prerogative has got into association with executive acts without Parliamentary authority, but it is getting very near to it, and it is an evil which calls for drastic remedy. I have, therefore, great pleasure in moving the adoption of the remit.

MR. H. C. D. VAN ASCH (Christchurch): In Mr. Wanklyn's absence, I have pleasure in seconding the adoption.

MR. P. J. O'REGAN (Wellington): First of all, I desire heartily to congratulate Mr. Ziman, to whose paper we all listened with great interest and respect. I congratulate him not only because he has touched on a point of great interest to the commercial community, but because he has shown with irresistible logic that the matter is one which appeals to every member of the community. I have repeatedly, during several years of a busy professional career, endeavoured to draw attention to the flagrant abuses referred to, and the immunity enjoyed by the Crown in respect of legislation which has been specially framed for the protection of workers. For instance, let us refer to the Stone Quarries Act of 1920. You will find that it refers to all owners of quarries, but when you come to read the Acts Interpretation Act you find that by reason of the provision that no Statute binds the Crown unless there is a special provision to that effect, the Crown, although the largest employer of quarry labour in New Zealand, is absolutely immune from the provisions of the Stone Quarries Act. Then, again, you will find that Section 4 of the Inspection of Machinery Act, 1914, gives a cause of action to every person injured by coming in contact with moving machinery, but although the Crown, in several of its departments, is a large employer of labour in this connection, and accidents frequently occur among its employees, the Crown is immune from the provisions of that Section of the Act. Instances could be multiplied illustrating the pernicious fact that the Crown is immune from those provisions which have been passed for the protection of life and limb of employees—provisions which have been particularly aimed at private employers of labour. If the Legal Conference does nothing else than draw attention to these abuses it will have conferred a lasting benefit on the public. I merely wish to draw attention to the grave public importance of the subject touched on by Mr. Ziman, and I again congratulate him on his address. It may be of interest to members of the commercial community, who have been as voices crying in the wilderness, to know that if the subject is properly approached they can appeal to a much wider audience.

MR. R. H. WEBB (Wellington): I would like to ask one question. Does Mr. Wright intend to convey to us that it is the intention of Canterbury to exclude such a department as the Public Trust Office?

MR. A. F. WRIGHT (Christchurch): It is not intended to exclude the Public Trust Office. I think the Public Trust Office must be regarded as a trading department. They issue a profit and loss account and balance-sheet, and, in addition to that, the Public Trustee can sue and be sued in his own name. I do not think he has the Royal prerogative of the Crown in the same manner as other Government departments.

MR. I. PATTERSON (Reefton): Whilst the remit proposed by Mr. Wright may not exclude the Public Trustee, seeing that he has been held to be a brewer, there is a fear that by confining it to trading departments, the result may be so limited that it may not be as effective as it ought to be. There are other departments which are not truly trading departments but which greatly encroach on the rights of the subject

in the manner indicated in the learned paper delivered by Mr. Ziman. One department has a very pernicious influence in the district from which I come—the Westland district. I refer to the State Forestry Department. Anyone who has been associated with that department must recognise how much they have taken to themselves the rights and privileges of the Crown without assuming commensurate responsibility. If the remit is limited to trading departments I am afraid it will not include the State Forestry Department, because, as I have said, it is not really a trading department—it is an industrial department. And I suggest that Mr. Wright should include industrial as well as trading departments so as to cover all branches of the Government's activities. In that form I would support the remit, because, from my own experience with the Department I have referred to, I feel very strongly that something should be done, and done quickly.

MR. H. C. D. VAN ASCH (Christchurch): I suggest to Mr. Wright that he amend the remit to read: "against all Government departments, trading or otherwise."

MR. M. MYERS, K.C. (Wellington): I would like to say that the remit is quite all right as it is. It refers specially to trading departments. What is the necessity for amending it? You will find the words "trading departments" are specially used.

MR. A. F. WRIGHT (Christchurch): Yes,—I will now ask that the remit stand as printed.

MR. A. FAIR, K.C., Solicitor-General (Wellington): I did not intend to speak to the motion as proposed to be amended, but the motion as it originally stood is quite a different proposition. It includes all kinds of actions against the Crown in all its capacities, and Mr. Ziman, in his very carefully considered and very aptly expressed paper, has pointed out that there are certain functions of the Crown in which the protection afforded by the provisions of the Crown Suits Act should properly be applied. Now, let us consider one by one what these provisions are. The first is that 28 days' notice is required of an action. That has been found necessary apparently by experience, and it does not work any great hardship. I do not propose to dwell on that. Then there is the special procedure by way of petition. That involves no hardship—it is practically the same as a statement of claim. We next come to the fact that if the Crown makes a claim, a subject cannot counter-claim in the same action. That, again, is a matter of procedure and is of no great importance. It may possibly delay the action for two or three months, but the delay affects the Crown equally as it does the subject. I mean that the Court would grant an adjournment of the Crown case if asked. It is not a matter of substance. Then one comes to the next stage that discovery and interrogatories cannot be obtained against the Crown in an ordinary action. That also has been found necessary in the public interest. There is eminent authority for that at Home, in England. Sir Leslie Scott, K.C., who, I understand, has no connection at all with any Government department, or any interest in forwarding the views of the Crown. . . . .

MR. H. F. O'LEARY (Wellington): He is an ex-Solicitor-General.

MR. A. FAIR, K.C. (Wellington): I believe so. Well, he has delivered a paper which attacks the Crown procedure at Home—which is very different from our procedure here. But in dealing with the question of discovery, he, while attacking other features, considered it was necessary to preserve the Crown's right against discovery, because, for instance, there might be certain documents mention of which might cause prejudice to the public interest. Take as an example, trade negotiations with other countries in connection with treaties. If, in certain circumstances, the fact is disclosed that such negotiations are in progress, it might seriously prejudice the whole proceedings.

MR. M. MYERS, K.C. (Wellington): They are documents of State.

MR. A. FAIR, K.C. (Wellington): They may or may not be; but there is no provision made in the remit for documents of State. Then, leaving the question of discovery, one comes to that of execution. It seems to me, with all respect to Mr. Ziman, impossible seriously to suggest that a person who recovers judgment against the Crown should be able to issue a writ of execution and, if necessary, seize the furniture in the Minister's office. Suppose, for instance, a person who obtained a judgment should take it into his head to seize the books of account in the office of the Commissioner of Taxes. I have no doubt there would be great rejoicing on the part of many taxpayers, but it would embarrass the functioning of the State, and that is the reason why execution cannot be granted against the Crown. And, again, I suggest there is no hardship, because in every case the Crown in New Zealand, so far as I am aware, has met any judgment given against it, and met it in full. There is no necessity for the change.

MR. M. M. F. LUCKIE (Wellington): Well, then, there would be no harm in passing the remit.

MR. A. FAIR, K.C. (Wellington): There is the danger that Crown property may be seized.

A MEMBER: Would Mr. Fair deal with the specific case mentioned in Mr. Ziman's paper?

MR. A. FAIR, K.C. (Wellington): I did not make a note of the case mentioned, and I am not aware of it. It is possible that there may be one case, but if there is, it is a case of—as the song says—"one flower blooming alone." But the difficulty one has in dealing with large questions of this sort is that considerations which support the maintenance of the present position are general considerations—it is difficult to state a specific instance. But it does seem to me that that instance in itself—that a creditor can seize any property belonging to the Crown if the right of execution exists—should be sufficient to exempt the Crown from that power. A private individual is in an entirely different position—he is not administering affairs on behalf of the State. It is a protection in the public interest, and, except for the case mentioned by Mr. Ziman, I do not know of one instance where it has been abused.

At the suggestion of THE CHAIRMAN further debate on the matter was adjourned till the following day, to allow members to attend a reception by the Attorney-General (the Hon. Mr. T. K. Sidey) and Mrs. Sidey, at Parliamentary Buildings.

SECOND DAY.

Thursday, 4th April, 1929.

The Conference resumed at 9 a.m., and proceeded with the discussion of the Remit above-quoted as to actions by and against Government Departments.

MR. A. T. DONNELLY (Christchurch): May I be permitted to move that consideration of this remit be referred to a small committee to be appointed by the New Zealand Law Society. I move that for these reasons. First of all, everyone will agree that the trading privileges of the Crown should be abolished, but it is not easy to decide, at a Conference of this nature, what privileges should be abolished and what should be retained. In the second place, although my friend Mr. Myers told Mr. Wright yesterday that the remit as it stood was perfectly clear, yet on scrutinising it more closely this morning I think the remit is one upon which there might be a difference of opinion in the House of Lords if its consideration came before that tribunal. As a personal explanation, I would like to say that although the remit is moved by Canterbury, the legal representative of the Crown in Canterbury has not oppressed the citizens. In Canterbury the profession has been rather spoilt and pampered, if I may say so, by the legal representative of the Crown, and there is no doubt a peculiar sympathy with other parts of the country which has caused them to move this remit in the very wide terms in which it is framed. I notice that the remit consists of some twelve lines of closely printed type—something like 200 words in all—with very little punctuation, and I hope the Attorney-General had not this remit in mind when yesterday he stressed the necessity for aspiring entrants to the legal profession having a sound elementary and advanced knowledge of English composition.

MR. L. A. TAYLOR (Hawera): I wish to second the amendment. I do so because no doubt gentlemen here will have noticed that, at the recent Labour Congress in Wellington, they affirmed the principle of the State's incursion into trading activities. These principles, of course, are diametrically opposed to the principles enunciated in Mr. Ziman's excellent paper read yesterday. I hope, however, that when the New Zealand Law Society does consider the matter, if this amendment be carried, they will appoint some of our Labour lawyers on the committee, so that it may be possible to reconcile the two angles of view.

A MEMBER: Is Mr. Donnelly's motion full enough? Should we not affirm the principle involved?

THE CHAIRMAN: Would that meet your views, Mr. Donnelly?

MR. A. T. DONNELLY: Yes.

MR. M. M. F. LUCKIE (Wellington): We have listened with very great pleasure to the address read by Mr. Ziman. I think that those of us—if there are any—who had any doubts about the propriety of passing this remit, would have had those doubts entirely removed after listening to the speech of the Solicitor-General against passing it. Every one of the arguments he used was a direct authority in favour of the principle of the remit and against his own case. I examined them carefully and could find nothing in them which did not carry more weight against his case than in favour of it, and in saying that I am speaking as a member of a City Council which probably does more in the way of private trading, or competition with private trade, than any other local body in New Zealand. Yet, I would have found it extremely difficult to defend the action of the Wellington City Council in these matters after hearing the very excellent speech against his own case by the Solicitor-General.

MR. A. E. CURRIE, Crown Law Officer, (Wellington): There is one point I should like to make, and that is to remind the Conference that although apparently the Crown Suits Amendment Act of 1910 has not been brought up to date to the satisfaction of this Conference, that Act was at least a vast improvement on the position which obtained previous to its passing, and the large extension of the rights of the subject against the Crown effected by that legislation was due, I think, to the Bill promoted by Sir John Findlay, when he was Attorney-General, and carried through when the late Sir John Salmond was in the early stage of his career as Parliamentary draftsman. The limitations referred to by Mr. Ziman are largely those which it does not consort with the dignity of the Crown to insist on. The Crown is not without its remedy. Another point is the question of damages against the Crown where a jury is concerned. I think we must recognise that as practical politics it would not be safe to dispense with a limit altogether in actions of damage to the person where a jury is concerned and the Crown is the defendant. We know what it is when we are proceeding against a bank or some large corporation—they are regarded as "fair marks" by juries.

A MEMBER: What about local bodies?

MR. A. E. CURRIE: They are really entitled to the same protection as the Crown. I agree with Mr. Donnelly that it is difficult to work out the details, but I think we must recognise that it is not within the sphere of practical politics to pass the remit in its present wording, thus placing the recovery of damages from the Crown on the same footing as recovering them from private traders. I think the efforts of the proposed committee should be directed to matters of procedure—whether it is reasonable at the present time, in view of experience gained since 1910, that some amendment should be introduced.

MR. J. D. HUTCHISON (Christchurch): I would like to say that if Mr. Myers' view of the amendment to this remit is correct—and it would appear that there can be no serious doubt about it—then the arguments brought forward by the Solicitor-General and Mr. Currie have no real foundation. This remit deals solely with the trading departments, and under these circumstances there is no reason why in any given case discovery should not be allowed against the particular trading department concerned. It discovers only what is relative to the particular case coming before the Court. And, further, there is no reason why there should not be a right of execution against that particular department in pursuance of any judgment obtained against it. Every subject of the Crown is subject to the right of execution and the obligation to pay his debts, and there is no reason to anticipate that any Crown department would not also pay its debts and so save the Minister's tables and chairs from being seized. If the view expressed by Mr. Myers is correct—and it appears to be—there is no reason why this remit should not be passed in the form in which it appears.

MR. M. MYERS, K.C. (Wellington): I suggest that Mr. Donnelly's motion should be in this form: "That the subject matter of the above remit be referred to the Council of the New Zealand Law Society for consideration and appropriate action." We need not suggest

the appointment of a committee—that could be left to the Council.

Mr. A. T. DONNELLY agreed to the suggested alteration, and the amendment as altered was put to the Conference and carried.

"AN ELECTIVE JUDICIARY."

(Mr. P. J. O'Regan).

MR. P. J. O'REGAN (Wellington) : then read the following paper on "An Elective Judiciary" :—

Mr. Chairman and Gentlemen :—That our Judges and Magistrates should be elected will doubtless appear to many a startling proposition. We have heard so much of the evils arising from the principle of election in the United States of America that we have grown increasingly satisfied that our own system of appointment is incapable of improvement. Doubtless that system marked a great advance in the seventeenth century, when, as the result of the evils experienced under the Stuarts, the Judges, though they continued nominally to be appointed by the Crown, had their positions founded upon a Parliamentary statute. Although they continued, and still continue, to be styled the King's Judges, as of old, they ceased to be amenable to influence by the Crown, were made immune from Parliamentary criticism, and could be deprived of office under circumstances so exceptional that the powers vested in Parliament to remove them have rarely, if ever, been invoked.

I think it can hardly be denied, however, that had there been no Parliamentary safeguards enacted as the result of the Revolution of 1688, the power of the Crown would have been effectively curbed owing to the enhanced authority of Parliament. In the days of the Stuarts, the heresy of the Divine right of kings was not the amusing fiction which it has come to be regarded in our times. In those far-off days no one dared suggest that it was the right of the subject to criticise the occupant of the Throne. Nowadays the position is very different, for, as has been well said by the historian, Green, the Sovereign is as much liable to criticism as the meanest tax-gatherer in his realm.

The authority of Parliament as we know it now, did not spring into existence immediately after the Revolution of 1688, but it is the direct consequence—and to a large extent, no doubt, the unforseen consequence—of the principles affirmed by the Revolution. The power which was once claimed by the Crown, to curb which what may be termed Constitutional statutes were passed, has not really disappeared. It has been transferred from the Crown to Parliament, and accordingly the intrusion of the Royal interference with judicial functions, which was characteristic of the Stuart dynasty, would have become a thing of the past had the Revolution been signalised by no Constitutional enactments preserving the immunity of the Judges. Doubtless the statesmen of the Revolution had something more in mind than the mere curtailment of Royal pretensions. Certainly the restrictions placed upon the right of removal by Parliamentary resolution, would appear to indicate that the legislator of the seventeenth century had in mind the protection of the Judges from political as well as royal influence.

It should be borne in mind, however, that nowadays circumstances have changed altogether from those contemplated in the seventeenth century. In those days the American Colonies were merely infant dependencies, but they were the only British Colonies. Although there is a historic explanation for the fact, it seems to me not a little anomalous that the Judge in Canada, in South Africa, in Australia and in New Zealand should still be styled the King's Judges, when we know that in fact they are appointed by the political party in power for the time being. To say so much is not to reflect upon the Judges, and, indeed, nothing is further from my intention, nor has this article been prompted or suggested as the result of any appointment to the Bench in this country. Heretofore our New Zealand Judges have upheld the principles which are the inheritance of centuries, and their work will bear comparison with that of any of the countries comprising the British Empire. My submission, however, is that circumstances have so altered since the seventeenth century that the time has arrived for a change in the method of making judicial appointments. The change that I suggest is, not that the Judges or Magistrates should be elected by the constituency from which the House of Representatives is chosen, but that our profession should be the constituency. Briefly, I suggest that the profession in New Zealand—and the plan would be equally applicable elsewhere—should elect a Senate or College of, say, forty members, that Senate or College being invested with the power to make all appointments to the judicial or magisterial Bench. The College might be elected by postal ballot, and it could be elected for three years or five years. For the purpose of election, the country might be divided into several districts, though this does not seem to me to be really necessary. In my opinion the country should be one constituency and the College elected on the proportional principle, but I cannot be expected to go into all the details in a paper like the present, wherein I can do no more than outline the general principles. Judges and Magistrates could be appointed during good behaviour as they are now, and the change I propose could, of course, be made only under the authority of a Parliamentary statute. Obviously the effect would be to take the appointment of Judges and Magistrates completely out of the hands of the Government of the day. Accordingly there could not be even the slightest suspicion of political influence in connection with any appointment, and I think it is no more than truth to add that under the system I suggest, we should obtain for the first time a really independent Bench.

The suggestion of political influence is inseparable from a system under which judicial appointments are made from time to time from the ranks of active politicians. Under the system I propose, political activities need be no disqualification to appointment, but the fact of the appointments being made by a non-political tribunal chosen by the members of the legal profession would make even the suggestion of political influence impossible, and consequently would place the Bench in a much better position than is possible at present.

Moreover, I think the circumstances of our time make imperative any change that would enhance the status and popularity of the legal profession. Under the prevailing system, the profession, through the Law Societies, does endeavour to exercise some influence in connection with judicial appointments, but it is vague, uncertain, timorous, and altogether beneath the dignity of a great profession.

I invite you to visualise the change I am proposing. Under any system, promotion to the Bench is necessarily denied to a great many capable members of our profession, because of the comparative fewness of the appointments. An Electoral College of forty members would open opportunities for able and public-spirited members of the profession to exert a salutary influence in connection with public affairs. The election to a College on whom devolved the high honour and responsibility of selecting Judges and Magistrates would be in itself an honour which would gratify the laudable ambitions of many able men who are now condemned to unmerited obscurity. Of course members of the College would be eligible for appointment, though appointments need not be limited to them. It might be desirable that the Attorney-General and Solicitor-General for the time being should be members of the College *ex officio*. As I have already said, however, details do not belong to the scheme which I am endeavouring to outline. The College might well be the tribunal to which the Judges themselves would look for guidance on certain points. Opinions may differ as to the propriety of Judges and Magistrates accepting appointment to Royal Commissions, but if they did so with the sanction of their constituents, as expressed by the tribunal which appointed them, I apprehend there could be no possible objection.

I may be told that the elective system has been in operation in America since the birth of the United States, and that it has there been productive of great evils. I do not propose the adoption of the American method of election, though I am prepared to maintain, if need be, that the evils of the American system have been greatly exaggerated. It has ever been the aim of Constitutional reformers to safeguard the independence of the Bench and to separate the Judiciary from the Executive. The theory underlying the system of election authorised by the American Constitution is that, though both the Bench and the Legislature should equally derive their authority from "the consent of the governed," they are more effectively separated than could possibly be the fact if the Bench owed its existence to the Executive. It should be borne in mind that the men who framed the Constitution of the United States lived in times very different from our own. They had in mind to an extent we do not realise the days, then not so far distant, when the Tudor and Stuart kings sought to sap the independence of the Judges, sometimes by direct interference, and sometimes through the medium of complaisant Ministers, and accordingly they sought a means whereby the Bench would derive its authority direct from the people. If the system they evolved has not fully realised their hopes, we should not too readily censure their workmanship, nor should we conclude that our own system is the only alternative, or that it excludes the possibility of improvement. The Federal Supreme Court of the United States does in fact closely resemble our own, inasmuch as the members thereof, unlike the State Judges, are not elected by popular suffrage, but are appointed by the President, "with the advice and consent of the Senate,". Yet, curiously enough, the Federal Supreme Court has by no means escaped the charge of political influence. You are aware, of course, that the interpretation of the Constitution of the United States is the function of the Supreme Court, and anyone who has followed American history does not require to be told that political controversy has often centred round the interpretation of the Constitution. For example, the Cleveland Administration came into office in 1892, under the pledge to give effect to a radical reduction of the tariff, the public opinion of the Union having been shocked into activity by the McKinley Tariff Act of 1889. Of course, such a reduction of the tariff as Mr. Cleveland contemplated involved direct taxation, and so one of the first acts of the Administration was to procure the passage of an Income Tax Act by Congress. The "interests" behind the tariff got to work, however, and the Federal Supreme Court was asked to decide whether the Cleveland Income Tax Act was within the ambit of the Constitution. We have it on the authority of Lord Bryce, in "The American Commonwealth," that the Judges appointed by the Republican Party voted one way, and the appointees of the Democratic Party the other. Following the Civil War, political power was practically monopolised by the Republican Party, and hence the Cleveland Income Tax law owed its defeat to the fact that the Democratic appointees were the minority on the Bench!

As a matter of fact, however, we have no need to go so far afield as the United States for examples of political influence in connection with the Bench. With us there can be no such example as that afforded by the Cleveland Income Tax Act, because under our system no Court has to determine the competence of Parliament. Within recent years, however, we have seen the occupant of the highest judicial post in England taking a prominent and aggressive part in the agitation against legislation limiting the powers of the House of Lords. Lord Halsbury did not think it beneath the dignity of his high office, first, to invite the Lords to reject the Budget of 1909, and, secondly, to announce his implacable opposition to the Home Rule Bill and to the Parliament Act of 1910.

There are several instances in New Zealand history where men have stepped from the arena of active politics to the Bench, and I mean no reflection upon these gentlemen when I contend that their position would be much stronger had they been appointed by their peers of the legal profession.

Doubtless there are critics who will argue that our profession is pre-eminently conservative, and that I am advocating a change so revolutionary that it cannot be justified. I trust I am not insensible to the value of conservatism, using the term with a proper regard to its meaning. There is conservatism which is merely a polite name for stupidity, but there is also a conservatism which is based upon a proper regard for the facts of history, but which bears in mind that there must be evolution or development as time progresses. Political and social progress consists in the expansion and extension of principles which have existed from the beginning of society. The law and Constitution of England are very different to-day from what they were in the days of King Alfred, but, properly speaking, there has been no change, but rather development with the times. Cardinal Newman in his "Development of Christian Doctrine" has shown that, although Christianity to-day is something very different from

what it was in the days of the Apostles, that difference is due to development and not to innovation. The same doctrine is equally applicable to principles coming within the ambit of constitutional and political history. Sir Henry Maine has shown us how the modern State has developed from the authority once wielded in the patriarch's tent just as surely as the peacock, with its glorious plumage and wealth of colour, was once potentially contained in the egg. I agree with Edmund Burke, who has given us his most matured thought in his "Reflections on the Revolution in France," that in everything we do, we should feel that we are standing in the presence of canonised forefathers. Taking that high ground, I am speaking no more than fact in affirming that the principle of election is deeply grounded in history. For history shows us that the principle is as old as human society. Certainly Samuel appointed Saul King of Israel, but the appointment was first requested by the chiefs and elders of the people. In the early days of Christianity the Bishops were elected by universal suffrage of the faithful. Mr. Lecky tells that "it should be remembered that the Early Church had adopted a system of government that was based on the most democratic principles. It can be no exaggeration to state that if the practice of electing Bishops by universal suffrage had continued, the habits of freedom would have been so diffused among the people, that the changes our own age has witnessed might have been anticipated by many centuries . . ." In the Greek Church to-day the clergy elect the Bishops in much the same manner as in the days preceding the rupture with Rome. In the Anglican Church, the clergy and laity, in Synod, elect the Bishops, just as they did in pre-Reformation times. In the Catholic Church the system of appointing Bishops has changed, and is not alike in every country, but the underlying principle is election. Usually the clergy nominate three of their number under the style of Dignus, Dignior, Dignissimus, whose names are submitted to the Pope for final selection. Moreover, the Superiors of the numerous religious Orders of the Church are, and have been from the inception of these Orders, elected by their fellow-members, and the Pope himself is elected by the College of Cardinals. Time was, indeed, when the Pope himself was elected by universal suffrage, and it is doubtful whether, had a state of peace been as normal as it has since become, that system would ever have been superseded. Since the year 1059, however, the suffrage has been limited to the College of Cardinals. Newman has pointed out that Hildebrand, probably the greatest of the Popes, was the first to be elected by the College of Cardinals, though the College on that occasion merely confirmed the popular wish, inasmuch as Hildebrand, on his appearance in St. Peter's, was acclaimed by the multitude as the Father of Christendom, whereupon the Sacred College approved the popular choice.

Some such precedent as that afforded by the election of the Pope must have been present in the minds of the great men who framed the Constitution of the American Republic. As you are aware, the President of the Republic is chosen by a College elected by the nation at large. Doubtless the machinery devised by the fathers of the American Constitution for the election of the President has in many respects fallen short of what was in contemplation by its founders. It remains a fact, nevertheless, that some of the wisest and noblest statesmen in history have filled the Presidential chair of the American Republic. Moreover, it is submitted that the plan itself is so excellent that it corrects the infirmities of its occupant, inasmuch as he is surrounded with safeguards which make it difficult, if not impossible, for him to act in a manner unworthy of his high office. It would be too much to predict that the American Constitution will remain unchanged and unchangeable as the laws of the Medes and Persians, but I think we may safely affirm that the office of President will always remain elective, and that as time goes on the plan will be followed by other nations. At any rate, the principle of election cannot be regarded as an innovation, since it is founded upon the surest of all bases—that of history.

I would invite those who may be unprepared to accept the proposal I am endeavouring to outline to state the rationale of their opposition. Do they consider our profession unfitted for the office of selecting Judges and Magistrates? It will require some argument to convince me that the great legal profession, comprising as it does a large proportion of the ablest men in this country, is not as competent to select Judges and Magistrates as party politicians who have no legal training, whose positions are uncertain, and who often owe their promotion to the accidents of politics. Contemporary history in this country is replete with instances showing that men may occupy high political office to-day who were unheard of yesterday. Can it be argued for a moment that the qualifications of these men to make judicial appointments should be preferred to those of men whose life-work it is to spend themselves in the service of an exacting profession?

The proposal I am submitting can be defended upon other grounds. The change I propose would reduce the patronage and power of the Executive. Not the least danger of the present age is the tendency to multiply the functions of Government, and there is no greater menace to liberty—I mean individual liberty, of course. "Liberty," writes Mr. Lecky, "cannot be maintained without a restriction of the province of Government, and indeed may be said in a great measure to consist of such a restriction." Herbert Spencer has pictured "The Coming Slavery" in the form of legislative restriction behind which are "caucuses of ignorant and fanatical wire-pullers." I do not propose to discuss here the proper functions of Government, or the principles of legislation. Suffice it to say that any change having the tendency to simplify Government, to reduce the patronage of the Executive, and to de-centralise power, should commend itself to the sympathy of all thoughtful men. A great mistake was made, in my opinion, in 1875, when we abolished Provincial Government. The evils emanating from the abolition of the Provinces have exceeded those contemplated by the able men who defended the Provinces when they were attacked in the early seventies. The degradation of local government is signified in the aggrandisement of the central Government, and local government has been undermined steadily since the abolition of the Provinces. Local governing bodies have diminished in importance, first, because their number has been multiplied out of all reason since 1875, and, secondly, because they have been deprived in a large measure of their political powers. Proposals are constantly coming before Parliament or are being bruited in the Press, not for the avowed curtailment of local government, but in favour of principles of which that curtailment is the inevitable sequence. The framers of the American Constitution, who may be regarded as the greatest men of their age, had vividly before them the dangers inseparable from the growth of control by the central

Government. Accordingly they were careful to surround the Constitution with safeguards calculated to modify that danger. Not merely were the activities of the Legislature restricted by the Constitution, but those officers of Parliament, whom we call Ministers, but whom Americans call the Cabinet, were denied the right to sit in Parliament. It is too late in any British country to advocate a Constitutional change involving the appointment of Ministers who do not sit in Parliament, but it is not too late to take measures calculated to check what is admittedly a growing evil. One of the great advantages of the system I am proposing is that it would curtail Ministerial patronage. To the extent that it lessened the power of the central Government, however, it would enhance the dignity and importance of the legal profession. It would give our profession a degree of standing and honour to which the ability of its members entitles it. At the same time it would in the highest degree conserve the public interest. Anything that will exalt the importance of the Bench, anything that will give its occupants a more assured position, must conduce to the highest of all interests—the interests of the people at large. I venture to submit that if you test the proposal I am submitting for your consideration by the standards I have indicated, you will realise that its effect would be far-reaching and salutary.

Though the public interest must be the paramount consideration, we should not disregard the incidental advantages of the change I am proposing. Our profession cannot afford to disregard the goodwill of the public at large, and that goodwill would be enhanced by a system which, while it increased the prestige of the Bench, would bring home to the public the great fact that the Bench was the constitutional emanation of the legal profession. Accordingly it would augment the popularity of the profession by emphasising its utilitarian benefits. Just as I regard with the gravest apprehension the recent curtailment of the right of trial by jury, for the reason that the jury is an important link between the profession and the people, so I regard a system of appointment which denies to our profession its proper participation in the selection of Judges and Magistrates. The pessimist to the contrary notwithstanding, democracy is not on its trial. Democracy is inevitable. To make the legal profession the constituency responsible for the appointment of Judges and Magistrates, while it would be a change in conformity with constitutional principles, would be in close harmony with the democratic tendencies of the age—with the spirit of the age, in fact, using that phrase in its best and proper sense. Accordingly I submit with confidence to your careful consideration a constitutional change, the effort of which would be to serve the public interest, to enhance the dignity of the Bench, and to give the legal profession its due place and importance in the life of the nation.

"THE UNIVERSITY AND THE PROFESSION."

(Professor J. Adamson).

PROFESSOR J. ADAMSON (Wellington) then read the following paper on "The University and the Profession":—

No apology, I feel sure you will agree, is due by your Committee for putting this subject on the agenda paper for discussion.

Some of you may have forgotten so much of your Constitutional History as to fail to remember that a meeting of the King, Lords and Commons in the 15th century has been, throughout the ages, branded as the "unlearned" Parliament because lawyers were excluded from it. But you are all aware that in that best known and most august of all modern political institutions—the Mother of Parliaments—members of the legal profession are still addressed respectfully as "the noble and learned Lord" and "the honourable and learned Member" in the respective Houses to which they belong. It is not for nothing that lawyers have thus been singled out. Many names will readily occur to you of those who have combined high academic distinction with conspicuous professional success. I recall at random a few learned holders of the highest judicial office who have acquired pre-eminence not only in law and politics, but also in other fields, and have left their footprints on the sands of time. In the 16th century, Bacon, that inexplicable personality who may be forgiven much because of his services to literature and science; at the beginning of the 19th century, Brougham, of whom it has been said, no doubt by a mordant wit, that, if he had known a little about law, he would have known a little about everything; in the 20th century, Haldane, who will probably be known to future generations rather as an expert authority on military organisation than as a brilliant exponent of philosophic theory. Birkenhead, after attaining a position in his profession which would have satiated the ambition of most men, has sought new worlds to conquer where his many-sided accomplishments may produce still more popular, if not greater, achievements than a reform of the English law of Property.

But the subject covers so vast a field that it would be impossible for me in the time at my disposal this morning to mark out its confines, far less to explore it fully.

I can only touch on one phase of the subject, and therefore my theme will be this: "There is, on the one hand, too much University, and, on the other, too little University in the profession." Paradoxical though this statement may at first sight seem, the paradox will, I think, disappear when it is noted that the word "University" is used in two senses. Until a hundred years ago a University would, I venture to suggest, have been understood almost all the world over to mean a seat of learning where those desirous of improving their minds sought erudition by means of personal and direct instruction from professors who were recognised as masters of some particular branch of knowledge, and by contact with their fellow students. And such is still the current conception in all but English-speaking countries. In some of these, however, a University has come to be regarded as an institution—a body without a soul—and, so to speak, without a local habitation, existing merely as an intermediary between examinees and examiners, to the latter of whom the former are mere ciphers. It would be interesting to trace the origin of this view, so divergent is it from the

earlier notion. I think it arose in connection with the foundation of the University of London, a century ago, or rather, in its first reorganisation in 1836, when for various reasons, which need not be discussed here, the University was dissociated from the University College as a teaching body and its activities were confined to the holding of examinations and the conferring of degrees. It was probably originally intended that such degrees should be conferred on students of the two teaching institutions then incorporated with the University, but the new charter was couched in language that implied no limitation, and in practice degrees were conferred on all and sundry who qualified by examination. But it was never suggested that this was an ideal arrangement or that it was anything more than a temporary makeshift.

However that may be, it served as a model for Colonial and Indian institutions which were subsequently established. It must not, however, be thought that those who were responsible for the introduction of University education in New Zealand were unaware of the distinction, because, as I am given to understand, they considered but rejected, rightly or wrongly, for good or ill, a scheme to send students to the old Universities at Home. But there arose those who knew not Joseph, and there came to prevail in this country the view that anyone who had obtained a degree from the local University could claim to have had a University education, and passing an examination became an end in itself. When the Judges turned the examination for the entrance to the profession over to the University the transformation was complete. So strongly has this impression prevailed that recently when it was felt that all was not well in the profession the only thing, apart from the rearrangement of subjects, that was done was to require more "University" in the shape of additional examinations. This had led to some curious and interesting results. A solicitor has now to undergo a longer, if not more strenuous, examination in Property and Contracts than does a candidate for Honours in Law. His examinations, if taken continuously, would last longer than a workman's week, and would, I venture to think, greatly exceed those for admission to the profession in any other country and less resemble them than the celebrated examination system of China.

Although ridicule has sent the latter to perdition, the comparison is so pertinent that I crave your indulgence while I paraphrase a passage from the Wallet of Kai-Lang, in which it is described or parodied. The author tells how a mild and studious youth from the country came to town to sit the examination, and how, after politely refusing an offer of impersonation—a thing not unknown in New Zealand—he presents himself at the examination hall, or, as it was in this case, the examination cell, and then goes on to say that "each day of the examination the candidate was found alternately elated or depressed according to the length and style of the essay which he had written whilst enclosed in his solitary examination cell. The trials each lasted a complete day, and long before the fifteen days, which composed the full examination, were passed Ling found himself half regretting that he had not accepted the (above-mentioned) offer or even reviling the day on which he had abandoned the hereditary calling of his ancestors." However, when after all was over he came to deliberate with himself on his chances of attaining a degree he could not disguise from his own mind that he had well-formed hopes. He was not conscious of any undignified errors, and he had been able to introduce curious knowledge which he possessed by means of his exceptional circumstances. When the results were published his name did not appear on the list of successful candidates, but it was announced that his papers were "of a most versatile and conflicting order, so that, indeed, the accomplished examiners were unable to decide whether they were very good or very bad. It is clearly impossible to place the expert and inimitable Ling amongst the foremost, nor would it be safe to pass over his efforts without reward." He was accordingly told to appear before the examiners again, and when he did so he was informed by them that nothing remains to be made known except the result of "our despicable efforts to come to an agreeable conclusion. In this we have been successful, and now desire to notify the result," and this was the appointment of this gentle youth, who only desired some pleasant and unambitious civil office, to the command of a valiant and bloodthirsty band of archers.

It is scarcely necessary to point the moral—there was another recruit to the army of misfits.

On the other hand, we have too little University in the proper sense of the term. When the University of New Zealand was established no provision was made for the teaching of Law. Probably it was felt that that spirit of self-reliance which is a conspicuous and almost necessary characteristic of early settlers would overcome the need for tuition. Whilst the keeping of terms was from the first a pre-requisite in other faculties, it was otherwise in the Law. It was only comparitively recently that this requirement was insisted on, first for the academic and then for the professional subjects. Even then, if a person had the good fortune to reside in a University district where no provision was made for teaching or more than ten miles from a University centre in which there was, or the misfortune to be engaged in earning his livelihood during the hours when classes were held, he could acquire his knowledge how he would subject to the somewhat strange requirement that he passed a college examination a week or two before he sat that of the University. A few years ago even this requirement was abolished (though it has since been reimposed). I have known at least one case of a student who had commenced by attending at college, but who, when he saw that it was extremely unlikely that he would satisfy his teacher as to his fitness to sit for the University examination, betook himself beyond the ten miles radius where he could defy any attempt by his teacher to test his mental qualification to obtain his degree. Recently a graduate who proposed sitting for Honours, believing that it was necessary to attend College for this purpose, intimated his intention to enrol, but on learning that this was not so, determined to gain the palm by his own unaided efforts.

Although the University was established in the early "seventies" it was not till about 1900 that any serious attempt was made to provide for the teaching of Law at any of the colleges, and although all subjects are now taught in all colleges, the circumstances in which some of the appointments have been made do not, in my opinion, augur well for the advancement of legal learning. One wonders what would the medical profession have said of the appointment of one, however brilliant he may have been as a student or successful as a general practitioner, who had not and did not pretend to have any special knowledge or experience of the subject which he had been selected to teach. The answer, I

conceive, would be that such an appointment would, without the slightest personal reflection, render no little disservice to the cause of University education.

Again, it is a matter of grave concern that among candidates for the Law degree the number of those who have a degree in Arts is gradually decreasing. Indeed they have practically disappeared. That many who enter the profession should content themselves with a purely vocational training is, under present circumstances, only to be expected, but, in order that it should be prevented from sinking to a mere trade, it is essential that it should have a nucleus of members who have received a higher general education than that merely evidenced by the passing of the matriculation examination. This is all the more necessary because here there is no hard and fast line drawn between barristers and solicitors, for where such distinction does exist it tends to produce and maintain a better standard. I do not mean to suggest that in every case a barrister has greater natural gifts or has received a better education than a solicitor, but it is an undoubted fact that a higher standard prevails in the one branch than the other. Where no such differentiation is made it is of the utmost importance to see that the lower standard does not become the only standard.

Though the statement may seem strange coming from a Professor, I firmly and strongly believe that we have far too many law graduates of the present type, and I should hazard the guess, which, however, I have not been able to verify by statistics, that the proportion of University graduates to non-graduates in the profession is greater in New Zealand than in any other country. The doubtful advantages of such a state of things is, I think, outweighed by the positive disadvantages, the principal of which is that under the present system of examination it reduces the level of intellectual achievement in the profession. In this matter I regret to say the profession has not received any encouragement from the University. Some years ago it was suggested that Roman Law should, as is the case in some Universities, be included amongst the Arts subjects, an inclusion which would have induced more Law students to have taken an Arts degree. Not only was this proposal rejected, but shortly afterwards the subjects of Jurisprudence and Constitutional History were struck out of the Arts curriculum and the two degrees have been completely divorced. It is, therefore, a matter of serious consideration for a student to take his Arts course before the Law course, though some have endeavoured to take them simultaneously—a proceeding which is not without its drawbacks, but which is more satisfactory than taking Arts after Law. It is inconceivable that one can acquire a thorough understanding of the law of his own country unless he knows something more than he learns at school—if he has there learned anything at all—of its political, social and economic history. And what of these conditions in other countries, and in particular of that Empire whose law, in its final form, has been a force in civilisation second only to that of Christianity itself? May I add that a knowledge of the classics, perhaps more than is the case with any modern foreign languages, enables one to obtain, as Viscount Bryce puts it, that more exact comprehension of the words, phrases and idioms of his own language which is of such importance to those engaged in the legal profession.

You may ask, and I think you are entitled to ask, how these things are to be remedied. I suggest—though I claim no originality for the suggestion—greater co-operation between the profession and the University. It should be a condition of admission to the profession that a candidate not only knows something of the theoretical, but also of the practical side of the law. Apart from the experience gained in an office, the aspirant imbibes in the atmosphere by which he is surrounded some of those traditions which made, and respect for which alone preserves, the profession as an honourable calling, while his academic training, by inculcating a sense of the dignity of the subject with which he is dealing, will further assist in maintaining the tone of the profession.

In other ways "clerkship"—I use the expression for want of a better—would prove advantageous. It might be prescribed that before commencing the student should have to devote his whole time for a session at a University College, and, again, a premium might be placed on literary culture by requiring a shorter period of practical work for those who had taken an Arts degree. But apart from this there is room for improvement as things are at present. The time of many students between 8 or 9 a.m. and 7 or 8 p.m. is divided between the office work and attendance at college. Is it surprising that, physically and mentally exhausted, they seek at the end of the day adventitious aids to passing examinations and regard it as a work of supererogation to acquire more than the bare minimum of knowledge required to satisfy their examiners? Some attempt, therefore, should be made, as is made in other occupations, to reduce his day's work within reasonable limits.

Another suggestion I have to make with much greater diffidence. It is this: That it should not be thought that the door of the University is for ever closed when one has opened that of the profession. I do not for a moment mean to recommend the adoption of a practice which prevails, or used to prevail, on the Continent of Europe of seeking to enlighten, or shall I say to intimidate, the Court by obtaining opinions from Universities, an exotic whose seed never took root in English soil although it was planted on at least one historic occasion. I do feel, however, that there are many occasions on which aid and assistance might be sought and given and rendered with mutual benefits if practitioners had confidence in the competency and experience of the law school. It is done in medicine and science; why not in law? When the foundation for this confidence is laid I venture to prophesy that association with the University will be sought not merely as a professional advantage, but as a distinct honour.

And here I conclude by reminding you that an American President, when he ceased to be the first citizen of a great republic, did not think it beneath his dignity to become a professor of law. During the tenure of this office he was, for a season, President of the American Bar Association, as well as President of the Institute of Jurisprudence. And he only vacated that office to take his seat as head of the Supreme Court of the United States, a tribunal which he still adorns. It is a coincidence that his immediate successor at White House had been a professor of law.

REMIT.

Taking of Evidence in Maintenance and By-law Cases.

"That the Destitute Persons Act be amended to permit a Magistrate, hearing any information or complaint laid pursuant to the Act, to make an order for the taking of evidence before another Magistrate, and that a similar right to have evidence taken be given to Defendants in By-law cases and cases under the Motor Regulations."—(WANGANUI).

MR. V. B. WILLIS (Wanganui): Before I proceed to address myself to the remit I should like permission to have it amended by the omission of the words " or complaint " which appear to have been inserted by inadvertence. When the remit was before the Council of the Wanganui District Society it was, of course, known by all members of that Council—and I presume it is already known to all members of the Conference to-day—that the power of a Magistrate to have evidence taken on a complaint already exists pursuant to Section 79 of the Destitute Persons Act. Unfortunately, most members present to-day have to do with that Act. We all wish that the circumstances which render that Act necessary did not exist, but they are with us and we are frequently called upon to deal with cases which come within the scope of the legislation. The power exists to take evidence in a Court other than where a complaint has been lodged, subject to the provisions of the Act, and it might well be asked why such power does not exist in a case where an information is laid under that Act and which is governed really by the Justices of the Peace Act. I have in mind a case which came under my personal observation—a case where a man, through no fault of his own and through circumstances over which he had no control, suddenly found himself faced with three months' imprisonment. It was an ordinary husband and wife case—there were undoubtedly many faults on both sides. An order was obtained and the wife removed to Auckland. The husband fell on hard times—he became out of work and for a considerable time earned no money. The order, as I say, was obtained in Wanganui, and there is power under the Act for the wife to take proceedings in Auckland in the event of disobedience of the order. This happened. A summons was issued. The husband, ostrich-like, buried his head in the sand and more or less forgot all about it until he was arrested and subjected to three months' imprisonment. It might be asked why there is no power to take evidence in such cases. I understand that it is an official objection that no magistrate should have the power to imprison anyone unless he is actually present at the time. It appears that such a power in the particular case I mentioned would have been only common justice to the unfortunate husband. In passing I would like to refer to Section 39 of the Act which gives a magistrate power to review an order where circumstances have arisen which justify the granting of a new order. That is a procedure adopted by the profession which gets over the difficulty in a roundabout way. The point I wish to make is, that if it is possible to overcome the difficulty in a roundabout way why should it not be possible to overcome it in a direct manner, and why should not authority be given by statute to have the evidence taken in the manner suggested. I propose now to refer very briefly to by-law cases. The same considerations apply there, except perhaps that the same danger of imprisonment does not exist to the same extent. With the increasing number of motor regulations and increase of motor traffic due to our good roads, it is an undoubted fact that the number of by-law cases, particularly those under the recent Motor-vehicles Act, is increasing. Magistrates have said that the problem of motor vehicles and the difficulties arising under that Act have been responsible for taking up the greater part of their time. It is suggested that if a motorist, who is a resident of say, Auckland, commits a breach of a by-law in Dunedin and is prosecuted there, he should have the right of having his evidence taken in Auckland. I have in mind a case where arbitrary action was taken under a by-law in the King Country, which necessitated the attendance of the defendant, with three or four witnesses, at great expense, and the trial resulted in the complete vindication of the defendant.

MR. LOUIS COHEN (Wanganui): I will second the adoption of the remit for the purpose of making one or two observations. I am much concerned as to whether now, in the early stage of this Conference, we should put ourselves in the position of a whale confronted with one small whitebait. It seems to me a wonderful example of bathos to have this remit brought before the Conference, particularly in view of the exaltation we have enjoyed by listening to previous discussions, and the papers read. Surely there is a way of bringing these obvious deficiencies in the law before the Solicitor-General through the District Law Societies, and of asking him to remedy the matter. It seems to me entirely beneath the dignity of this Conference to have to discuss the subject of fugitive motorists and worthy destitute persons.

MR. C. P. BROWN (Wanganui): I understand I was to have seconded this remit, but as Mr. Cohen has forestalled me, I suppose I can only submit to the criticism he has made. I agree that possibly this Conference should not be asked to discuss such small details, but the District Society considered it of sufficient importance to send it to Wellington, and the Wellington Conference Committee evidently considered it of sufficient importance to place it on the order paper. Now that it is there I do not propose to have it dismissed summarily without consideration, and I propose to say what is to be said to support it. The remit arises out of a hard case, and I suppose we will be told that hard cases make bad laws. There is a philosophical remark to the effect that philosophy is the art of enduring with equanimity the misfortunes of others. It is equally true in the inverted form—that bad laws make hard cases, and really the question is whether the law is bad. Orders made under the Destitute Persons Act are equivalent to all intents and purposes to orders for civil debts. They are criminal in form and because of that the man already referred to was deprived of the opportunity of having his evidence taken, and he had no money to go to Auckland. I submit that there is no reason why the procedure should not be analogous to a judgment under a judgment summons. You cannot expect the wife, or the State, to tender conduct money in these cases. So far as by-law cases and fugitive motorists are concerned, the procedure should be made analagous to other forms of procedure. I finally submit that there is no reason why this matter, having been brought before the Conference, should not be discussed, and an intelligent expression of opinion be given by the Conference.

MR. P. THOMSON (Hawera): I think Mr. Cohen's remarks constitute an uncalled-for reflection on the Conference Committee. Possibly Mr. Cohen's remarks were only meant humourously. I wish to refer to the second

part of the remit. Some time ago I happened to be retained by a Christchurch firm to appear on behalf of a theatrical company manager at Stratford, who was charged with breaches of the motor regulations and summoned to appear at Stratford. It was essential for him to proceed to Auckland, from whence he had to go to the East Coast and then on to Christchurch. We obtained various adjournments. Finally, however, our client was compelled to go to Sydney. He therefore had to let the case go undefended and suffered a civil conviction and fine. I think the amendment referred to in the remit is very desirable.

MR. M. J. GRESSON (Christchurch): Would the Wanganui members tell us whether the matter has been brought under the notice of the Crown Law Officers ?

THE CHAIRMAN: So far as taking evidence in cases of breaches of motor regulations is concerned, the New Zealand Law Society did receive a suggestion from one of the District Societies, and adopted its suggestion that it would be desirable to have evidence taken in these cases as in ordinary civil cases heard in the Magistrates' Courts. The Council, having approved this suggestion, passed the matter on to the Attorney-General, and asked him to take steps to have the law amended. However, after much consideration he said he was unable to see his way to give effect to our suggestion. He stated that the Commissioner of Police and his officers were entirely against it, and he saw no reason for altering the law.

MR. A. J. LUKE (Wellington): Has any movement been taken by the Wellington Automobile Association in regard to this matter ? They were very anxious that it should be dealt with.

A MEMBER: I intend to support the remit because I think it works extreme injustice in certain circumstances, and I do not think Mr. Cohen's remarks were altogether justified. A case came under my notice of an information being laid in Wellington, and the summons was served in Whangarei. The circumstances were such that the defendant was not in a position to comply with the order, so obviously he was not in a position to make the journey to Wellington to explain the position. In the particular case I refer to a compromise was arrived at, but there must be other cases in which a distinct hardship is wrought.

MR. L. COHEN (Wanganui): May I, Mr. Chairman, make a personal explanation. We are all, I am sure, well aware in practice of the propriety of this remit being established as part of our law. My view was that I did not think we could have an Attorney-General who would not at once see the propriety of incorporating it in our law if the matter were put before him. But we now have a new Attorney-General, and I desire, as gracefully as I can, to withdraw any observations I made—not being properly briefed in this case. I hope, Sir, that you and the members of the Conference will admit the grace with which I withdraw my remarks, and my sincerity in doing so.

MR. C. S. THOMAS (Christchurch): I think there is one mistake about this remit, and that is, that there has been a combination of matters connected with the Destitute Persons Act and the Motor-vehicles Act. It would have been better, I think, to have made two separate remits, one dealing with each subject. I am afraid I must disagree with Mr. Cohen's last remarks, when he says he is sure the Attorney-General would agree to the alteration if the matter were put before him. In any event I think we should be very careful before we recommend such an alteration in the Destitute Persons Act as has been suggested. Anyone who has had much experience in matters coming under that Act knows that the average man, if he does not want to pay, is an artist at lying, and if he can get away and give his evidence without having to submit to a cross-examination, he will get away every time. I think, therefore, we should move very warily in this matter. Personally, I always like to "have a go" at the man myself personally, and have the wife alongside me, if possible, to keep me well posted. If you are going to do any good against a man who is deliberately flouting an order, you can only do it if the man is present.

MR. J. S. BARTON, S.M. (Wellington): I would like to point out that the remit as drafted requires amending in one direction, by eliminating indictable offences. As it stands at present it would include indictable offences, and the Destitute Persons Act specially classifies six offences as indictable. I therefore make that suggestion. I think the remit should be referred back to Wanganui. In my experience there is a great deal to be said in support of the remit, but I agree with Mr. Thomas that the whole matter bristles with difficulties. We must not lose sight of the fact that there are two classes of husbands—there is the one who is willing to pay but has fallen on hard times, and there is another class who are very unwilling to pay whatever their position is. Now, take the case of the one who is willing, but who has got into difficulties. He is summoned to appear in a distant Court. What does that mean ? Well, of course, if he were in a position to pay the expense of going to the Court, he would not be in arrears on his order, and there would be no case against him. So he has the alternative of either letting the case go by default or writing to the Magistrate. An added hardship is that the husband remains in the town where the order was made, while his wife removes to another town. Now, he may be a man who has a genuine desire to pay, if possible. But he falls into arrears. His wife lays an information in the town in which she lives. He, having no means, is unable to appear, and the case is heard in his absence. Conviction follows, and the Magistrate has no guidance as to what punishment should be inflicted. The defendant is probably advised to write to the Magistrate, and I am satisfied from some of these letters that I have read, that they deserve considerable weight. But, again, it might be dangerous. The position, however, undoubtedly calls for some remedy. By way of warning I would say that if any reform is brought about, it should not be left to a "single shot," otherwise you will find that the wife sets up one case and the husband, in another part of the country, sets up a different case altogether. You may get a wife, say, in Wellington, who tenders formal evidence that her husband has committed a breach of the order. The husband then gives evidence, say, in Hamilton, and raises a number of points. His evidence might tend to show that she has been unreasonable—that she has agreed to certain things and has then changed her mind. It would be necessary to provide that in the case of evidence being taken of an absent defendant the Magistrate should have power to call on the wife again, and it may be that it would be necessary to hear both sides more than once. A few years of domestic infelicity yields a good deal of ammunition. We must go back to the general principle that a man must not be tried in his absence. The defendant should be given an opportunity to be present, so that

the whole of the evidence may be heard before the presiding Magistrate. I think Mr. Brown is not correct in saying that these cases are civil or quasi-civil cases. They are purely criminal—they have nothing to do with the non-payment of a debt. The wife can sue on a debt created by the obligation to pay under an order, but the nature of the proceeding is that a man contumaciously refuses to obey the order of the Court. These criminal cases, like all others based on an information, must be heard by one Magistrate, who hears all the evidence, and he is expected to hear it in the presence of the defendant.

Mr. M. J. GRESSON (Christchurch): I have been rather impressed by the arguments of the last speaker, and it does seem to me that we should differentiate between cases under the Destitute Persons Act and those under the Motor-vehicles Act. It is, as Mr. Thomas has pointed out, possible that under the Destitute Persons Act a man may make lying statements—not before the Magistrate but before the Clerk of the Court—and there can be no cross-examination. Under such a procedure defaulting husbands could put up any sort of a story and there would be no means of testing it at all. These arguments do not apply to cases under the Motor-vehicles Act, and it does seem a very great disadvantage that a man who commits a breach of the by-law, say, in Rotorua, should be charged in, say, Dunedin, with the offence, and be called upon to appear in Rotorua, with no right to have his evidence heard in his home town of Dunedin. There is a very great deal to be said about this remit, and I suggest that as this matter has been before the Law Society, which has had the advantage of fully discussing it, it should be referred back to experts. I suggest, therefore, that the mover should be willing to refer it to the New Zealand Law Society, who could set up a committee to deal with the matter.

After further discussion, the remit was passed in the following form:—

"**That the Destitute Persons Act be amended to permit a Magistrate, hearing any information determinable summarily laid pursuant to that Act, to make an order for the taking of evidence before another Magistrate, and that a similar right to have evidence taken be given to defendants in by-law cases and cases under the Motor-vehicles Act and the Motor Regulations.**"

REMIT.

Statements to Police.

"**That the whole question of the taking of statements by the Police in connection with any crime, committed or suspected, should be investigated, and that in all cases where such a statement is demanded, the position should be governed by a regulation providing for the witness being previously informed that he is entitled to have present with him at the taking of the statement his solicitor or a friend.**" (Hawke's Bay).

Mr. C. G. E. HARKER (Waipawa): I move this remit in the absence of Mr. P. W. Dorrington, of Dannevirke. I am sorry that I do not know all that was in Mr. Dorrington's mind, and I have not, therefore, come fully armed with arguments in support of it. Perhaps, however, to make the intention of the remit clear to you I should tell you shortly what it is not intended to do. It is not intended to conform to the spirit indicated in the old toast, "Here's success to crime." I think we should jealously guard the old tradition that it is the right of any accused or suspected person to be represented by a solicitor or friend. At this and the preceding Conference much exception has been taken to the growing encroachment of executive powers on the part of Government departments, and in this respect I think most of us have had some experience, and of an unfortunate tendency in that direction on the part of that very excellent department—the Police Department. Not long ago a Magistrate said that he had yet to meet a policeman who did not on all occasions speak the truth, the whole truth and nothing but the truth. Now, we have all agreed with the statement made that we belong to an honourable profession, and yet we have passed remits in favour of the Solicitors' Guarantee Fund—in other words we recognise that in the honourable profession to which we belong there are black sheep. Now, the Police Force is a large body of men, comprising men who have not, perhaps, the education that our members happen to enjoy, and there must, therefore, be in the Police Force some who are not qualified to pay due regard to the rights of an accused person. That being so, some check, it is suggested, should be placed on the present haphazard methods. Many of us feel and know that some statements which are tendered, sometimes over the signature of an accused person, cannot be fairly called the accused's statement at all. They are actually the statements of the police officer who prepared them. When I saw this on the agenda paper I took the opportunity of referring it to a police officer of many years' experience—an officer whose humanity and integrity I had had every opportunity of testing. He said, "This is only what I have been doing, so far as possible, all my life." I asked him whether he considered that such a regulation as is contemplated by the remit would hamper the police in their work. He answered emphatically, "No." In the course of further conversation he said that when he himself read statements of accused people which had been prepared by a police officer he always took into consideration the identity of the police officer obtaining such statement. What he said, in effect, was that if the statement had been obtained by A, he had the highest confidence in it; if by B, he was a little doubtful; and if it had been obtained by C, it was probably wrong. It should be a matter of some concern to this Conference that the purity of the administration of justice should be maintained, and as we cannot expect that every individual in such a body as the Police Force will be educated up to the standard required for the whole, and as there are black sheep in every fold, then I suggest that it is desirable that some regulation should be made for the guidance of the police, and I think such a regulation would meet with the hearty approval of the best type of police officer.

Mr. E. J. W. HALLETT (Hastings): I have much pleasure in seconding the adoption of the remit. It has always seemed an anomaly to me that when a man is brought before a magistrate on a preliminary hearing he is warned that he is not required to make a statement, and that any statement he makes will be taken down and may be used in evidence against him. I submit that the average man who is taken to the police station is somewhat astonished at the position in which he finds himself, and is not fit to make a coherent statement which he might be quite able to do under different circumstances. That being so it is most advisable, and even necessary, that the accused person should have the benefit of the presence of either his

friend or counsel. This would give him confidence and would enable him to state his position more clearly, and he would himself more clearly understand the nature of his statement. I suggest that circumstances do arise where the statement made in the police office on this preliminary investigation is not a true statement of the facts, because it does not represent what the accused person actually said. I suggest, therefore, that it be made clear that the statements referred to in the remit are those which the police endeavour to obtain from persons suspected of having committed a crime—and that they do not refer to the interviewing of witnesses. I think we should unduly hamper the police if we asked that when interviewing witnesses the latter should have a friend present. I think we might well refer the matter to the Law Society.

THE CHAIRMAN: I am afraid you are seeking to put rather too much on the shoulders of the Council, because I do not think it has any facilities for making investigations.

MR. C. R. FELL (Nelson): I think before the remit is passed on to the Council of the New Zealand Law Society it would be better if all members of the Conference were acquainted with the report of the Commission which was recently set up in England in connection with the case of Miss Irene Savidge. I think we should be a little premature in acting before we have seen that report. We have had a cabled summary of some of the findings, but I think we should be merely beating the air if we tried to cover the ground until we know the full findings. My experience in these matters is possibly more on the side of the Crown. I have many times had a policeman before me in connection with evidence, and often that policeman has told me of other matters which the accused has stated, but which he did not think it fair to include in the statement. That, I think, as a whole is the attitude of our police. I do not think this Conference should give the public the impression that it casts a reflection on the police by suggesting that its officers obtain their statements unfairly from persons suspected of having committed a crime, and, as I have said, I do not think we should put this resolution forward until we have had an opportunity of reading the result of the recent Commission held in England.

MR. H. C. D. VAN ASCH (Christchurch): I do not wish to make any observations in regard to the merits or otherwise of this remit, but I would like to suggest to the mover that the following words be added:—"and that he is entitled to a copy of his statement." In Canterbury the procedure is that the Superintendent flatly refuses to give an accused or defendant any information at all in regard to any statement he has made. I submit that is entirely wrong, because, as has been said, the accused, or defendant, as the case may be, may not be in a condition at the time of making his statement to make a clear and concise statement of what has happened.

MR. H. F. O'LEARY (Wellington): This is a remit with which I have a good deal of sympathy, but at the same time I think the remedy suggested in the remit will have no practical effect whatever. I have had a good deal of experience in the class of case in which a statement said to have been made by an accused person is produced, and I am definitely of the opinion that in some cases the police officer has been unfair in getting such statement from the accused. I think that at times a wrong interpretation is written into the words used by an accused person or by a witness interrogated, and I am also satisfied that in other instances words are contained in the statement which were never used at all by the person who is said to have made the statement. I therefore agree that, if it is possible to find a remedy for the matter, one should be found. But the attitude I take towards this remit is this—it is aimed at the police officer who acts unfairly. Now, the remedy suggested, namely, that the person who is being interviewed shall be informed that he is entitled to have present a solicitor or friend when his statement is being taken, will be of no use whatever in dealing with the person we are trying to get at. He will merely say, "I told him he was entitled to have a solicitor." It is suggested that it should only apply to suspected persons. The officer who does not wish to be hampered by any regulations will reply, "I did not suspect him when I asked him these questions." We get it under the law at present, where an accused person is supposed to be warned that anything he may say may be used in evidence against him. But until the officer intends to arrest the person he need not give that warning, and when you complain to an officer that he has given no warning he will say, "Oh, at that time I did not intend to arrest him." Consequently, I say that the remedy suggested will be of no effect. We may affirm some principle in connection with the matter, but the remedy suggested—in order to get at the man we want to get at—will be of no avail. I am bound to admit that it would be very useful to those who have to defend persons charged with crimes, if such persons saw their solicitors before they saw the police. I do not want to be boastful, but I am bound to say that men who have seen me before they have seen the police . . . (The rest of Mr. O'Leary's remarks were lost in the outburst of laughter). However, while there are undoubtedly cases where the police have acted unfairly, I cannot see that the remit will prove a remedy.

MR. L. COHEN (Wanganui): This is a matter which I think I may be pardoned for saying that I am somewhat informed about. I think the real remedy is that there should be posted up a notice in each watchhouse to the effect that persons are not bound to make a statement to the police unless they choose to do so. The public do not know that they are not bound to make a statement, and I think, with Mr. O'Leary, that there can be no remedy by regulation. It will be very interesting to read the report of the Commission recently held in London in regard to the Savidge case, and the recommendations of that Commission will no doubt have an effect on the morale of the police throughout the Empire. Although I am in sympathy with the remit, I agree with Mr. O'Leary—I do not see that it will achieve the desired result.

MR. P. J. O'REGAN (Wellington): I agree with previous speakers in many of the remarks made, but with all due respect to what has been said I think a statement made by an accused person to a police officer bears a strong resemblance to an affidavit. But it is not without its advantages. In my own time I have defended one or two criminals and have sometimes found it advantageous to cross-examine on the "statement," especially when the police officer concerned has introduced words of his own. For instance, I remember a statement in which the word "sanguinary" was used. Now, the accused was not the sort of person who would be likely to use such a word, so I got at the detective, and asked him, "Do you honestly say the man used the word 'sanguinary'?" The detective

admitted that it was a euphemism used by himself. I agree with the suggestion that it would be better to await the report of the English Commission before doing anything.

MR. S. H. MOYNAGH (Nelson): I rise to support the remit. One case came under my notice which to my mind emphasised the necessity for some safeguards. The case occured in Nelson, and the solicitor for the man concerned told the detective that if any questions were to be asked, he (the solicitor) would like to be present. The result was that the detective followed the man all round Nelson until he got him alone, when he put his questions. I do not wish to reflect on the integrity of the average policeman, but my opinion is that they are not up to the standard of education of most people, and when they are taking statements from persons of higher education than themselves inferences are drawn which are not in accordance with the facts. We must guard against that. I have known instances where distortions of sentences have caused disastrous effects. I think the remit, modified as suggested, would be an improvement. Some safeguards should certainly be afforded to prisoners. In the smaller centres, where business is rather circumscribed, the police know who is acting for the person accused, and it would be very little trouble for them to acquaint the solicitor.

MR. P. THOMSON (Hawera): I would like to move that pending the receipt by the Council of the New Zealand Law Society of the report of the Savidge Commission, further consideration of this remit be deferred.

MR. W. J. HUNTER (Christchurch): I will second that.

MR. W. E. LEICESTER (Wellington): I would like to say that Mr. van Asch has moved an amendment which might bring about a more practical result.

THE CHAIRMAN: Yes, I think he suggested that the accused should have the right of being supplied with a copy of his statement.

After some little discussion, by permission of the Conference, Mr. C. C. E. HARKER withdrew his original motion and substituted the following:—

"That this Conference recommends that the Minister of Justice should take steps for the investigation of the whole question of taking statements by the Police from persons suspected of crime with a view to ascertaining an appropriate remedy against possible abuse; and that in every case where such a statement is taken, a copy thereof should be supplied to the person making the same."

THE CHAIRMAN: We have also an amendment, moved by Mr. Thomson, and seconded by Mr. Hunter, that the matter be deferred till after the receipt of the Report of the Commission which dealt with the Savidge case in England.

SIR JOHN FINDLAY, K.C. (Wellington): I think there is a great deal of wisdom in Mr. Thomson's suggestion. It is quite possible that after receiving the report from England it may involve the re-casting of our own proposals. Without in any way disparaging what has been suggested, why not wait until the Report of the Commission reaches us? It will be here in a few weeks, and in all probability the Council of the Law Society will not be able to deal with the matter before then.

MR. M. M. F. LUCKIE (Wellington): If we pass the amendment we automatically defer the consideration of the matter, not only until after the receipt of the Report, but until the next Conference. Surely it can be arranged that it be an instruction for the New Zealand Law Society to defer consideration of the matter until after the receipt of the English Commission's Report, and then let the Law Society deal with the matter subject to such modification as it thinks desirable in the light of that Report.

THE CHAIRMAN: The motion does not commit the Council to the duty of making any investigation—therefore there would be no postponement.

MR. H. F. JOHNSTON (Wellington): I hope the amendment will not be carried, and I hope the remit, as amended, will be carried. There is no point at all in sending this remit to the New Zealand Law Society. That has happened before with remits that have been passed—they go to the Law Society and the Society does not know what to do with them. The most it has done so far has been either to adopt them as passed by the Conference, or in some cases to water them down. In my opinion it is very necessary that this remit should be agreed to. The investigation that we are now asking should take place was forced on the authorities at Home by the strength of public opinion, and I think it will be forced on the authorities by public opinion here. All we are asking is that an investigation should take place, and the method of that investigation should really be a matter for the Attorney-General, who should set up a committee consisting of lawyers, heads of the police, and members of the Department of Justice. Such a committee would have the immense advantage of knowing the findings of the Commission which has just sat in England. But to hold up the matter until we get the findings seems to be entirely unnecessary. The committee will probably find that the regulations proposed by the English Commission will be a sufficient safeguard. I do not agree with Mr. Cohen that there is no remedy. I hope, therefore, that the remit, as amended, will be passed and that the amendment will not be proceeded with.

MR. E. S. PARRY (Wellington): May I suggest that the New Zealand Law Society might appoint a committee which could investigate conditions in New Zealand relating to this matter, and compare those conditions with the conditions obtaining in England at the time the English Report was made? It seems to me that we are all more or less talking in the dark. We know perfectly well that certain abuses have crept in in regard to the taking of statements.

THE CHAIRMAN: I would like to point out that it is not the function of the New Zealand Law Society to undertake an investigation of this nature. How can the New Zealand Law Society deal with this subject without taking evidence from all parts of New Zealand? If, as I think Mr. Johnston intended, this motion should be in the form of a recommendation to the Attorney-General that he should take steps to set up a committee, that is a different matter.

MR. G. M. SPENCE (New Plymouth): I think there is some confusion in the minds of the different speakers as to the method by which such an enquiry should be held. I agree with the Chairman that it is no function of the New Zealand Law Society to set up such a committee—it is a matter for the Attorney-General, and I think we should keep that matter clearly before us. I oppose very strongly any suggestion to

delay the matter until next Conference. By the time such a committee can be set up by the Attorney-General we shall have a report of the Savidge case. There is no reason why such an investigation should not be taken. Within my own personal experience, I know that unfair statements have been obtained. I hope the remit will be passed, with a view to its being transmitted to the Attorney-General, who will no doubt appoint an appropriate committee.

Mr. P. THOMSON (Hawera): In moving my amendment I did not intend to be unsympathetic towards the principle involved, but I do feel that it is not the function of the Council of the New Zealand Law Society to conduct such an investigation. I am prepared, therefore, to withdraw my amendment.

It was agreed that the amendment should be withdrawn, and the motion proposed by Mr. Harker, as amended, was then put to the Conference and carried.

SOLICITORS' GUARANTEE FUND.

Personnel of Deputation to Attorney-General.

Mr. W. J. HUNTER (Christchurch): With regard to the first remit passed by Conference yesterday (respecting the Solicitors' Guarantee Fund) I would point out that we did not name the deputation which was to wait on the Attorney-General. It has occurred to me that it will be difficult to get an appointment with the Attorney-General during the present Conference, and I suggest that the members of the committee set up by the New Zealand Law Society be the deputation from this Conference, with power to add to their number.

This was seconded by Mr. W. PERRY (Wellington) and carried.

"THE PROFESSION OF A BARRISTER IN NEW ZEALAND."

(Mr. A. H. Johnstone).

Mr. A. H. JOHNSTONE (Auckland) then read the following paper on "The Profession of a Barrister in New Zealand."

Much has been said and written in these latter days concerning the passing into alien hands of a great volume of lucrative work which in former times was regarded as the peculiar perquisite of the solicitors' branch of our profession; how the Public Trustee and others have invaded our ancient demesne and taken from us much cost-producing business, and how these spoilators are being abetted by those of the public who seek immunity from the predatory habits of some of our brethren; and many arresting figures have been compiled which tend to show that the leakages in the future are likely to be far more serious than they have been in the past. These and kindred matters have caused the profession "furiously to think" and to devise means for self-protection. We have determined amongst other things to set our house in order by improving the education and practical training of solicitors and by insuring the public against the depredations of the baser sort of practitioner who peradventure may stray within the fold. It is to be hoped that these praiseworthy efforts will produce the desired results. In the meantime, it seems that the future of the solicitors' profession can hardly be described as bright with promise. It is, therefore, with feelings of relief that we turn from these melancholy reflections and consider the profession of a barrister in New Zealand, which still remains in its integrity unassailed, so far at any rate, by attacks from without. Nevertheless, in our comparatively small community, far removed as it is from the great intellectual and moral movements of the Old World, there is always a danger that we may be afflicted by the baneful blight of self-satisfaction which is one of the surest checks to progress; and it may well be that the very conditions under which the barrister in New Zealand is obliged to work may tend to obscure the true functions of his profession. It may, therefore, be not unprofitable for the Bar of New Zealand to enquire whether on the whole its members are worthily upholding the traditions of their great calling, and especially whether they are exercising that important and benign influence upon the corporate life of the community which their profession obliges them to do; whether, in short, they too do not need to set their house in order. For a barrister should be something better than the Court man attached to a solicitor's practice. He should be a lawyer in the fullest sense of the term—a member of a great profession fitted to render to the community, to borrow Lord Langdale's language, "those truly honourable and important services which counsel constantly perform as ministers of justice acting in aid of the Judge before whom they practise."—*Hutchinson v. Steven*, 1 Keen 668.

"Amongst the organised institutions of a country," says Lord Bryce in "The American Constitution," vol. 2, p. 665, New Edition, "which, while not directly a part of the Government, influence politics as well as society, the Bar has in England, Scotland, and France played a part only second to that played by the Church. Certainly no English institution is more English than this body with its venerable traditions, its aristocratic sympathies, its strong though now declining corporate spirit, its affinity for certain forms of literature, its singular relation, half of dependence half of condescension, to the solicitors, its friendly control over its official superiors, the Judges."

The same view is even more emphatically expressed in Bulletin 15 of The Carnegie Foundation for the Advancement of Teaching, referred to with approval in the Report of Royal Commission on University Education in New Zealand (page 44) as follows:—"Practising lawyers do not merely render to the community a social service which the community is interested in having them render well. They are part of the governing mechanism of the State. Their functions are in a broad sense political. This is not due primarily to the circumstance that a large proportion of our legislative and administrative officials and virtually all our judges are chosen from this practically ruling class, nor is it due entirely to the further circumstance that the growth of our law in the form of judicial decisions that interpret and declare its actual content is necessarily greatly influenced by the arguments of counsel. It springs even more fundamentally from the fact early discovered that private individuals cannot

secure justice without the aid of a special professional order to represent and advise them. To this end lawyers were instituted as a body of public servants essential for the maintenance of private rights. From their earliest origin the law has accorded to these officers of the Court certain special and exclusive privileges which set them apart from the mass of the people as truly as if they were in a strict sense public officials." We of the Bar, therefore, belong to an order of the first rank. We are bound by our profession to assist to the utmost of our ability those members of the public who seek our aid and in giving of our best to them we add our contribution to the making of the law itself. Politicians may if they please claim the credit, to use their cant phrase, " of placing this or that statute upon the statute book," but the moulding and development of the English law has always been and will continue to be mainly the work of trained lawyers, the barristers and the judges. " Sound arguments beget sound decisions. Many of the best judgments it will be found are but reasoned and authoritative summaries of the cogent arguments addressed to the Court. In a true and most significant sense it may be said that the Bar takes to-day, as it has taken in the past, a direct and responsible part in the creation and development of our law by legal decisions."—" The Law, the Advocate and the Judge," by Mr. Justice McCardie, Solicitors' Journal, 1927, p. 501.

Obviously then it is of the first importance that the barrister should be properly equipped for his task, which year by year by reason of the rapid growth of the decisions and the increasing complexity of modern life becomes more and more formidable. Mr. Justice McCardie has also in the same speech referred to this ever-increasing burden. " First, in my view there never was a time when the position of the advocate was of greater importance or responsibility than to-day. A century ago the Press was but narrow in its range. To-day an unparalleled publicity is given to every trial which touches character or repute. Secondly, there never was a time when the profession of the Bar called for greater knowledge or greater intellectual grasp. The magnitude and intricacy of many of the trials of this decade of ours call for the highest mental capacity. Thirdly, there never was a time when the barrister had greater need of a wide culture and a full acquaintance with history, with economics, and with sociological science . . . Law after all is but a branch (though a great branch indeed) of what is perhaps the widest science of all—the science of sociology."

The quotations which I have read refer for the most part to the English Bar, but there is no reason why with slight change they should not be applied to the Bar of New Zealand. We are in fact and in law in substantially the same position in New Zealand as members of the English Bar are in England. We are, as I have said, members of a profession of the first rank. It was recently put to me by a young barrister from New South Wales that there was strictly no profession of a barrister in New Zealand. His view was that our advocates were solicitors who had a right of audience in all Courts; and although since the passing of " The Law Practitioners Amendment Act, 1898 " (now Sec. 5 of " The Law Practitioners Act, 1908 ") his observation came perilously near the truth, yet as matters both of history and of law he was quite wrong.

The professions of barrister and solicitor have always *qua* professions been separate in New Zealand. The Supreme Court of New Zealand was constituted by " The Supreme Court Ordinance, 1841," Sections 13 and 14 whereof are as follows :—

13. " The Court shall enrol to practise therein as barristers such persons only as shall have been admitted barristers or advocates in Great Britain or Ireland and to practise therein as solicitors such persons only as shall have been admitted as solicitors attorneys or writers in one of the Courts of Westminster, Dublin, or Edinburgh, or proctors in any ecclesiastical court in England or shall have served such term of clerkship with a solicitor of the court as shall be required by the general rule thereof. All persons so enrolled shall be removable from the rolls of the Court upon reasonable cause.

14. " The barristers of the Court shall be allowed to act as solicitors and the solicitors of the Court to act as barristers for the period of five years from the passing of this ordinance unless the Court shall in the meantime make order to the contrary."

The fusion of the professions was obviously regarded as a temporary expedient, justified doubtless by the smallness and sparseness of the population then inhabiting the Colony.

By various amendments the time during which barristers might practise as solicitors and *vice versa* was continued by five-yearly periods down to 1861, when the earlier legislation was repealed and provision was made in " The Law Practitioners Act " of that year for the fusion and also for the division of the professions. Power was by Section 59 given to the Judges to make rules directing that no barrister should practise as a solicitor and no solicitor as a barrister. The rules were to come into force at the expiration of six months from the day of publication in the " Gazette " (but not before presentation to both Houses of Parliament) and during that period every person enrolled as a barrister and solicitor was obliged to elect which of the branches of the profession he would practise in the future. No rules were in fact made, nor have any been made under the later legislation, if indeed there is power to make them. For the sake of completeness it may be mentioned that by this Act it was required from a candidate for admission as a barrister that he should have been *bona fide* exclusively engaged in the study of the law as a pupil of some barrister on the roll of the Court as such for three years at least before the date of his application and that he should have passed the examination prescribed for barristers. Several other qualifications for admission were prescribed, depending upon the previous standing of the candidate, but all of them provided for a reasonable standard of legal education and for a term of pupilage or articles.

By the same Act it was provided that in New Zealand barristers of the Supreme Court should have all the powers, privileges, duties and responsibilities that barristers have in England; and this provision has been continued by subsequent legislation to the present time: see Law Practitioners Act, 1908. Thus, we became by law heirs to the same rights and subject to the same duties as attach to our brethren of the Bar of England; but in the meantime we have lowered the standards for admission to the profession, first by the abolition of pupilage, and secondly by accepting solicitors of five years' standing without further examination.

Briefly stated, the rights of a barrister are these :—

(1) The right of audience in all Courts of the Dominion, and, with some slight exceptions, exclusive right of audience as an advocate in the Supreme Court and Court of Appeal.

(2) The right to draw or prepare, for or in expectation of a fee or reward, instruments relating to real or personal estate or any proceeding in law or equity.

(3) The right to advise on questions of law.

By virtue of his profession he has certain privileges:

(a) He is eligible for appointment to certain judicial and other offices;

and may I observe, parenthetically, that it seems to follow that as the Bar is so will the Bench be.

(b) His expressions uttered in his professional capacity with reference to and in the course of a judicial enquiry are absolutely privileged, this by reason of the right of every subject of the realm in all Courts of Justice to assert and defend his rights and to protect his liberty and life by the free and unfettered statement of every fact and use of every argument and observation that can legitimately conduce to this end—*Butt v. Jackson*, 10 Ir.L.R. 124. With this privilege is intimately bound up that freedom and independence of the Bar concerning which much that is eloquent has been said and written. It is, however, a privilege which should not be and rarely is abused. "My noble and learned friend Lord Brougham," said Sir Alexander Cockburn, in 1864, "whose words are words of wisdom, said that an advocate should be fearless in carrying out the interests of his client; but I couple with that this qualification and this restriction that the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interests of his clients *per fas* but not *per nefas*. It is his duty to the utmost of his power to seek to reconcile the interests he is bound to maintain and the duty it is encumbent upon him to discharge with the eternal and immutable interests of truth and justice."

(c) He is immune from arrest on civil process when on circuit or whilst going to or returning from the Supreme Court. This is a privilege which may or may not be known to the New Zealand Police Force, and accordingly barristers may display some wisdom if they do not rely upon it.

He suffers from one serious disability: his employment is purely honorary in the sense that it confers on him no legal right to remuneration for his services, hence it is said in the books that the remuneration of a barrister is termed *honorarium* as opposed to *merces*.

This aspect of the barrister's profession tends to increase its nobility and should certainly be kept in mind by those who have the recommending of suitable persons to receive Birthday or New Year Honours.

Yet the newly-fledged junior need not be discouraged, because it seems that despite the honorary nature of his employment he has a right to be paid for his services, which right was eloquently vindicated over a century ago by Mr. Justice Bayley, in *Norris v. Hunt*, 1 Chitty 544, at page 550, thus:—

"But then the suggestion is that by law no man is liable to pay for counsel at all, and that therefore the whole of this charge for counsel is improper. That seems to me to arise entirely from a mistake in point of law. It is never expected, it never has been the practice, and in many instances it would be wrong, that counsel should be gratuitously giving up their time and talents without receiving any recompense or reward. It is the recompense and reward which induce men of considerable ability, and certainly of great integrity, and with every qualification which is necessary to adorn the Bar, to exert their talents. It is the emolument in the first instance, to a certain degree, that induces them to bear the difficulties of their profession, and to wear away their health, which a long attendance at the Bar naturally produces; and it is of advantage to the public that they should receive those emoluments which produce integrity and independence; and I know of nothing more likely to destroy that independence and integrity than to deprive them of the honourable reward of their labours. But it is said that counsel can maintain no action for their fees. Why? Because it is understood that their emoluments are not to depend upon the event of the cause, but that their compensation is to be equally the same whether the event be successful or unsuccessful. They are to be paid beforehand, because they are not to be left to the chance whether they shall ultimately get their fees or not; and it is for the purpose of promoting the honour and integrity of the Bar that it is expected all their fees should be paid at the time when their briefs are delivered. That is the reason why they are not permitted to maintain an action. It is their duty to take care, if they have fees, that they have them beforehand, and therefore the law will not allow them any remedy if they disregard their duty in that respect. The same rule applies to the case of a physician, who cannot maintain any action for his fees. He therefore is to receive his fees at the period of time when his attendance occurs. These are the reasons why the gentlemen of these two professions can maintain no action for their fees; but is it to be supposed that men are to waste their lives to qualify themselves for their profession without receiving any emolument? That never can be imagined; and the constant course which has been adopted shows that it never could be so understood."

Nevertheless it is in my view true that a barrister was placed in respect of his fees upon the same footing as any other professional man, including even the physician, and this matter should not be overlooked when amending legislation is being prepared.

Having now referred at perhaps inconscionable length to the institution of the Bar, and to qualities of heart and mind expected from those who would become creditable members thereof, I pass on to consider, first whether the provisions at present in force in New Zealand are such as reasonably to ensure that candidates for the Bar shall be properly educated, both culturally and professionally, for their work, and secondly whether under the conditions existing in New Zealand a Bar strictly so called is possible or desirable.

The provisions relating to admission of barristers in New Zealand are contained in Sections 4 and 5 of "The Law Practitioners Act, 1908." For practical purposes it may be said, shortly, that a candidate who has not been admitted or examined elsewhere must:—

(1) Pass the examinations prescribed for the degree of LL.B. of the University of New Zealand;

or (2) Pass the examinations prescribed for admission of barristers;

or (3) Pass the examinations prescribed for admission as solicitors and thereafter practise continuously as a solicitor or managing clerk for at least five years.

These provisions were considered by the Royal Commission on University Education of 1925, before which evidence was given on behalf of the New Zealand Law Society and by a number of gentlemen who have had experience in teaching law subjects in the University Colleges. So far as one can gather from a perusal of the report not a single witness came forward who regarded our system of legal education as adequate, whilst most of them condemned it with more or less of emphasis. "Legal practitioners," says the report of the Commission, "have always been regarded as members of a learned profession, as indeed is shown by the customary courtesy of allusion to 'my learned friend.' It appears to us that unless a marked change is effected in the legal education provided in the Dominion this term runs the risk of being regarded as a delicate sarcasm."

The standards of legal education are those fixed by the Judges. The late Sir Charles Skerrett, in presenting the report of the New Zealand Law Society to the Commission, pointed out that "The experience of the profession in the past has been that the Judges have been very slow to move in the matter of legal education and that their judicial work is of so great a volume as to prevent their devoting to this subject as much time as its importance demands." This was said in 1925, and they have not moved in the meantime.

The Commission recomended that a Council of Legal Education should be set up, representative of the Judges, the leaders among practising barristers and solicitors, and the University teachers of law, to provide and watch over a course of legal education which should comply with the requirements of a good professional education and at the same time satisfy the demands for a training which is strong enough on the practical side.

So far as I know no steps have been taken to set up this suggested body.

The Commissioners also recommended that the course for barristers should be strengthened :—

(1) By requiring all barristers to take the subjects of general education now taken for the LL.B. degree.
(2) By bringing the number and standard of the law professional subjects into line with the requirements for barristers in New South Wales and Victoria.
(3) By providing for a definite period of training in a law office.

They further recommended :—

(4) The closing of the back-door entrance to the barristers' profession ; and
(5) The establishment of a properly staffed and equipped Law School.

Down to the present time little or nothing has been done to carry into effect these important recommendations. Whatever views we may entertain about matters of detail, we surely all agree that the education of barristers should be extended both culturally and professionally, and that candidates for a great profession are just as much in need of practical training for their work as a plumber or a carpenter. Indeed, no one nowadays would object to their being paid "award" rates of wages during their period of pupilage.

Again, I suggest that the present system of conducting law examinations is capable of improvement. For many years past it has been the practice of the University to select its examiners in law subjects from members of the profession. These gentlemen may, or may not, have the ability to test the knowledge of candidates by setting questions and estimating the value of written answers. There are many who think that an examiner should also be a teacher. In my view the practice adopted by some of the English Universities and by the University of New Zealand in relation to certain examinations for the medical profession might well be adopted here, viz. : examination by two examiners, one a practitioner and the other a teacher.

As we ourselves have come to regard the preliminary steps towards the admission of a barrister as unsatisfactory, we can scarcely complain if the profession in other countries take the same view. It is a standing reproach to us, and a very distinct disability, that barristers admitted in New Zealand are denied admission elsewhere unless they undergo substantially the same curriculum as that required from students, whilst we, on the other hand, are quite glad to welcome barristers from other lands without examination, or at any rate with but slight examination.

And as the removal of that reproach and that disability is largely in our own hands our duty is surely obvious. We need not hesitate to promote legislation which has the backing of this Commission's report.

Difficulties of a more substantial kind are encountered when we proceed to consider whether it is possible to improve the conditions in which the barrister in New Zealand carries on his work. In England the barrister is a specialist. Not only must he confine himself to advocacy, advising and the preparation of important legal documents, but he usually confines himself to these activities in some branch or branches of the law. And the same is true to some extent in the Eastern States of Australia, where counsel have always practised separately from solicitors, and this in the State of Victoria in spite of the fact that there every solicitor is also a barrister. The weight of opinion seems to be that this separation of the professions has been found in England and in Australia also to make for efficiency on the part of the Bar. The tendency all over the world in every walk of life is towards specialisation. The qualities necessary for a good solicitor are essentially different from those necessary for a successful barrister. It is but rarely that we find one man who excels both in the office and in Court. The arts of advocacy and of advising are quite sufficient for one man to master in his lifetime. On the other hand, a solicitor frequently is what usually the advocate is not, a man of business as much as a man of law. Our experience in New Zealand has been that usually the most successful barristers have been those who have most completely thrown off the trammels of the solicitor's office, and the not uncommon practice of so arranging partnerships that one partner shall attend to the conveyancing side and another to the Court side is founded upon an attempt to meet the difficulty. It is some admission of the need for specialisation even here.

The Judges of the Supreme Court of South Australia, in their annual report to the Attorney-General of that State for the year ended 31st December, 1927, wrote : We are of opinion that it would be in the public interest

to separate practitioners of the Supreme Court into two distinct classes of barristers or advocates, and attorneys, solicitors and proctors. This was contemplated in the ordinance still in force to regulate the profession of the law in South Australia, No. 6 of 1845."—Australian Law Journal, 15th June, 1928. This statement is entitled to some weight, first because it emanated from the Judges of South Australia, and secondly because in Australia there exist ready means for comparing the amalgamated system of South Australia and West Australia with the separated system of New South Wales, Victoria, and Queensland.

Now the foregoing observations, which are no doubt familiar to every practitioner here, are by way of introducing the suggestion that if we in New Zealand are to have a Bar properly so called, able to fulfil the functions hereinbefore referred to, we must separate the professions also. The time may not be, indeed probably is not, yet ripe for compulsory separation which, as we have seen, was contemplated on the foundation of the Colony, but it is a topic well worthy of consideration by a gathering such as this. For if some change seems desirable in the interests of efficiency it is not necessary that we should slavishly follow the English system. Several modifications suggest themselves, e.g., easy passage from one profession to the other, partnerships amongst barristers, less restriction upon the accessibility of counsel; and it may be that the profession and the public would prefer a Bar to come into existence with their tacit permission, as in Victoria, rather than by amendment of the law.

The barristers of New Zealand may be divided roughly into three classes :—

First.—Those who hold themselves out as barristers, but do not practise or intend to practise as such. They are in reality solicitors pure and simple. They have become entitled to practise as barristers, either after examination or after the lapse of five years' practice as a solicitor, the majority probably by the latter method. At any rate it was stated before the University Commission that a substantial majority of barristers now on the roll have entered in that way. They use the title to convey to the public the impression that they are more highly qualified than the solicitor simpliciter, but they never go into a Supreme Court at all. In these circumstances the propriety of using the title is perhaps open to doubt. To them it may be said that there is nothing the matter with the profession of a solicitor. It is an honourable occupation, calling equally with that of the barrister for high standards of learning and honour, and a solicitor does not increase either his knowledge or his standing by calling himself that which he is not.

Secondly.—There is a considerable number of barristers who make occasional excursions into Court. Amongst them are, of course, those who will in time excel in their profession, and also those who are finding out by the *via dolorosa* that they were much happier in their offices. But there are many practitioners who take cases into Court not because they have any desire to do so, but because they have a perfectly understandable objection to sending a brief to an opposition practitioner. For not only do they pay him fees which they themselves may earn—albeit at some inconvenience—but they run the risk that they may lose their client to the Court man. On the other hand, when litigation comes into the hands of a practitioner who is not overburdened with work he is under a great temptation to brief himself, whatever his aptitude may be or whatever his experience may be, unless perchance, as sometimes happens, a day or two before trial he begins to have doubts, and at the eleventh hour decides to hand over his envelope of miscellaneous papers to someone more experienced in the art.

The third class comprises those who go fairly regularly into Court and who hold themselves out as competent to do regular counsel work, advocacy and advising. The difficulty which they have to face is that they, for the most part, carry on a solicitor's practice as well. Which of them has not experienced the scramble to get office matters attended to between 9 a.m. and the opening of the Court, the nightmare of accumulating correspondence, the difficulty of finding time to devote to the semi-judicial work of opinion writing, and the drudgery of night work associated with the preparation of cases for trial? I venture the opinion that a man cannot for long do his best work under these conditions. That practitioners willing to undertake Bar work tend to segregate themselves appears to be indicated by the comparatively few who do this class of work. In the Auckland District Law Society's district, 554 solicitors and 232 barristers took out practising certificates last year. Of the 232 barristers probably not more than 32 go into Court with any degree of regularity, and that in a city where there are no breaks between sessions, and where two Judges are employed during most of the year. Of the conditions elsewhere I am not qualified to speak. It may be said that the remedy is in the hands of those who seek better conditions. There is nothing to prevent them from practising as barristers only, and I do not need to be reminded that this has actually been done with conspicuous success here in Wellington. But a Bar worth the name must be composed of junior members as well as of seniors. I do not think, therefore, that a Bar will come into existence by this means unless it is to receive the whole-hearted support of the solicitors' branch, and, speaking generally, it is too much to expect of human nature that solicitors who are themselves barristers will hand over work to another barrister. May it not, however, be worth while for us to consider whether it would not be well in the interests of both professions that some understanding should be reached on the subject.

In the meantime, I think that the time has fully arrived when the practice of retaining two counsel on both sides in all important cases should be more frequently resorted to. By adopting this practice consultative work between members of the Bar is promoted, cases are more carefully prepared, whilst during the hearing of the case a junior is enabled to practise under some benevolent supervision.

Nor is there any need to confine the arrangement to cases where one of the counsel is greatly senior to the other, as frequently happened when King's Counsel were more numerous than they now are. What I desire to stress is that it is in the public interest that the practice followed elsewhere of retaining two counsel of experience in important cases should be followed here, and that the public should be educated accordingly.

It will no doubt be said that under existing conditions there has arisen in New Zealand a not inconsiderable number of barristers who would have distinguished themselves at the Bar in any country, and I of course gladly concede that this is true. The barristers of the past have set for us the highest standard of work and of conduct, and to them we of this generation owe an

incalculable debt. But there is nothing to show that they were satisfied with their conditions, and in any case we cannot stand still. And whilst we remember that the past has not been without honour, there is no reason why the future should not be even better, and if by taking pains with respect to education and training it can be made so, as I venture to think it can, then our duty is to go ahead. For, to borrow Lord Bacon's famous phrase: "I hold every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavour themselves by way of amends to be a help and ornament thereunto."

REMIT.

"That this Conference endeavour to have inserted in Fire Insurance Policies a clause providing that the insurance of the Mortgagee's interest shall not be invalidated by any act or omission on the part of the Mortgagor or owner, nor by the unoccupancy of the premises or any other increase in risk without the knowledge of the Mortgagee, with a proviso that the Mortgagee will inform the company of any increase of risk known to him, and pay any additional premiums required by the circumstances." (CANTERBURY).

MR. W. J. HUNTER (Christchurch): I shall be glad if this matter could be postponed in the meantime. I have been asked to put forward this remit on behalf of Mr. Godfrey.

THE CHAIRMAN: This matter has, in a sense, already been dealt with by the New Zealand Law Society. The Auckland District Society made suggestions, which the Council of the N.Z. Society adopted, and I presume the Attorney-General will give the matter consideration. It might be convenient to postpone the remit.

MR. M. J. GRESSON (Christchurch): I am sure Mr. Godfrey was not aware of the fact that it had been dealt with by the New Zealand Law Society. Under the circumstances no advantage would be gained by discussing it, except that the Conference might endorse it.

Consideration of the remit was postponed.

"COURTS AND COURT-HOUSES."

(Mr. A. T. Donnelly).

MR. A. T. DONNELLY (Christchurch) then read the following paper on "Courts and Court-houses":—

I intend to discuss two matters. Firstly, the present architecture, construction and furnishings of Court-houses in New Zealand as these effect the administration of justice, and, secondly, the Jury system in civil and criminal cases, and some possible changes in its working mechanism.

The first matter is worth the consideration of a Conference such as this because most lawyers pass a varying but substantial part of their working lives in the Court-houses of the country, which are the factories or workshops of the law. If an English lawyer of the Year Book times returned to earth to-day and went abroad into our streets he would be deafened by the ceaseless clang and din of modern life, and would stand amazed at its crowds and its hurry, its organisation and its inventions. If he took sanctuary in one of our Court-houses and looked around the dingy sunless room, and sniffed the musty air, then he would feel at peace and at home and could say to himself: "Here, anyhow, there has been no change since the reign of Edward I." Such a lawyer would find the Courts of to-day as ill-ventilated, as badly lit, as uncomfortably furnished, as hard to hear in, as hot and cold according to the season as any Court of mediaeval times.

In modern times, by reason of a combination of legal compulsion and commercial expedience, factories, workshops and offices are usually well built, furnished, lighted, heated and ventilated. There are societies which exist to urge upon the Government the value and necessity of fresh air and sunlight for school children; but the elementary needs of schoolhouses have been forgotten in our Courts. There would be a volley of complaint if the pupils of a primary school were set to work in the Supreme Court room in Christchurch or in Wellington, where the highest Court of the land discharges the duty of the most honourable and responsible office in the State. The Government of the country, apart from the maintenance of public order, sells justice to its citizens in return for their allegiance, taxes and personal service at reasonable but nevertheless constantly increasing and obviously profitable rates. It sells justice in its Court-houses under circumstances which would bring a private employer of labour into conflict with the health and factory authorities. The conditions are much the same the world over, but that does not answer the complaint, and I should like to read to you one or two quotations from an American book called "The Problem of Proof." The author of this book is a person of pontifical authority in the United States on disputed documents, and the book, although primarily devoted to the solution of the problems in such cases, is distinguished beyond the ordinary by some broad and general chapters of great price and value to students and practitioners. The chapter on Advocacy is the best account in the English language of the rights and duties of an advocate. The author has a chapter dealing with the designing and lighting of court-rooms in the United States, from which I make the following quotations:—

> "The interests of justice require that trials at law should be held where every word spoken can be distinctly heard, where every piece of visible evidence can be clearly seen and where every witness can be closely scrutinised by court, counsel and jurymen. When these requirements are specified it at once is apparent that many court-houses are not suitable places for trials at law.
>
> "Many a city in this broad land has spent hundreds of thousands of dollars on a court-house in which there is not one properly arranged, furnished and lighted court-room where comfort, clear-seeing and distinct hearing are all attainable.
>
> "Many a beautiful court-house, standing out in an open square, in God's free sunlight, is so designed and

arranged that it is necessary to use artificial light in it in the daytime.

"Ordinary commonsense ought to suggest that a court-room should be so designed and constructed as to serve best the use to which it is to be put. It should be a place where words spoken in an ordinary tone of voice can be easily heard by jury, by court and by counsel, and it should be properly and adequately lighted by the sun by day and by suitably placed artificial lights by night. A room where trials at law are to be held should also have adequate means provided for proper ventilation. If in addition to these essentials it can also be made artistic and beautiful, or even sumptuous if that is desired, well and good, but these latter requirements should not be allowed to supplant the real uses of the room."

These criticisms apply as justly in New Zealand as in the United States. Consider the Supreme Court-room in Christchurch, where I have practised most. The ceiling is so high that the tones of the human voice are lost among the rafters. Counsel and Judge have constantly to ask witnesses using an ordinary tone of voice to speak up "so that my learned friend can hear what you say," or, "so that the farthest juryman can hear you," and honest but nervous witnesses are upset and halt and falter in their testimony. The walls are blank and windowless and the sun has never reached the room since the day that it was built. It is hot and stuffy in the summer and cold and draughty in the winter. The authorities seem to be ignorant of all modern systems of interior heating. There are two or three fireplaces about the size of those in the breakfast-room of a suburban bungalow. After a long departmental war of requisition, the Judge has been provided with an inexpensive radiator on the bench, but counsel, witnesses and jurymen in the winter-time freeze in a permanent arctic zone in the middle of the Court. Gusts of cold and mouldy air sweep through this zone every time a door is opened and people enter or leave the Court.

The imperfections and deficiencies of our Court-houses bring other evils with them, and I invite you to consider just a few. In every trial there is an inevitable though differing strain and stress of responsibility or self-interest, or desire to win on all the participants, Judges, counsel, parties, witnesses, and jurymen, and that strain and stress is unnecessarily increased by the conditions of the Courts. I can remember a spectacular criminal trial which took place in close and muggy weather when the Court was packed with onlookers during the whole of the trial. Counsel for the accused addressed the jury on the sixth day, and as he called no evidence his address was the whole case for the defence. Late in the afternoon when counsel was in the full swing of his address he had plainly failed through no fault of his manner or his matter to seize and retain the attention of a number of jurymen whose faculties, severely tried as they must have been in any event, were at last numbed and overpowered by the lack of ventilation and the foulness of the atmosphere in the Court-room. The prisoner was properly convicted, but the jury, under the conditions, was hardly able to do its work.

Judges and lawyers, by habit and long exposure, can set up a greater resistance than jurymen to the unwholesomeness of the Courts, but the defects in the court-houses tend occasionally to make even their hardiest occupants sleepy, irritable and quarrelsome, and bad air and lack of ventilation may account for some bad decisions not only on fact but possibly on law. The legal profession, in the interests of the Judges, practitioners, the public, and of the administration of justice, should make a sustained and vigorous effort to abolish from court-houses in the country the mediaeval characteristics which have marked them for so long. The remedy is in the hands of the politicians and departmental officers of the Government, and the organised legal profession should see that it is used. The politicians themselves have never turned their faces from the amenities of life, as anyone can see who visits the business apartments of a Minister of the Crown, and, as you saw for yourselves, Parliament has surrounded even the private member with a certain modest comfort to soften the hardship of his service to the State.

The architects and officials of a past generation should not punish the community for all time by their design and construction of buildings intended for public use. An intelligent application of some part of the profits of the Justice Department, some expert engineering and architectural advice, the help and experience of the Judges would improve the working conditions of those whose combined labours make up the administration of justice, and we must never forget that the administration of justice is the first business of the State upon which all its other businesses depend for existence and support.

Now, as to the Jury System: this was discussed last year in the magnificent paper which Mr. Johnston gave to the Conference in Christchurch, but nothing has been done to restore the Jury in civil cases to its former position.

I should like to supplement Mr. Johnston's paper with some considerations from a slightly different point of view. The ancient veneration for the institution of the jury has decayed in our time and it has been directly attacked by its enemies in this country and only tepidly supported by its friends. Throughout history there has always been some hostility to the jury because the opponents of popular and individual liberty have always feared and distrusted it. A hundred years ago you will remember the eminent Mr. Bumble in "Oliver Twist" discussed the faults of the institution with his friend the undertaker. Mr. Bumble was aggrieved by a rider to the finding of a Coroner's jury, and I hope you will allow me to remind you of the criticism made by him. Said Mr. Bumble:

"If the board attended to all the nonsense that ignorant jurymen talk, they'd have enough to do."

"Very true," said the undertaker, "they would indeed."

"Juries," said Mr. Bumble, grasping his cane tightly, as was his wont when working into a passion, "Juries is ineddicated, vulgar, grovelling wretches."

"So they are," said the undertaker.

"They haven't no more philosophy nor political economy about 'em than that," said the beadle, snapping his fingers contemptuously.

"No more they have," acquiesced the undertaker.

"I despise 'em," said the beadle, growing very red in the face.

"So do I," rejoined the undertaker.

"And I only wish we'd a jury of the independent sort in the house for a week or two," said the beadle, "the rules and regulations of the board would soon bring their spirits down for them."

In his last sentence Mr. Bumble spoke in the tone and used the language of some of the bureaucrats of to-day. Many of us have had our spirits brought down by the rules and regulations of the board, not the workhouse board of Mr. Bumble's time, but one or some of the host and swarm of boards and local and general authorities which, bred by the complications of social life to-day and armed with the stings of rules and regulations, irritate and persecute the ordinary private citizen.

The proposition for which I cite Mr. Bumble as an authority is that the Jury System has always been attacked by its enemies, and should, therefore, to-day be defended by the friends of popular rights and individual liberty.

It is the fashion to speak contemptuously of the jury to-day. According to an American authority the only thing the Almighty Himself does not know is what the verdict of a common jury will be. A great jurist in New Zealand once told me that juries were a device occasionally used by Judges in times of doubt and difficulty to avoid responsibility and work. In New Zealand the hostility to the jury has undoubtedly recently grown stronger, but this hostility is partially founded on lack of knowledge and experience because it is greatest among lawyers who have practised before juries the least. The jurisdiction of the jury is unimpaired in criminal cases although the Rules of 1924 have lopped off the whole of its jurisdiction in contract and sadly maimed its jurisdiction in tort. These Rules have cut into the jurisdiction more deeply than many of us think because the practice decisions under the Rules have interpreted them always strictly, and sometimes narrowly, against the granting of a jury. Most of us believe that we should not only defend the remaining civil jurisdiction of the jury from further invasion, but we should recapture the jurisdiction which has been lost. For such a purpose it may be useful to consider certain of the present ills of the institution and possible cures. I will not refer to the general arguments in favour of the jury, because they were set out in a masterly way in Mr. Johnston's paper, but there are some general observations I should like to make. One is that decisions of fact, in order to satisfy litigants and the public, must accord with the average standards, principles, and opinions current in the community at the time, and sometimes it is better to satisfy the community with a bad decision rather than offend it with a good one. The advantage of the jury over the Judge is that the decision of the jury, unless tainted by rare passion or prejudice, is the anonymous average of the honest and honourable impartiality of the community as the whole. The decision of the Judge may be sounder and wiser and yet not give the same satisfaction because the standards of the Judge may be higher or lower, broader or narrower, than the average community standard at the time. The necessary isolation of the high office of Supreme Court Judges in New Zealand may, as the years go by, leave the Judge a little out of touch or sympathy with the current changing standards of everyday life. In New Zealand a Judge's resident jurisdiction extends over a whole province or an island. If decisions of fact in common law actions are left permanently and exclusively to the Judge, then all such decisions over a great territory may be stamped or coloured or bent too strongly by the outlook on life of the Judge or his personality or cast of thought. Common Law decisions of fact depend on the reaction to the evidence of the tribunal's knowledge and experience of life. These cases are not the same as controversies about technical doctrines such as the Statute of Frauds or the perpetuity rule because the man in the street has the material and competence in many of these cases to match, and does match, his opinion with that of the Judge.

There are changes which we might consider in the working of the Jury System. One disability is to be found in the principle of exemption which excuses the best brains in the community from service on the jury. Exemptions are too wide to-day, and organised bodies of commercial men, commercial travellers recently for example, have applied for total exemption for members of their trade or business. A thorough conscription of jurymen should be enforced, exemptions should be diminished rather than increased, and applications for exemptions by business men should receive less consideration than in the past.

No enemy of the system has had the courage to attack the criminal jurisdiction of the jury, but if the whole institution is not defended such attacks will come. In criminal cases there are certain practical changes which might be considered.

The jury system in criminal cases has been strained unfairly by placing on a lay and untrained tribunal the burden and responsibility of enforcing laws which set a standard higher than the average ethical standard of the community. The Gaming Act Amendment which makes bookmaking a crime is a type of such legislation. All sensible men are agreed that the bookmaker should be suppressed, and he can be suppressed, but there are methods more effective than prosecutions before common juries. Such prosecutions generally fail, even when plainly established, because there are always one or more of the jurymen who will not affirm the principle that bookmaking is a crime. If there is to be moral legislation of this class, it should be enforced by Judges and Magistrates who will administer the law as they find it. The report of one of the recent Commissions in England refers to such legislation as it affects the Police. The failure of prosecutions of the bookmaking class is a serious matter for two reasons :—

(1) Such failures diminish the respect for the whole institution of trial by jury and supply material for its opponents.

(2) Such failures are regarded in a foolish and cynical way as something natural and inevitable. The great sanction of the criminal law is the promptness and certainty of detection and punishment. We should not accustom the community even in gambling cases to the constant failure of the administration of criminal justice, because, as in diseases of the human body, a small infection may spread through the whole system. Great social evils may follow from a trivial breakdown in the criminal law, and the experience of the United States teaches us that those evils can extend until they threaten the foundation of civilisation itself.

Two amendments in criminal cases may be considered together. Firstly, copies of the jury list should not be issued to litigants by the Sheriff until a brief time before trial, say 48 hours. Secondly, the Crown's right to stand aside should be abolished. There is little interference with juries in New Zealand, except in cases of the bookmaking type, and that little would disappear if jury lists were withheld until just before trial, because any successful tampering with the jury is dependent on a sufficiency of time for the purpose. If there is no fear of interference with the jury there is no

reason for the continuance of the Crown's right to stand aside, which can only be justified as an emergency weapon against possible corruption of the course of justice. The right is not generally abused, but is always available, and in important criminal cases it has been extensively used. The preponderant selection of the tribunal should not be left to the discretion of individual prosecutors, because the vesting of such a right in one party to the litigation may sometimes prejudice and does frequently dissatisfy the other.

The community is protected from all perils in the Jury System by the power of correction and control by the Judge which is always available to check irregularities and misconduct. This power of control has in some times and places been extended to include a right in the Judge to express publicly in the presence of the Jury his personal disagreement with a verdict. I feel no delicacy in making this reference, because there has been no such comment by a Judge in New Zealand for a very long time. Such comments have occasionally been made, and one of the first is in an early Year Book, where we read as follows :—

> "A jury had acquitted a man charged with felony, evidently to the dissatisfaction of the Justices, Scrope and Spigurnel, before whom he had been tried. 'Since the jury have acquitted you, we acquit you,' Scrope said grudgingly. 'Get you gone.' And Spigurnel, the other Justice, said that upon the evidence the man ought to have been hanged."

We should carefully preserve the balance of the component parts of our system of justice. A Judge is hardly more entitled to comment on the verdict of a jury than a defeated litigant from the body of the Court or a defeated counsel from his place at the Bar. Criticism by the Judge beyond his traditional power of control and correction not only hurts the institution of the jury, but also lessens the dignity of the Bench.

Well, gentlemen, I have finished this rambling paper. I do not warrant what is in it, but merely submit it for your consideration.

As Holmes said in his lecture on "The Common Law," "the life of the law is not logic, but experience," and everyone from his own experience can and should contribute some ideas to the improvement of the law. We share in the administration of British Law, which is the greatest achievement of our race and one of the greatest of all human achievements. The traditions of the law have been spoken of at this Conference, as they always are when lawyers are gathered together at Law Society meetings, or when we are pressed by our competitors, such as the Public Trustee, These traditions are rustier than they should be to-day. We should live with them and have them live in us and use them more and talk about them less. They are not to be acquired by the ownership of a practising certificate or, as we are inclined to think, in any magical way by breathing them in from the outside air or automatically absorbing them through the pores of the skin. We have imperilled these traditions by building our profession on too shallow a foundation of general and technical knowledge, sometimes only on the matriculation examination and correspondence notes. The traditions of the law are to be found in its history and are to be acquired by the study of that history. A child must know the date of the Battle of Hastings to win a proficiency certificate ; but it is sad to think that a student can qualify for the Law in New Zealand with no knowledge of its history before 1929. If we are to live for the Law as well as live on it we must not think of it as something finished by wise men long ago just for our use as a business. We have inherited from our ancestors their experience in the law, and we should know something of that experience so that we can bequeath it to the future enriched and invigorated by our own.

In conclusion, let me leave you with a final quotation from "The Problem of Proof." I make this quotation for two reasons, first, because of the soundness of its statement of principle, and secondly, because when the author speaks, as you will see he does, of evils in the law peculiar to the United States, we must remember that the United States inherited the Common Law just as we did, and in some times and places debased and adulterated and neglected it, and so there they have the evils from which we are free. If we are to remain free from these or other evils we must preserve the best of the past in the Law and give our best to its present and its future. The quotation is as follows :—

> "It is the fashion to find fault with the administration of the Law, and there certainly are faults and abuses, but now and then let it be said that there is more to be thankful for than to criticise. Won by the devotion and sacrifice of thousands through long years of history, that which we vaguely call 'the Law' still stands as the citadel of human freedom. Its menace in some lands during these recent days tends to make conservatives of many who, while in favour of reform, are opposed to anarchy.
>
> "In spite of over technical procedure and the great flood of perjury, of incompetent lawyers, and the shortcomings of the bench, of the weaknesses of the jury system, and the abuses of expert testimony, of able attorneys on the wrong side, and the debasing contingent fee, of lying experts, and the great mass of conflicting precedents, justice prevails in the great majority of cases in the United States. There are grounds for the belief that the stars in their courses still are in league with justice. It behoves the young and aspiring lawyer to see to it that he is on the side of the stars."

"THE POWERS AND FUNCTIONS OF THE LAW SOCIETY."

(Mr. G. M. Spence).

Mr. G. M. SPENCE (New Plymouth) then read the following paper on "The Powers and Functions of the Law Society."

It is axiomatic that any society of persons, established for given purposes, should be vested with adequate powers to enable it to achieve those purposes.

The Law Society in England and corresponding societies in the British Dominions have been established, generally speaking, for the purposes of affording opportunities for the continuous acquirement and diffusion of legal knowledge, preserving and maintaining the integrity and status of the profession, suppressing dishonourable conduct and practices, protecting the public against abuses, providing means for the amicable settlement of professional disputes, and aiding reforms in the law likely to be of benefit to the community.

A perusal of the statute law of England and of the British Dominions shows that the statutory powers and functions of the New Zealand Law Society are much more limited than those of either the English, Canadian,

or Australian Law Societies, and the profession in New Zealand therefore labours under disabilities which have gradually been removed by statutory enactments conferring authority on the English, Canadian, and Australian Law Societies of a nature much more adequate to the proper performance of their functions and objects than those enjoyed by us in New Zealand.

It has been frequently stated from the Bench at Home that it is now the policy of the legislature to make the Council of the Law Society masters in their own house, but a study of the New Zealand Law Practitioners Acts would make it appear that this policy has not extended very far in this country.

History of the English Law Society.

Some reference to the history of the English Law Society and the growth of its powers and functions is appropriate to an adequate discussion of the subject. The handbook of the English Law Society, from which I shall quote to some extent, shows that a society called "The Society of Gentlemen Practisers in the Courts of Law and Equity" was established in the year 1739, and another society called "The Metropolitan Law Society" was formed in 1819, both of which were constituted for the purpose of dealing with abuses in the profession. In 1823 many of the members of Clifford's Inn and the other Inns of Chancery, with other attorneys and solicitors, founded an institution in Clifford's Inn which comprised an extensive law library and in which various courses of lectures were delivered for upwards of twenty years. A committee was set up in 1825 to draw up a scheme for the formation of a Law Institution, and at a general meeting held that year the Law Society was formed. A site was acquired and a building was erected thereon as a home for the Society, the members of which had the satisfaction of holding their annual meeting for the first time in their own hall in 1831. The original Deed of Settlement was superseded that year by a Royal Charter and by an elaborate set of by-laws prepared under the authority of the Charter. The latter, which was by no means granted as of course, and was indeed obtained only after very considerable exertion on the part of the committee, was in its turn superseded by a new Charter in the year 1845, under which, as amended by supplemental Charters granted in the years 1872, 1903 and 1909, the Society still remains constituted.

English Solicitors' Acts.

At the time of the Society's institution the legislation specially affecting solicitors was to be found in Acts and parts of Acts numbering, in all, nearly seventy, and extending back in date to the reign of Henry III. There was, therefore, urgent need for consolidation and improvement, but the task of placing matters on a satisfactory footing was not an easy one to face. It was, however, undertaken not long after the Society had been securely established, and in the year 1839 a consolidating Act was prepared by the Society and submitted to the Master of the Rolls. From that time, until the passing of the Act in the year 1843—a period of four years—the Committee laboured, without intermission, to make it an effective piece of legislation. This was the first Act of Parliament in which the Society was referred to by name and its representative capacity recognised. The Act provided, amongst other things, that no person should act as a solicitor unless admitted and enrolled, and no person should be admitted as a solicitor unless he should have served a clerkship of five years. The Society was appointed Registrar of Solicitors and Attorneys, and the issue of a certificate authorising any person to practise was made unlawful unless and until he should have obtained a certificate from the Society, as such Registrar, that he was entitled to take out such certificate, leave being granted to an applicant to appeal to the Court against the decision of the Society. Various disqualifications were removed, and the present legislation dealing with solicitors' rights to remuneration, which is substantially incorporated in Solicitors' Acts throughout the Empire, was first included.

In 1860 a further Act was passed, dealing mainly with the question of articled clerkships and increasing the powers of the Law Society with reference to the issue of practising certificates and imposing penalties on persons wrongfully acting as attorneys or solicitors. An Act of 1870 made further provisions with regard to solicitors' remuneration, and several more statutes were subsequently passed dealing with the same and other matters.

In 1877 the Solicitors' Act (40 and 41 Vic. cap. 25) was passed, which conferred upon the Law Society the power and duty of examining all candidates for admission as solicitors, and prescribing the examinations to be conducted by the Society, and directed that all fees should be paid to the Law Society.

This Act emancipated the Society from external interference in the matter of law examinations. The entire practical control of the preliminary, intermediate and final examinations, by that Act was placed—not merely as a permissive, but as a compulsory matter—in the hands of the Society, which thus acquired, as of right, that which it had only before enjoyed by the favour of the Judges. An examination committee of the Council was appointed on the passing of this Act, and they have been actively engaged in organising and supervising the work of the system which it inaugurated. The Council have, in exercise of the powers given to them by the Act, appointed a staff of paid assistant examiners, all of whom have been selected from among practising members of the profession, to aid them in the conduct of the examinations, and have also effected great improvements in the scheme of the final examination.

Following a number of minor Acts, the Solicitors Act of 1888 was passed, which transferred the Roll of Solicitors, which had previously been kept by the Clerk of the Petty Bag, to the Law Society, as Registrar of Solicitors, and also made the registration of articles of clerkship with the Society, as such Registrar, compulsory. It also made the production of the Society's certificate that a candidate for admission as a solicitor had passed the prescribed examinations, and the payment of the necessary fees, conditions precedent to his admission as a solicitor. The most important and far-reaching provision of this Act, however, was the con-

stitution of a Statutory Committee for the purpose of hearing and dealing with complaints against solicitors and applications to strike solicitors off the Rolls, to which I shall shortly refer with more particularity.

Apparently a good deal of trouble was experienced as a result of unqualified persons practising without certificates or proper qualifications, and a further statute, passed in 1891, made stringent provisions and imposed heavy penalties with a view to suppressing and punishing such persons. The problem in this connection which faced our own Society in preparing its Bill for submission to the House last year was anticipated and dealt with in the English Act of 1891. The powers of the Statutory Committee were increased as recently as 1919, when a further Act was passed dealing expressly with the powers and functions of this Committee of the Law Society, which would appear to indicate that the exercise of the disciplinary powers originally conferred upon it by the Act of 1888 had proved entirely satisfactory.

The Law Society's Gazette.

A useful function performed by the Society at an early stage in its history was the establishment and maintenance of an office of registry which kept a record of property for sale or sought to be purchased; of moneys awaiting investment or wanted to be borrowed; of applications for articled, managing and other clerks, and notices of clerks wanting employment; in short, of everything deemed generally useful to the members. The value of the department was increased in the year 1888, when monthly lists of the entries in the register were issued to members. In the year 1898 many pages of information to members were added. This information met with appreciation, and the extent of it was gradually increased, and in 1903 the publication was issued in improved form, with much fuller information, under the title of "The Law Society's Gazette." The information is confined to matters of professional interest. The Gazette does not contain leading articles, comments or expression of opinion on legal questions, or correspondence or reports of decided cases, except such as have direct reference to the profession, and it is not intended to be in competition with the existing Law Journals or periodicals.

Dominion Solicitors' Acts.

Turning to the legislation in the British Dominions dealing with the practice of law, it is found that the legislatures of the provinces of the Dominion of Canada have passed Acts incorporating the Law Societies in the different provinces which vest in the Societies considerable disciplinary powers. The Legal Profession Act of Manitoba (1913) empowers the Benchers of the Law Society, who correspond to our Council, amongst other things, to prescribe the qualifications and examinations for admission of barristers and attorneys (or solicitors); to fix admission and practising fees; to strike off the roll or suspend from practice any barrister or solicitor; to control and register all articles of clerkship; to appoint readers and lecturers and conduct courses of lectures for articled clerks and to conduct law examinations.

The Legal Profession Act of Saskatchewan (1920) confers on the Benchers of the Law Society in that Province, amongst other powers, that of summoning any practitioner against whom a charge of professional misconduct has been made to appear before them, and they have powers of disqualification for six months or until their report on the charge has been presented to and dealt with by the Court of Appeal.

Coming nearer home we find that all the States in the Commonwealth of Australia, except New South Wales, have passed enactments constituting the Law Societies in those States and vesting in them powers far in excess of any at present possessed by the New Zealand Law Society. In 1915 the South Australian Law Society was incorporated under the Law Society Act passed in that State, and this was followed in 1917 by the Law Institute Act of Victoria. No Act has been passed in New South Wales since 1898, this being merely a machinery Act for the purpose of defining the qualifications of barristers, solicitors and conveyancers, and providing for the taxation of bills of costs and penalties to be inflicted on unqualified persons who might attempt to practise. A bill was introduced into the New South Wales Legislative Council last December with the object of making the audit of solicitors' trust accounts compulsory, the substance of the bill being taken from the New Zealand legislation and rules on the subject, but I have been unable to ascertain whether this has become law. In 1927, however, the Queensland Law Society Act was passed, which incorporated the Queensland Law Society and followed the precedent of Western Australia, South Australia and Victoria, by setting up a statutory committee along the same lines as the Statutory Committee of the Law Society in England. The provisions of these statutes will shortly be more particularly referred to.

Powers under New Zealand Solicitors' Acts.

The powers and functions of the New Zealand Law Society and the District Law Societies are set out in "The Law Practitioners' Act, 1908," as amended by the Act of 1913, and these may be summarised as follows:—

(1) To sue and be sued in any Court.

(2) To acquire any estate in lands of a yearly value not exceeding £500 and to sell, convey, demise, exchange, dispose of or mortgage such lands.

(3) To make by-laws, rules and orders for—

  (a) The regulation and good government of the Society and of the members and affairs thereof.

  (b) Determining the manner of electing the President and Vice-President.

  (c) Regulating the times and places at which meetings of the Council shall be held and convening ordinary and special meetings.

  (d) Generally for carrying out the objects for which the Society is formed into full and complete effect with power to impose reasonable fines for non-performance of or disobedience to the rules and by-laws.

(4) To receive fees from practitioners and apply them for certain purposes.

(5) To provide and maintain law libraries.

(6) To prepare and publish law reports.

(7) To institute prosecutions and other proceedings for the breach of any statutes or rules relating to the practice of law or the preparation of deeds or instruments relating to real or personal estate.

(8) To investigate charges of professional misconduct against any practitioner.

(9) To oppose any application for admission as a barrister or solicitor or any other application made under Part I. of the principal Act.

It will be noted that these provisions are mainly machinery, and, with the exception of the right to object to admissions and institute prosecutions—both most objectionable matters—do not give the Society any power whatever to exercise supervision over legal education or practical experience, admission to the profession, or control of practitioners when admitted. In other words, the powers of the Society are confined to exceedingly narrow limits, and are very far from enabling it to be master in its own house.

In marked contrast to the powers of the New Zealand Law Society are those conferred upon our younger sister institution, the New Zealand Society of Accountants. Under its Act of 1908 and the rules made thereunder that Society has power to make provision for the training, education and examination of accountants; to issue certificates of proficiency and diplomas; to control and regulate the practice of the profession of accountancy in New Zealand; to set up an Investigation Committee to investigate and deal with charges of unprofessional conduct; and to suspend or expel members without, apparently, any right of appeal to the Court. How greatly do these powers exceed those possessed by the New Zealand Law Society!

Additional Powers and Functions Suggested.

Taking the English and Australian Acts as a basis as well as our own experience in New Zealand, it would appear that the following additional powers and functions are desirable:—

(1) To establish and control a Trust Guarantee Fund.

(2) To have power to regulate service of articles and to be responsible for registration of articles of clerkship by those intending to qualify for admission to the profession.

(3) To have increased powers in connection with legal education and the examination and admission of solicitors.

(4) To act as Registrar of Solicitors and control the issue of practising certificates.

(5) To have increased disciplinary powers.

(6) To be primarily responsible for the investigation and audit of trust accounts.

(7) To have some recognised authority in the matter of revision of the law, with power to make representations to Parliament.

(8) To prepare and issue to practitioners at regular intervals information of the nature contained in the Law Society's Gazette.

(9) To have power to establish and subsidise a Solicitors' Benevolent Fund.

(10) To have power—and this is admittedly a revolutionary suggestion—to adopt a system of community advertising, if found necessary, to combat unfair advertising propaganda directed against the members of the Society.

(11) To have power to make rules and by-laws for effectively carrying such additional powers and functions into effect.

(1) Trust Guarantee Fund.

The matter of establishing a Solicitors' Trust Guarantee Fund has been before the practitioners in New Zealand for two years, and the principle of adopting some form of guarantee by the profession against defalcations was definitely adopted by the last Conference. After very careful consideration, two bills were prepared by the Society and submitted to the Attorney-General. One was passed through all its stages by the Legislative Council and reached the second reading in the Lower House. The provisions of this bill, which seems adequately to cover the case, are well known to all present, and it is, therefore, unnecessary for me to elaborate them further. Suffice it to say that, after the most careful consideration by the New Zealand Law Society and the District Law Societies, the scheme outlined in that bill has been considered to be the most satisfactory which could be devised, and, in view of the fact that both the New Zealand Law Society and this Conference have passed resolutions urging that the bill should be proceeded with and passed into law as soon as possible, it is unnecessary for me to make any further reference to the subject here, beyond stressing the urgent necessity of securing statutory power to establish such a fund under the control of the Law Society with the least possible delay.

(2) Articles of Clerkship.

As has been pointed out earlier in this paper, service of articles of clerkship is a condition precedent to admission as a solicitor in England under the provisions of the Acts of 1843, 1860 and 1888. Under the last-mentioned Act, registration of all articles of clerkship with the Law Society is made obligatory, and it is necessary to obtain the Society's certificate as to service of articles before an applicant can be admitted to the profession. A similar condition obtains in certain Australian States, and "The Legal Profession Practice Act, 1915," of Victoria, empowers the Council of Education, which includes three members nominated by the Law Institute of Victoria, and three nominated by the Committee of Counsel, to make rules, which have the force of law, relating to service of articles, courses of study and examination, and other qualifications of candidates for admission as barristers and solicitors. The principle was endorsed by the last New Zealand Legal Conference, when it was resolved "that practical experience of legal work on the part of all candidates for admission to the profession be ensured by a return to the system of articles or by the adoption of some other system having the like purpose and effect." Although this resolution was forwarded to the proper quarters, no action appears to have been taken so far in connection with the matter. The principle of apprenticeship is recognised as necessary and adopted in other vocations. Why, in this most exacting vocation, should it be possible to engage in practice without any real practical experience whatever?

There is no doubt that our present system, whereby, after passing certain written examinations, even although one of them does include practical work, a candidate may be admitted to the profession without any office experience or training in the practice, ethics, and traditions of the profession, is neither in the interests of the public whom such a practitioner sets out to serve, nor in the interests of the profession itself, nor, for that matter, of the candidate when he actually commences practice. Practical training is of far greater value than mere book-learning, and qualification by examination only is, as experience has shown, an insufficient qualification where it leaves the practitioner

to pick up his experience at the expense of the interests of his clients.

(3) Legal Education.

As I have already mentioned, the whole responsibility of examining candidates and issuing certificates of qualification was vested in the English Law Society in 1877. Three examinations were prescribed: the preliminary examination, which was one as to the general knowledge of the candidate on his becoming bound under articles of clerkship; the intermediate examination, which was intended to ascertain the progress made during the service of the articles; and the final examination on the conclusion of the articles as to the fitness and capacity of the applicant to act as a solicitor, including, where any allegation was made as to the moral unfitness of any such person, an enquiry into character. Very full rules were drawn up by the Law Society for the conduct of such examinations, laying down the subjects in which candidates should be examined, and all examinations are conducted by the Society, which grants or withholds its certificate as to the candidate's qualifications as it sees fit, leave, however, being reserved to the candidate to appeal to the Master of the Rolls against the decision of the Society. The Society has established law schools in twenty-seven centres and arranges for courses of lectures to articled clerks. It has already been pointed out that a Council of Legal Education is constituted under the Legal Profession Practice Act of Victoria, which has similar powers of examination and issue of certificates of qualification.

Although the law examinations in New Zealand are conducted by examiners who are usually practising solicitors, the conduct of the examination is under rules formulated by the Judges, and the examination is conducted by the New Zealand University, the certificate of the University that the candidate has passed the necessary examinations being accepted by the Judges as a sufficient qualification. The only certificate required from the Law Society is a certificate from the District Law Society as to character. It seems desirable that the Law Society should be vested with much fuller powers and should have some voice in the conduct of the examinations and the issue of certificates of qualification, even if it were not considered expedient or necessary that it should have the full powers conferred on the English Law Society.

(4) Register of Solicitors.

Once a solicitor is admitted to practice and is entered on the Rolls, the New Zealand Society has no further jurisdiction over his registration. The Society does not even receive notice of the admission of solicitors, and has no control over the correctness of the Roll or the issue of practising certificates. So long as a practitioner, who is duly enrolled, pays the prescribed fees, his certificate is issued as of course. If the Society were appointed Registrar of Solicitors and Custodian of the Rolls, and controlled the issue of practising certificates there is no doubt that its prestige would be greatly enhanced, and such power would act as an incentive to practitioners to recognise the authority of the Law Society, tending at the same time to make them more careful not to offend against any of the recognised principles of legal practice and ethics.

(5) The Statutory Committee.

By far the most important matter for consideration, however, is the setting up of a Statutory Committee similar to that constituted by the English Solicitors' Act of 1888. Prior to that date, on an application to the Court for the removal of a solicitor from the Roll, the Society had power only to appear by counsel. The case was usually referred to one of the Masters of the Court to enquire into the allegations and report, and after the enquiry the Master's report was brought before the Court and the facts were, if necessary, gone into again and the Court made an order striking a solicitor off the roll or not, as it thought fit. Many of the applications were, on enquiry, found to be of the most frivolous character. The enquiry before the Master frequently continued over many months. On all these occasions the Society had to appear, and thereby incurred expenses which its exchequer could ill afford. The Council, therefore, looked about for some means of relief, and adopted a suggestion that such might be found in a re-arrangement of the functions exercised by the Court and the Society. It was considered that the functions then exercised by the Court at considerable cost to the Society could well be exercised by the Council alone, subject, of course, to the solicitor affected having the right to appeal to the Court against the decision of the Council. The Council had a Bill prepared to give effect to this, and, as a result, the Solicitors' Act, 1888, was passed. Its effect was to abolish the first application to the Court and to provide that the enquiry formerly conducted by the Master should be conducted by a Committee of Members of the Council of the Law Society, and that the application should first come before the Court on the report of the Committee. This Statutory Committee consists of not less than three, nor more than seven, members of the Council of the Society, which acts under rules prepared by it with the concurrence of the Master of the Rolls. The Committee has power to issue subpoenas, take evidence on oath and examine documents, and to make an order striking the solicitor off the Rolls or to suspend him from practice, such order being enforceable in the same manner as a judgment or order of the Court. The solicitor may, if he thinks fit, appeal to the Court against any order made by the Committee.

Under the Law Society Act of South Australia, the Law Institute Act of Victoria, and the Queensland Law Society Act, statutory committees are constituted with similar powers.

The Victorian Act, the provisions of which are similar to those embodied in the statutes in force in the other States mentioned, provides that any person feeling aggrieved by reason of the alleged misconduct of any practitioner in a professional capacity may make a charge in writing to the Statutory Committee or the Council. The Council must forthwith refer any charge to the Statutory Committee and may, of its own motion, refer to the Committee for enquiry any question as to the misconduct of any practitioner which appears to the Council to require investigation. The Supreme Court or a Judge thereof may also refer any similar question to the Statutory Committee for enquiry. The Committee has power to require that further particulars be given of any charge, and that the charge be verified by declaration, and may summon before it any practitioner in respect of whose misconduct, in a professional capacity, any charge has been made. For the purpose of conducting any such enquiry the

Committee has all the powers conferred upon Boards of Enquiry by the Evidence Act. If any practitioner, having been duly summoned, fails to attend, the Committee may proceed with the enquiry in his absence. In the exercise of their functions, the Chairman and other members of the Committee are constituted officers of the Supreme Court. Any person under examination before the Committee may object to any question upon the ground that the answer may tend to incriminate him but *shall be compelled to answer such question notwithstanding such objection.* No answer given subject to such objection is permitted to be used in evidence upon any other proceedings for any offence except that of perjury in connection with the enquiry. If, after enquiry, the Committee is of opinion that the practitioner has been guilty of any misconduct in a professional capacity, it makes and transmits a report thereon to the Supreme Court, together with a copy of the evidence taken upon the enquiry. The Supreme Court may refer the report back to the Committee for further enquiry or for amendment, and may review any finding of fact therein. Subject to any such reference back or review, every report is conclusive evidence of all statements and findings of fact therein contained. The Court may, on reading such report, whether with or without further evidence, make such order as it thinks fit. The Committee, if it finds that any misconduct, alleged by a person aggrieved, has not been proved, may order the person making the charge to pay to the practitioner against whom it was made the whole or any part of the costs of the proceedings, such costs being liable to taxation. Every order may be enforced and costs may be recovered by execution. Right is reserved to apply to the Court direct.

It is interesting to note that, in a State in which the political conditions are such as we are lead to believe them to be in Queensland, an Act containing similar powers was passed in that State as recently as 1927.

On account of the irreparable damage that would be sustained by a practitioner through the institution of unsuccessful proceedings, notwithstanding his acquittal, the policy of the New Zealand Law Society and District Societies has been not to take action against a practitioner unless they have the clearest possible case and consider that his guilt can be proved conclusively. The powers of the Law Society are practically confined to fining or expelling from membership of the Society practitioners found guilty of unprofessional conduct. It has no power at all to deal with a practitioner—and there are, unfortunately, many such—who is not a member of the Society except by adopting the very drastic course of making application to the Court to have him struck off the Rolls. It has not even power to compel a member, let alone a practitioner who is not a member of the Society, to appear before it or any committee set up for the purpose of investigating charges, nor of compelling witnesses to appear and give evidence, nor of investigating a solicitor's accounts and dealings with his clients. Powers of reprimand, fine, and expulsion from membership of the Society are totally insufficient for practical purposes.

It would appear most desirable, for the increased protection of the public and in order to enable the New Zealand Law Society to exercise proper supervision over practitioners, that a statutory committee should be constituted in New Zealand with full authority to investigate complaints against practitioners, to inflict penalties, make and enforce orders and deal effectively with all cases of professional misconduct and breaches of the rules governing the usages and ethics of the profession, always, of course, reserving an adequate right of appeal to the Court.

(6) Audit of Trust Accounts.

At the present time the audit of solicitors' trust accounts is conducted under regulations pursuant to the provisions of "The Law Practitioners Amendment Act, 1913." These regulations do not confer on the Law Society any powers whatever unless and until an adverse auditor's report has been sent to the Solicitor-General, when the Council is faced with the task of taking proceedings against the solicitor. Although it may be strongly suspected that all is not well with a solicitor's trust account, the Law Society has no alternative but to sit still with folded hands and wait till some disaster occurs and is discovered which imposes on it the duty of taking such action as will shut the stable door after the horse has got out. This matter was fully discussed when the Guarantee Bill was before the District Law Societies and the New Zealand Law Society last year, and provision was made by Section 9 of the first draft bill that the Society should have power to examine and enquire into the accounts of any solicitor. This course would be open to the very obvious objection, particularly in a small town, that the fact that an auditor or investigator had been "put in" by the Law Society would tend to have a most damaging effect on the solicitor's business, as the fact that "the auditor was in" would become bruited abroad and would possibly create quite unwarranted suspicion and comment. If the whole control of the audit of solicitors' accounts were vested in the Society, which would, in the ordinary course, send its auditors when and where it pleased, and would receive and, if necessary, transmit to the Solicitor-General regular reports, the Society would be in the position of being able to investigate the accounts of solicitors at any time without such investigation being open to the objection above referred to, proper provision, of course, being made for secrecy. Further, the fact that the Society had such powers would tend to prevent any laxity on the part of practitioners generally.

(7) Assisting in Formulating Legislation.

The Society has at present no voice in the formulation of legislation by Parliament or of regulations made thereunder. It is true that it employs, at its own expense, a barrister to peruse bills presented to Parliament, but he has no opportunity of perusing regulations before they are issued. If anomalies or unsatisfactory features in impending legislation are discovered, the Society has no official status in the matter and no right of audience to represent its views before Parliamentary committees. In special cases the Society may be asked to peruse and make suggestions regarding bills, but these bills may become law without regard to any such suggestions, or the whole matter may be shelved and valuable criticism may then be lost sight of. Although the Society has no voice, yet it is the one body with the qualifications for advising on these matters. Much is heard in these days about slip-shod legislation, and yet no adequate opportunity is afforded the Society of assisting the Legislature to keep its enactments on sound lines.

It has often been asserted—most unjustly—that the attitude of the profession to the proposals of law reform has been that of at least passive resistance, and that

anomalies and inequalities which could not logically be defended have been allowed to survive for no better reason than that legal practitioners were interested in keeping them alive. The imputation—based as it is on a transparent fallacy—scarcely requires serious contradiction, but its want of foundation cannot be more conspicuously illustrated than in the case of the work of the English Society. We find in the year 1835 the first record of the English Society's activities in this direction. This branch of the Society's functions from that time rapidly increased in importance and soon began to occupy the foremost place in the Annual Reports, and the consideration of current Bills in Parliament, whether affecting the principles or the practice of the general law, has long been a special feature of the Society's work.

The most cursory glance over the public statutes at Home during the last hundred years will suffice to show that the exhaustive consideration of current measures, and the preparation of practical criticisms and suggestions, have represented no mean expenditure of labour by the Society, which has considered and helpfully criticised many hundreds of measures. The Society is always represented upon the Royal Commissions, which have preceded nearly all great legislative enactments, by members of its body appointed to take part in the deliberations of those Commissions.

The New Zealand Law Society might, with considerable advantage to the common weal, be given the power and undertake the duty of advising upon impending legislation, particularly when it has some important bearing on the general body of the law. To this end it might be a practical suggestion that the functions of the perusing barrister should be widened, or that a committee, with official recognition, should be set up to consider and report on impending legislation, with authority to make representations to Parliament, and with some financial assistance from the State.

(8) The Law Society's Gazette.

The need of some means of promptly and regularly providing all practitioners with authentic information of special interest to them has been felt for some time. The decisions of the Law Society, the proceedings of the New Zealand and District Law Societies, reports of committees, legal decisions affecting solicitors, admission of barristers and solicitors, rules and regulations of general interest to the profession, calendar of sittings of the Court, changes in partnerships, honours and appointments—these and many other matters of interest to the profession can only be obtained casually and in an incomplete manner as the result of considerable effort. There is no systematic collection and dissemination of such information in New Zealand. I have perused over a score of copies of "The Law Society's Gazette," and all the items of information to which I have referred and many others are there collected and issued in an orderly form to every practitioner once a month. The decisions of the Statutory Committee, amendments to regulations, reports on legal education, results of law examinations, tabulated lists of persons applying for admission with particulars of their articles, partnerships, successions and offices wanted and vacant, clerkships wanted and vacant, and a great amount of miscellaneous information is collected and issued in a complete and orderly form. There is no organisation charged with the duty of collecting and circulating such information in New Zealand. Surely it is the duty of the Law Society to see that this want of regular and authoritative information is made good.

The proprietors of the "New Zealand Law Journal" have generously offered to place four pages of that journal at the disposal of the Law Society, but so far advantage has not been taken of that offer. What is everybody's business is nobody's business. I suggest that those four pages should be taken over by the Law Society, and that an editor should be appointed to collect and arrange similar information to that contained in the English Society's Gazette, and that this should be published in the four pages in question under the heading "New Zealand Law Society's Gazette."

(9) Solicitors' Benevolent Fund.

Although the English Society is not a benevolent institution and has no funds available for charitable purposes, it is in close sympathy with the Solicitors' Benevolent Association for the relief of poor and necessitous solicitors, their wives and families, and necessitous widows and families of deceased solicitors. There does not seem to be any reason, however, why the New Zealand Society should not have power to create from its ordinary or extraordinary revenues a Law Practitioners' Benevolent Fund for the relief of aged and indigent practitioners, their widows and families. In this connection I would point out that the New Zealand Society of Accountants, a much younger and poorer Society than ours, has established a Benevolent Fund, the capital of which now amounts to £6,255, which enables a considerable sum to be annually granted by way of relief in proper cases. Charitable assistance to fellow-members and their dependents has always been considered as being in harmony with the objects of a Society like ours. A Benevolent Fund was always one of the principal objects of the old English Guilds, and is to-day one of the principal objects of the large City of London Companies and Guilds, such as the Goldsmiths' Company. It seems, therefore, that our Society should at least now contemplate this matter, and, when it is possible, put such a scheme into active operation. The Society should be relieved of the obligation, imposed on it by the 1913 Amendment Act, of providing and maintaining the Judges' Law Library. There is absolutely no reason why lawyers should provide the Judges' Library. It is clearly the duty of the Justice Department to do this. The amount at present devoted to that purpose, or part of it, could be diverted to the establishment of a Benevolent Fund.

(10) Counteracting Unfair Propaganda.

For many years it has been an accepted principle that practitioners should not advertise, and the insertion of advertisements by individual firms is still to be deprecated. Circumstances alter cases, however, and in view of a skilfully conducted advertising campaign directed mainly against the profession, it may be necessary for the profession to endeavour to counteract the effect of such advertisements by some form of community advertising. If these objectionable advertisements are not discontinued, it may be not only advisable, but necessary, to put and keep before the public the ideals of our profession and the services which it is highly qualified to render to the community. The Institute of Chartered Accountants of England and Wales extensively advertises its existence and the services which its members can render to the public and the advantages of employing its members, and other corporate institutions advertise the nature of the ser-

vices which their members can render. A series of dignified statements of fact relating to the work of the legal profession could no doubt be drawn up and published with a view to enlightening the public as to the true position with reference to the ability of the profession to undertake and carry out the duties which its members are specially trained and peculiarly fitted to perform. This would especially be the case in the event of the Guarantee Bill becoming law.

(11) Power to make Rules.

As has been shown, the New Zealand Law Practitioners Acts lag far behind those in other parts of the Empire in effectiveness. To embody in our statute law almost any of the suggestions which have been made in this paper would entail substantial amendments to our Acts, but this should not deter the profession from seeking such powers as would make for the increased efficiency of the Law Society. It was only after years of strenuous and persistent effort that the English Law Society secured the powers which it now possesses as master in its own house, and if it is considered advisable to obtain additional powers in New Zealand we may have to strive mightily to achieve desirable reforms. When such reforms are obtained it would be essential that the Society be given power to make rules and by-laws for the exercise of its increased powers, and again we have a model in the rules and by-laws of the English Society. The Queensland rules are admirable, and those of the Incorporated Law Institute of New South Wales are also very full, and in that respect are in sharp contrast with our own.

Supplementary Suggestions.

This paper has dealt with a number of new functions which it is suggested that the Law Society should be empowered to undertake, but of these, although the first in importance is admittedly the establishment of the Guarantee Fund, the constitution of a Statutory Committee with adequate powers is a matter of the greatest urgency for the purpose of maintaining the status of the profession. Legal education, articles of clerkship, and control of practising certificates are cognate matters, and should be dealt with in conjunction.

But the question of the efficiency of the present organisation of the Society for carrying out its functions is one that, in view of changed and changing conditions, could bear some consideration. Time was, not more than three or four years ago, when the New Zealand Council met for an hour-and-a-half three times a year, and the District Law Societies did not appear to consider it necessary to send delegates to the meetings. This year five Council meetings have been held, besides numerous meetings of sub-committees, and representatives of District Law Societies have regularly travelled to Wellington to attend these meetings, which now commence at 2 p.m. and last till 6, and even then it is found difficult to complete the business. This is an inconvenient and expensive method of dealing with the Society's affairs, and has the disadvantage of lacking continuity of effort unless a considerable amount of work is delegated to committees which must of necessity be composed of busy practitioners who can only at considerable personal inconvenience give the time which the committee work demands.

Continuity of effort could possibly be ensured and the Society's work could be facilitated if a paid executive officer were appointed who could combine the duties of perusing barrister, compiler of rulings and decisions, editor of the Society's Gazette, and Registrar of Solicitors, and who could carry out investigations for the Statutory Committee and appear on all applications to the Court, present the Society's views on legislation before Parliamentary committees, and generally assist the President between meetings of the Council. Such a course would probably lend force to the activities of the Society and ensure the prompt dispatch of business.

The question of compulsory membership of the Society is one which has been before the English Law Society, and was considered by the Committee set up to formulate our Guarantee Bill, and it may be that, when that measure becomes law, membership of the Society should be made compulsory.

Conclusion.

In bringing this paper to a close I should like to draw the attention of those members of the profession who are not members of the Society to the fact that by becoming members they can not only assist the Society by increasing its membership and therefore its weight and authority, but they will strengthen the profession to which they belong by enabling it to present a united front in the advocacy of reforms in the law generally and so far as it relates to legal practitioners in particular, which would be of great advantage alike to the public and the profession. In this connection I will conclude by quoting a paragraph from the English Law Society's Handbook, which says: "It is never permitted to such a body as the Law Society to rest and be thankful. Its labours and responsibilities multiply in a corresponding ratio to the increase of its influence and importance. The Law Society must ever aspire to be a faithful leader and a true reflex of enlightened views, and a watchful guardian alike of the honour and of the best interests of a learned profession. It can only fulfil the task with effect, and raise its voice with authority, if it is heartily supported on all sides by those whose cause it represents and advocates. . . . It will be a matter for sincere gratification to every member of the Society if . . . all members of the profession who have not yet joined the Society's ranks were to realise that there are higher and larger considerations involved in doing so than any question of the mere personal convenience of membership."

I trust that, although some may not agree with all the suggestions contained in this paper, all will agree with some of them, and that active steps will be taken to obtain for the Law Society such additional powers as will enable it to preserve and maintain in the future, even more effectively than in the past, the high purposes for the attainment of which it was originally constituted.

REMIT.

Legal Holidays.

"**That the New Zealand Law Society should, at the commencement of each year, settle the holidays to be observed by the legal profession.**" (Taranaki).

Mr. G. M. SPENCE (New Plymouth): In moving this remit I shall do so very briefly. I want to refer for a moment to the inconvenience that we have all experienced through the fact that there are no recognised legal holidays in New Zealand. I want to go a step further and say that my Council has been considering the question from a different point of view

altogether. Certain members of our Council have expressed the view that there is no good reason why we should close our offices for a fortnight or three weeks at Christmas and ten days at Easter, while ordinary business requires to be done. We in these days are faced with serious opposition, and in closing as we do it has been suggested that we do not show much consideration for the convenience of the public, whom we set out to serve. The idea expressed by those members of the Council who are responsible for the remit is that we should shorten our holidays, and adhere to recognised holidays, in the same way that Banks and other mercantile houses do. If the holidays were cut down at Christmas and Easter, the members of the staff would get their ordinary fortnight's holiday, or three weeks, as the case might be. At any rate we think that legal holidays should be uniform throughout the country. I move the adoption of the remit.

MR. W. MIDDLETON (Waitara): I fo nally second the adoption. I cannot say much more than Mr. Spence has said, except that, with all due respect to him, I do not think he is actually voicing the opinion of the majority of the practitioners in Taranaki when he says we are not in favour of closing for such a long time at Christmas. That is undoubtedly the idea of a number in Taranaki. I think, however, the main idea was that legal holidays should be uniform throughout the Dominion, and that one office should not be closed at one time while another was open.

MR. C. R. FELL (Nelson): Is it proposed that the remit should apply to all holidays, or only to Christmas and Easter? Some districts have holidays which are peculiar to that district.

THE CHAIRMAN: I understand it is meant to apply to Christmas and Easter. One does sometimes hear complaints from the uninstructed that we take too many holidays at Christmas and Easter, and that our offices are closed when they want work done.

MR. M. J. GRESSON (Christchurch): I do not wish to let this motion go unopposed or undiscussed so far as Canterbury is concerned. In Christchurch we do not close at Easter except from Good Friday until the following Tuesday, but we close down virtually for a week at our Carnival week. It seems to me that each district should settle its own holidays, because so far as Canterbury is concerned it would not suit us to have our holidays fixed by the Law Society. The Council of the Canterbury District Society has at present under consideration the very important matter set out in this remit. They feel that we have been closing down for too long a period at Christmas, and it is possible they may cut the period down. Still, I think we should prefer to settle our own holidays for ourselves.

MR. P. J. O'REGAN (Wellington): I only want to mention one point. If we are determined to hold Conferences annually, I think they should also be held at Easter, and due regard should be paid to that fact.

MR. A. COLEMAN (Stratford): I should like to ask whether the New Zealand Law Society or any of the District Societies have power to enforce the observation by practitioners of any holidays which may be prescribed. I agree with Mr. Gresson that each District should settle its own holidays.

THE CHAIRMAN: I do not think the Law Society would have any power to enforce the observance of holidays—the only thing that could be done would be to ostracise an offender who kept his office open when it should be closed.

The motion, on being put to the meeting, was lost.

REMIT.

Number of Members of Council of the New Zealand Law Society.

"That Section 61 of The Law Practitioners Act be amended; the maximum number of the Council to be eleven instead of nine." (WELLINGTON).

This remit was moved by MR. H. F. O'LEARY (Wellington), seconded by MR. P. LEVI (Wellington), and carried.

REMIT.

Voluntary Removal of Name from Roll.

"That the Law Practitioners Act be amended to permit either a Barrister or a Solicitor voluntarily to remove his name from the Roll." (CANTERBURY.)

MR. M. J. GRESSON (Christchurch) in moving this remit said: This is intended to meet a special case in Canterbury. It was found, after investigating the affairs of a solicitor there, that the Council had not sufficient material before them to enable them successfully to apply for the removal of a certain practitioner from the Roll. On negotiation with the person concerned, however, he was willing to voluntarily remove his name and to give an undertaking not to continue in practice. However, it was found that there was no procedure to enable this to be done.

MR. R. TWYNEHAM (Christchurch): I second the remit. It is not necessary for me to say anything further—the virtue of the remit seems to be evident.

Remit carried.

REMIT.

No Solicitor to Practise Until Twenty-five Years of Age.

"That no Solicitor shall be entitled to practise as a Solicitor on his own account until he has attained the age of twenty-five years." (CANTERBURY).

MR. M. J. GRESSON (Christchurch): This remit arises out of the Batchelor case in Christchurch. As members are probably aware, he embezzled a sum of something like £7,000 and received a punishment of two years' imprisonment. He had been a clerk in the Public Trust Office, and had qualified at the age of 21 years, and started practice on his own account at that age. His counsel at the trial put forward as a defence the youth of his client, and the fact that at first he had no criminal intentions. It is considered by the Canterbury District Society that the age of 21 is too low at which a solicitor should be permitted to practise on his own account, and that no man is fitted to practise and handle other people's money until he is at least 25 years old. That, of course, is not without precedent. I noticed in the Australian Law Journal that an Act has been introduced in New South Wales imposing certain restrictions with regard to a conveyancer practising as a solicitor. The remit, if carried, would not cause any hardship, because a man can always remain at work in an office. I move the adoption of the remit.

MR. C. S. THOMAS (Christchurch): I second the motion.

THE CHAIRMAN: I may mention that in the Law Practitioners Amendment Bill prepared for last year's

consideration, four matters were included, besides the question of the Guarantee Fund, which, on the advice of Sir Francis Bell and the Hon. Mr. Rolleston, were omitted from the Bill. These were: first, the extended definition of the word "conveyancer," so that persons doing conveyancing work under another guise might be brought within the scope of prosecution if need be; secondly, that the Judges should have power to make rules that a person should have practical knowledge of work before being allowed to practise; the third matter affected land brokers, and the fourth referred to the minimum age at which a solicitor could practise—I think it was put at 25 years. I may add that some provision was made in the Bill by which a Judge under special circumstances could give permission to commence practising below that age.

The motion, on being put to the members, was carried, and the Conference then adjourned for the day.

THIRD DAY.

Friday, 5th April, 1929.

The Conference resumed at 9 a.m. on Friday, 5th April.

REMIT.

Customary Hire-Purchase Agreements.

"That this Conference views with grave concern the dangers arising from the provisions regarding customary hire-purchase agreements in The Chattels Transfer Act, 1924, and the constant extension of the articles to which these provisions apply, and urges that means be devised to protect purchasers of chattels to which such provisions may relate." (NELSON).

MR. C. R. FELL (Nelson) in moving the adoption of the remit, said: I think it is necessary to refer shortly to the law as it existed prior to the recent Chattels Transfer Act, because the hire-purchase provisions, or customary hire-purchase provisions, in that Act touched on the law on two points—one, the question of fixtures, and the other affecting chattels subject to a custom. I think the best definition is contained in *Johnston v. International Harvester Co.*, (1925) N.Z.L.R. 529, relating to a milking machine. The question was, had the milking machine become part of the freehold or did it retain its original character of a chattel. The Court defined the two considerations, (1) the mode of annexation—whether the chattel can be easily removed or not without injury to itself or the fabric of the building, and (2) whether it was for the permanent and substantial improvement of the building, or merely for a temporary purpose and the more complete enjoyment of it as a chattel. The other point is the question of bailment. Prior to the 1924 Act a bailment was not void for want of registration, but chattels might pass under the "apparent possession" clauses in the Bankruptcy Act unless it was taken out of that class by sufficient evidence of a notorious custom. (Cooper, J., in *Booth, Macdonald v. Official Assignee*, (1913) G.L.R. 276). His Honour goes into the question at considerable length, and the principles to be taken from that case are these: that goods of a particular class may be by custom in the possession of persons carrying on a similar business or trade who are not the true owners. It is not necessary to prove that individual creditors know of the custom, but it must be proved that the custom is a custom known in business generally, or has existed so long and has been so extensively acted upon that the ordinary creditors of the debtor may be presumed to have known it. That was the position of the law prior to the 1924 Chattels Transfer Act, and it was hardly altered by that Act. Section 57 defines the customary hire-purchase agreement as an agreement in writing between the owner of or dealer in certain chattels and a conditional purchase of those chattels where: (a) the owner is either the manufacturer thereof or a person engaged in the trade or business of selling chattels of such nature; (b) the property does not pass until completion of payment; (c) chattels are such as are described in the 7th Schedule or are added to that Schedule by Order in Council. It is valid without registration and the chattels affected are not in order and disposition under bankruptcy. The purchaser has no right to sell and no sale confers a title on the purchaser. The Governor-General, if satisfied that the practice has been established of dealing with any specific chattel or class of chattels by hire purchase, or that it is desirable in the public interest that such practice should become established in respect of any specific chattel or class of chattels, may from time to time add to the class of chattels defined in the 7th Schedule. Any chattels which are the subject of a customary hire-purchase shall notwithstanding any rule of law to the contrary remain in all respects chattels although the same may have been fixed, and shall be movable by the vendor if and when he shall become entitled to possession of the same, provided that such vendor shall not be entitled to remove any such chattels fixed to such land or building without first giving to the owner or other person for the time being in possession of the said land one month's previous notice in writing. Then follows the Schedule, which I have divided into two classes—those which are likely to become fixed and those which are likely to remain chattels, among the latter being furniture, pianos, gramophones, typewriters, motor vehicles, sewing machines, cash registers, reapers and binders, and all other machinery and implements for use in agriculture; and these are the articles which may become fixed—shearing machines, engines, pumps and machinery and implements for use in pumping, windmills, milking machines, and, since the Regulations of 1925, gas stoves, geysers and washing coppers, electrical equipment and apparatus and appliances required in connection with the use of electrical energy, computing machines, machines for slicing bread, bacon and cheese, tractors. Under the Regulations of 1926—equipment and apparatus and appliances for use in connection with the consumption of coal gas, and, under the Regulations of 1928, cinematograph machines and lighting and other equipment peculiar thereto. In every case the regulations are prefaced by a recital that a practice has been established. It seems to me that the Act has entirely disregarded the law as to fixtures, and I do not think that, as a general rule, we realise the onus which is placed on us as practising solicitors by the provisions of the 1924 Act. Where do we stand as solicitors when we act for a purchaser who has purchased, say, a farm, where electric light and power has been installed by a company on time payment? There may be also a windmill and a pumping plant put in on the same basis. And shearing machines. We may act for the purchaser, and nothing is said about the terms on which these various goods have been acquired. After the purchaser takes possession, in about a week or so, let us say, the Power Board not only takes out the fittings but also the wiring, the shearing machine, and so on. Where do we stand as solicitors for the purchaser, or as solicitors to the mortgagee who has lent money on that security? How are we to ascertain whether these goods are free or not?

What enquiries are we to make? And what are our liabilities if we do not make enquiries? In many of these provisions the interests of the salesmen alone have been regarded, and the interests of the general public have been entirely disregarded. The Act entirely disregards the principles laid down by the Courts for a long series of years as to whether the fixture has become part of the freehold or not, because it expressly provides that notwithstanding any rule to the contrary it may be removed. In one instance in my district the Official Assignee sold a motor garage, in which there was a bowser pump and tank. The purchaser did not think he was buying the bowser and he did not wish to deal with the oil company who owned it—he preferred to buy a cheaper brand of petrol. But the oil company, with a view to bringing him to heel, threatened to take away the pump and tank, and they implied that in doing so they would do as much harm as possible to his concrete building, and they gave him a month's notice of intention to remove the fitting. That was to give the purchaser an opportunity of buying the chattel which had really become, but for the provisions of the Act, part of the freehold. Acting under advice the purchaser took the tank out himself. Then there is the other side of the question—the almost unlimited possibilities visualised by the extension of the schedules. We have got to realise that we live in times when salesmen intend to sell on the instalment system. Before 1924 it was a rather difficult matter to prove a custom. Now we have had four or five years of regulations by Order-in-Council, and unless a check is put on it, it will be impossible for a man who buys a chattel to know whether he has a good title to it or not. What is the position of an auctioneer who sells a chattel which is under a hire-purchase agreement? And how is he ever to know the limits of his liability if the items in the Schedule are to be indefinitely extended? It appears to me that we want to exert all the influence we can to prevent the extension of the present Act to an unlimited number of chattels, and we want to do what we can to amend the Act with reference to chattels which do or may become fixtures.

Mr. W. V. ROUT (Nelson): I have pleasure in seconding the adoption of this remit. I fancy that if it had not been for the well-known mark "Made in U.S.A." we should not have had this matter to deal with. So far as the chattels themselves are concerned I think the remit is of a distinctly altruistic nature, because chattels do not come within our province. The trouble arises, I think, because of the extension of the articles that have already been listed, and I am afraid it is likely to go on indefinitely unless a substantial protest is made. I submit, therefore, that this Conference should take up a very firm attitude, because, as Mr. Fell has said, in the old days it required a very notorious custom indeed to protect the man who sold under a hire-purchase agreement. But the notoriety of a custom which seems to satisfy the framer of an Order-in-Council seems to be very small indeed. So far as fixtures are concerned, I think we should take up an even stronger attitude. We are vitally interested in all matters dealing with conveyancing, and no one else in the community is really interested in that other than vendors and purchasers. It is obviously difficult to frame any remedy for the difficulty that has arisen. So far as fixtures are concerned there may be one or two remedies adopted. The first remedy would be that any fixture—and fixtures are usually of a substantial nature—that is sold under a hire-purchase agreement should have a metal tag attached to it so that the purchaser would be made aware that it is subject to the provisions of that agreement. The only other alternative, so far as I can see, is to place the vendor in the same position as the vendor is placed in under the Chattels Transfer Act, that is, make it a penal offence to sell as unencumbered any fixtures which are subject to a hire-purchase agreement. The hire-purchase agreement is really the same as an instrument by way of security, and there seems no reason why a purchaser should not have protection as much in the one case as in the other. And if the penal provisions in the Chattels Transfer Act were made applicable to fixtures under a hire-purchase agreement, the purchaser would at any rate have some measure of protection. I can think of no other methods available for the protection of the purchaser, and obviously some protection is necessary.

Mr. W. H. McLEAN (Taihape): I have only one fault to find with this remit—it does not go far enough. It would be in the interests of the profession and of the community in general if the whole of the provisions in the Chattels Transfer Act of 1924, dealing with customary hire-purchase agreement were repealed, and we were taken back to the law as it stood previously. There is another aspect of the matter which has not yet been touched on, and that is, the position of the man who wishes to borrow money on the security of chattels by way of a bill of sale. It is quite impossible to lend money to such a man unless he is in a position to produce evidence that he has bought and paid for every article included in the security. Then again there is an aspect which affects the commercial community more than it affects us—but it is our duty to see that the mercantile community is protected. I refer to the position of the man who gives credit to his debtor on account of the assumed stable position of the debtor. We will assume that a man is carrying on farming and is in an apparently good position. He owns a nice farm, but it is mortgaged up to the hilt. His stock is in the same position—he is bound to a stock company. He may have an expensive motor car, a player-piano, beautiful furniture, a gramophone, electrical machinery of all sorts, shearing plant and the like—all bought on the hire-purchase system. His creditors do not know that and give him credit on his assumed position. He "comes a crash" and disappears, and then it is discovered that all these things—not only his land and his stock, but all the substantial things he is assumed to have owned—are held under hire-purchase agreement. Still, as the last speaker has said, there is no doubt that the system of buying by instalments has come to stay. But is there any reason why the old provisions of the Chattels Transfer Act should not give ample protection to the vendor? Why should not any vendor selling goods which are subject to a hire-purchase agreement be compelled to register the document as a bailment under the Chattels Act? The only additional expense incurred would be the registration fee. That, at any rate, would give notice to those who were interested.

Mr. H. F. JOHNSTON (Wellington): I should be very sorry to see this remit carried. The provisions now contained in the Chattels Transfer Act were very carefully considered, and were inserted, I understand, at the urgent request of the mercantile community. If I remember rightly, more consideration was given to the preparation of that Bill than was given to almost any other Bill ever put on the statute book, and a great number of lawyers were concerned in its preparation, including the late Chief Justice, Sir Charles Skerrett

(he was not Chief Justice at the time, of course), and Mr. Ernest Bell, of Messrs. Bell & Gully's firm, and they spent, I believe, many months considering the preparation of the Bill. The necessity for the measure arose, I think, from two factors—the unsatisfactory state of the law or the decisions regarding fixtures, and the great difficulty and doubt as to whether the mercantile community could prove a custom or not. In some cases, according to some decisions, a custom could be proved fairly easily, while, according to other decisions, what was presumed by the mercantile community to be a fairly well known custom was held to be not sufficiently notorious to satisfy the Courts. The law in regard to fixtures was, in a sense, absurd. The decisions were so conflicting that the mercantile community quite rightly considered that they should be given some clear indication by statute of what the position was. I am personally interested in this matter, because the question has come before me—and it is well known to a great number of the members of our profession—in connection with books. Law books, medical books and scientific books are not mentioned in the Schedule, and there is a movement to have them included. Lawyers, I think, would be surprised if they knew the many thousands of pounds that are outstanding in respect of liabilities on law books alone. If the remit is passed it is going to cramp and prevent young lawyers and medical men obtaining what books and authorities they require unless either a custom can be proved in regard to books, or unless books can get into the same favoured position as, for instance, typewriters now enjoy. The whole question of the wisdom or not of purchasing goods by means of the instalment system is one which is hardly within the province of this Conference, as everyone admits the system has come to stay. A large number of people say it has many advantages indeed—that really it ensures peace and security amongst the people who have to buy their furniture and the like in that manner. Whether that be so or not, I think this remit, if it is passed, will not meet with the approval of the mercantile community, and I think if it is passed, and if the authorities consider it an expression of opinion from the legal community, it will hamper them from adding to the Schedule very desirable additions—and I would not like to see them hampered in that connection. If, on the other hand, the Minister who is responsible for the Orders in Council creating additions to the schedule, can be trusted to make enquiries as to custom, it merely removes that question from the arena of the Courts—and he has a cheap and expeditious manner of ascertaining whether custom exists or not. I think a very desirable addition to the Act was made in 1924, and any attempt to repeal it would be resented.

Mr. F. B. ADAMS (Dunedin): I agree with a great deal that the last speaker has said, and think the provisions provided for the customary hire-purchase agreements are quite valuable. I think it is possible to exaggerate the degree to which they really interfere with title to chattels because, as we all know, the question of title to chattels has always been a difficult one, and there is no certain protection, as there is in the case of lands. Many thousands of pounds' worth of chattels change hands in the mercantile community and great risks are taken which we as conveyancers would be afraid to take. I think, moreover, it would not be within the realm of practical politics to suggest the complete abrogation of these provisions in the Act. I should be loth to see that done, because I think they are a very convenient method of dealing with chattels and are required and called for by the mercantile community. I think, however, there is room for improvement in one direction, and I wish to move an amendment to this remit. The remit ends with the suggestion that means be devised to protect purchasers of chattels "to which such provisions may relate." I think we might add there a concrete suggestion as to what means should be adopted, and the method I suggest is by registration of these agreements in the simplest possible manner. I move, then, that the words after "and urges" be deleted and that the following be substituted therefor:—

"that in order to protect purchasers of chattels to which such provisions may relate the Act should be amended so as to provide for the registration of every such agreement by depositing a copy with the Registrar containing accurate particulars of the purchaser and the goods, and paying a nominal fee, and for the avoidance of unregistered agreements in favour of bona-fide purchasers."

I have prepared that quite hurriedly after listening to the discussion, and detailed consideration may be necessary. I submit that that would serve the purpose so far as those who brought this remit before the Conference are concerned. It would protect our clients because they would be able to ascertain all they wanted to know by a simple search, and if that is open to them and they do not adopt it, well, then the fault is entirely their own. I have purposely omitted reference to verifying affidavits, because I think the procedure should be as simple as it can be, so that if a man sends in an instrument to the Registrar, along with the necessary fee, that would be sufficient provision for the protection of other people. If that were done I think there would be little objection to the provisions of the Act. Mr. Fell referred to the possibility of somebody coming out and tearing out a fixture from a concrete building. My amendment will certainly not meet that case, but I do not see how we can very well deal with such a contingency. I suggest that we limit our proposals to the perfectly clear point that registration should be required in order to protect *bona fide* purchasers.

Mr. C. A. L. TREADWELL (Wellington): I will second the amendment, *pro forma*.

Mr. A. COLEMAN (Stratford): The suggestion made by Mr. Adams had occurred to me during this debate, but it now occurs to me that it is not entirely practical. It is all right so far as chattels fixed to the soil are concerned. In those cases registration would probably achieve the desired result, but I cannot see that the purchaser of, say, gramophones would be necessarily protected. Suppose a man buys a gramophone in one town and removes to another. How can you search the register in his new place of abode? Of course it might be provided that all instruments are to be registered with the Chief Registrar in Wellington. But that would entail an enormous amount of work. I think the suggestion so far as it relates to movable chattels is quite impracticable, but it is a good idea in connection with chattels fixed to the soil.

Mr. P. LEVI (Wellington): I think Mr. Fell, and the Nelson District Society, are to be congratulated on bringing this matter before the Conference. At the same time I think it involves so many questions of detail that it cannot be fully considered by the Conference, and I am of opinion that some means should be adopted of referring it to a committee for consideration, and

presentation probably to the New Zealand Society. There are some points in it which I think should be mentioned. In the first place, the Chattels Transfer Act as originally drawn was never intended to deal with the question of title to chattels at all. That, I think, is quite obvious. You cannot, by searching any register, be absolutely sure of a title to chattels, and a title to chattels is open to all sorts of difficulties which cannot be dealt with in the same way as a title to lands. The object of the Chattels Transfer Act was to afford to traders notice of transactions which the Act required to be registered owing to the fact of traders giving credit to persons on the strength of goods in their possession. That is really the crux of the matter. As you will recollect, an unregistered document under the Chattels Act is only voided against certain transactions, and not against purchasers, so that the purchaser is not intended to be protected by the Act, and that aspect ought to be considered in connection with the matter. I myself think that the Act has merits, in certain directions at any rate. It embodies in statute law what traders have been endeavouring to do, by devising certain forms of hire-purchase agreements. It drops the necessity of making it a hire-purchase and makes it more understandable to the purchaser by making it an outright purchase, while it protects the vendor so far as the goods are concerned. But so far as fixtures are concerned, it is a matter requiring very careful thought, and I certainly think that any committee which may be set up to deal with the matter should consider the whole question, and consider whether it actually affects the question of title to goods. With reference to the suggestion of registration, I would point out that registration means, if not at once, eventual publication in the Gazette. Of course, before the Act of 1924, a great number of bailments were not registered simply to avoid publicity—the people concerned took the risk. And people who deal in chattels know, or ought to know, that they incur certain necessary risks as to title. I do not think registration is a solution of the matter—though possibly it might be different in the case of fixtures.

Mr. C. P. BROWN (Wanganui): I agree with Mr. Johnston that the hire-purchase system has come to stay and that it is not within the bounds of practical politics to repeal the law. I hope the suggestion about a penal clause will not be lost sight of. I happen to act for a motor car company, who, in the course of business, take over cars in part payment of the purchase of new ones, and they have from time to time been "caught" by their own system. So far as registration is concerned, I think the whole object of the system is to avoid publicity, and I do not think registration would be acceptable to the mercantile community.

Mr. H. C. ROBINSON (Masterton): I support the remit for the reason that it is a perfectly general remit and enables the matter to be dealt with in detail by a proper committee, and every speaker seems to agree that some steps should be taken.

Mr. P. J. O'REGAN (Wellington): It appears to me that the practice of buying goods on the hire-purchase system is extending rapidly. There are canvassers going round the whole country urging young men to buy motor-cycles. The young men buy them and have these millstones round their necks, and it does seem to me to be unfair that if a man has paid a substantial sum on account of the purchase price, and should subsequently through some misfortune be unable to continue his payments, he should lose all that he has paid. It seems to me that legislation might well be considered whether the equitable rule should not apply, and that some allowance should be made to the purchaser who finds himself in that position.

Mr. H. E. ANDERSON (Wellington): With respect to Mr. O'Regan's remarks, I have known of several instances where motor car companies have been compelled to seize goods, and have been generous in making refunds to men who have had to give up their cars. I am quite aware that that does not always happen, but in many cases the mercantile community are very generous in the way they handle these matters.

Mr. M. M. F. LUCKIE (Wellington): In connection with hire-purchase agreements, would it not be possible to have registration that would not involve publication?

The amendment was put to the Conference, and lost.

The motion, on then being submitted, was carried.

REMIT.

Protection of Mortgagees' Interests under Policies of Insurance.

"That this Conference endeavour to have inserted in Fire Insurance Policies a clause providing that the insurance of the Mortgagee's interest shall not be invalidated by any act or omission on the part of the Mortgagor or owner, nor by the unoccupancy of the premises or any other increase in risk without the knowledge of the Mortgagee, with a proviso that the Mortgagee will inform the company of any increase of risk known to him, and pay any additional premiums required by the circumstances." (Canterbury).

Mr. W. J. HUNTER (Christchurch): With reference to the remit dealing with Fire Insurance Policies: Consideration of this remit was postponed, but I understand it has already been dealt with, and I therefore formally move that it be withdrawn.

This was agreed to, and the remit lapsed.

DISCUSSION ON PAPERS.

Mr. M. MYERS, K.C. (Wellington): I think it would be very discourteous, to say the least, to the Attorney-General, and to Professor Adamson, were nothing said and nothing done in regard to the paper these gentlemen have read. There can be no doubt that the questions raised by those papers are of the utmost importance to the profession and, I believe, are of the utmost importance in the public interest. I do not want to discuss the suggestions made in either of those papers because I do not think it feasible in a Conference of this kind without having had an opportunity of reading the papers closely and debating the points they raise. But I do think something should be done to enable the questions raised by those papers to be properly and thoughtfully considered. I suggest, therefore, that while we cannot set up what might be called a Council of Legal Education, we might nevertheless set up what we might call a Committee on Legal Education, consisting of members from various parts of New Zealand, to consider the matters raised by the Attorney-General and Professor Adamson, and to report in the first instance to the Council of the New Zealand Law Society. I move accordingly in that direction if I may, and if the motion is carried I have no doubt we shall be able to set up such a committee without difficulty to deal with the matters on those lines.

MR. G. M. SPENCE (New Plymouth): I would like to second the motion proposed by Mr. Myers. In Victoria, as I mentioned yesterday, there is a Council of Legal Education, on which there are three members elected by the Law Society, and three by the Committee of Counsel. That at least gives the profession some voice in the matter regarding the nature and scope of the examinations. Although it is not within the realm of practical politics to make any such suggestion at the moment so far as New Zealand is concerned, yet Mr. Myers' proposal is a step in the right direction, and I think the setting up of such a committee to explore the ground and bring down recommendations as to the manner in which this Society can be directly represented in connection with Law examinations, will go a long way towards achieving the objects desired.

Motion carried.

The Conference then decided that the committee should consist of the following, with power to add to their number :—

The Attorney-General, Professor J. Adamson, Messrs. A. Gray, K.C., M. Myers, K.C., P. Levi, G. G. G. Watson, F. L. G. West, A. H. Johnstone, M. J. Gresson, A. T. Donnelly, F. B. Adams, and H. J. Macalister.

MR. H. H. CORNISH (Wellington): I feel some diffidence in speaking on the matter of legal education because I am by way of being a University teacher myself, but there is one matter dealt with by the Attorney-General which is of special interest to me, and no doubt to all here—that is, the method of case law teaching. That is not a new thing. It has been tried for many years, and its merits have been discussed in England as well as in America. At Victoria College the method has been partially employed for a number of years by Professor Adamson, but it cannot be the staple of the teaching method. It is all right for partial use, but no more. It may be of interest to this Conference to know that the late Sir John Salmond, after his return from America, was asked if he had seen at first hand this method in operation, and he replied, "Yes, and I told them what I d——d well thought about it."

MR. A. E. CURRIE (Wellington): I forsee that a single joint committee such as is proposed to be set up will have more interest in arranging examinations and curricula than in helping the actual teaching. I suggest that the local District Law Societies in districts where there is a University College should hold out to the Boards of Governors of those colleges a suggestion for local legal education committees composed jointly of representatives from the colleges and from the local Law Society, with a view to helping the actual teaching in the colleges. I do not wish to move a motion in that direction, unless the Conference so desires, but I think that, with the healthy rivalry which Professor Adamson refers to in his paper, and with the close co-operation of the local men, something might be done which it is beyond the power of a central committee, such as has been suggested, to achieve.

It was agreed that Mr. Currie's suggestion should be referred to the Committee for consideration.

THE CHAIRMAN: I am sure it is not from any lack of interest that members do not wish to discuss the various papers read. Perhaps we made a mistake in not taking the discussion immediately after the reading of each paper, and it may be that at the next Conference a different procedure will be adopted.

MR. R. H. WEBB (Wellington): I do not wish to offer any remarks on the papers, but following the Chairman's remarks I would like to suggest that the committee in charge of this Conference should consider whether it would be practicable to have all the papers printed and circulated among the members before the Conference meets. We could then devote the time that might otherwise be spent in listening to the papers being read, to discussing them. If that were done the discussions in many cases would be of much value to members.

MR. F. L. G. WEST (Auckland) did not consider the suggestion feasible, as the personal touch would be lost, and the same attention would probably not be paid to the papers. In view of the fact that the sittings of the Conference were confined to two or three days, it might be advisable to limit the number of papers to be delivered to say, four.

MR. M. M. F. LUCKIE (Wellington) agreed with Mr. Webb's suggestion, and thought it would be advisable to have papers printed and circulated prior to the commencement of the proceedings.

MR. C. A. L. TREADWELL (Wellington): I am sure that neither Mr. Johnstone, nor the two gentlemen referred to by Mr. Myers, will think that this Conference is not entirely in accord with what they said. I am sure I am speaking for all members of this Conference when I say that we are extremely grateful to them for the brilliant manner in which they have expressed their views. It is impossible for us in a gathering of this sort to do justice to discussion of these papers. It will also be agreed, I think, that discussion must follow immediately after the paper is read. I would like here to refer to Mr. Ziman's paper. I did not realise that consideration of the remit which immediately followed the reading of Mr. Ziman's excellent address would burk to a large extent any further discussion on the paper itself. If I might make one comment on Mr. Ziman's paper it is this—that in order to get full benefit from Mr. Ziman's suggestions it is essential that action be taken immediately. The tide is now setting—in fact, it set some eighteen months ago, when there was a combined meeting of all industries and professions, and the Government of the day agreed that interference with or participation by the Government departments in private enterprise should be restricted to reasonable limits, and be placed at any rate on the same basis as that on which private enterprise has to carry on its activities. If Mr. Ziman's very moderately expressed views are to be given effect to, action must be taken while the tide is setting deliberately in favour of those views, which are in accord not only with the views of the legal profession but also, I am convinced, with those of the whole of public opinion in this Dominion.

THE CHAIRMAN: I would remind Mr. Treadwell that the Conference has already passed a remit in respect of Government Departments, and I take it that all the resolutions deemed by the Conference Committee worthy of consideration by the Government will be forwarded to the authorities, and probably a deputation from the Conference will attend to support them.

MR. H. H. CORNISH (Wellington): With reference to Mr. Johnstone's paper, I think Mr. Johnstone convinced us that the change he foreshadowed—the separation of the professions of barrister and solicitor—must come. And I think it will have the advantage of making for a higher standard of efficiency in the Bar. I think there is no doubt that when practitioners combine solicitor's work with what is purely Bar work, then

each suffers. I was struck with Mr. Johnstone's statement that if the profession voluntarily passed a self-denying ordinance under which a great number of our members should become solicitors, while others became barristers, there could be no suggestion that those who were thenceforth practising as barristers were to be regarded as superior in the profession. The difficulty would be the great amount of decentralisation which at present obtains in the country—a number of Court-houses would have to go.

MR. C. R. FELL (Nelson): It is all very well for a Wellington man to talk about centralisation. If I am going to be told that because I live in Nelson I must practise as a solicitor all my life—well, I tell you quite frankly that I am not prepared to accept the position. I realise that specialisation is a trend of the age, but I also realise that a very strong trend of the age in New Zealand is decentralisation, and I do not see why it cannot be possible to devise some means to effect alterations on the lines of Mr. Johnstone's paper, without condemning those of us who do not live in Wellington to never have the honour and glory of wearing a wig and gown.

THE CHAIRMAN: I am quite in accord with the expressions of those speakers who think we have had rather a feast of good things. There has been too much for the Conference to digest, and I see now that we had rather much business to be compressed into two days. The question of printing in advance the papers to be read before the Conference is well worth consideration by those who are responsible for the conduct of these Conferences, but I am told that there will be a special Conference Number of the "New Zealand Law Journal," containing a full report of the Conference proceedings, and also that the papers will be printed in it in full.

MR. C. G. E. HARKER (Waipawa): I would like to make one or two observations on the paper read by Mr. Donnelly. He referred to the fact that though the 1928 Conference passed a resolution dealing with an alteration in the procedure regarding jury cases, nothing had been done. Now, if these Conferences are going to achieve any useful results I think we should not lose sight of the work of previous Conferences, and that that the mere passing of resolutions is not sufficient. I think, therefore, that any matters dealt with by one Conference and not brought to a successful conclusion should be re-affirmed by the succeeding Conference and dealt with accordingly.

THE CHAIRMAN: I do not know that members remember all that was passed at the last Conference. A number of the resolutions were passed on to the Attorney-General, and he took the opinion of the Council of the New Zealand Law Society on them. We affirmed all the resolutions except one—that is, trial by jury. There was no dissent from that, but in place of affirming the resolution that we should revert to the former practice of trial by jury, the New Zealand Council passed a resolution, on the motion of Mr. Harold Johnston, that a Rules Committee should be set up, consisting of representatives from the Judges, practising members of the profession, and the Attorney-General, to take into consideration all rules of practice which require revision or amendment, and that this question of trial by jury should be one of them. That resolution was passed on to the then Attorney-General, but nothing was done. The resolutions that the Conference passed last year will again be sent to the new Attorney-General, and the Council of the New Zealand Law Society will do what it can to see that they are taken into serious consideration. The same procedure will, of course, be adopted in respect of the resolutions passed by this present Conference.

MR. A. COLEMAN (Stratford): I am glad to hear the explanation given by the Chairman. I think it is very essential that in preparing the agenda paper for the Conference, provision should be made for placing on it those matters passed by a previous Conference and not disposed of in a manner satisfactory to the profession. That would involve, of course, a serious limitation in the number of fresh matters to be brought before the Conference, and, without making any suggestion as to the definite number of new matters to be brought forward, I think Mr. West was very near the mark when he suggested four. The remits would, of course, be correspondingly reduced. We would then be able to devote the time to the discussion of the papers which they deserve, and which, unfortunately, members have not been able to give on this occasion. I think a discussion of four papers, and possibly an equal number of remits, and the consideration of matters undisposed of from previous Conferences, would more than occupy the time available at Easter. I do not know that it is necessary for me to move a motion in the matter, but I have pleasure in supporting Mr. West's suggestion.

MR. H. B. LUSK (Napier): The remarks of Mr. Harker and Mr. Coleman induce me to say that I also consider that matters dealt with by a previous Conference should not be lost sight of. There is one matter I would like to refer to at this time—a matter of extreme importance, not only to the profession but to the community at large; and it formed the subject of a remit at the last Conference: I refer to the remit dealing with the question of the salaries and pensions of Judges. I think this is a very important matter, and I do not think it is necessary for me to traverse it at length. We are all agreed that it is important in the interests of the administration of justice. Further, the anomalies at present existing in the matter of Judges' pensions should be removed. I, therefore, move:—

> **"That the Government be requested to take into their earnest consideration the question of the increase of the salaries of the Judges of the Supreme Court and the removal of the anomalies at present existing in connection with their pensions."**

MR. F. C. SPRATT (Wellington): I have pleasure in seconding the motion. I have before me a copy of this morning's "Dominion," and in commenting on Mr. O'Regan's paper with reference to an Elective Judiciary, the "Dominion" says:—

> "However, the weakness of Mr. O'Regan's case for change lies in the high record of our Bench appointed under the system he condemns. As a matter of fact, the difficulty experienced in connection with appointments to the Bench is not political, but financial. So far from political patronage playing an important part, Governments are troubled by the disinclination or inability of leading members of the Bar to make the sacrifices involved in the acceptance of positions on the Magisterial or the Supreme Court Bench. The Law Conference perhaps, before it disperses, will seize the present opportunity to make representations to the Government as to the need of increasing the pay of both Judges and Magistrates. This would be a really practical and desirable step."

MR. P. J. O'REGAN (Wellington): If we are discussing Mr. Donnelly's paper I should like to say that in my opinion Mr. Donnelly has placed us under a deep debt of obligation. I was agreeably surpised to hear a

Crown Prosecutor taking such a reasonable view and being opposed to any restriction of trial by jury. In my opinion there is a strong undercurrent of veiled hostility in New Zealand to the system of trial by jury. In reading the English Law Reports we also see that uncomplimentary remarks have been made by Judges about juries. And, you can read the Law Reports of New Zealand as closely as you like, and you will never find a complimentary remark made about the jury by the Judges. In fact, Judges have repeatedly told juries to their faces that they did not agree with their verdicts. The Conference last year adopted the principle of restoring the right of trial by jury.

THE CHAIRMAN: I might explain that a remit was carried at the last Conference on the subject of the revision of the Judges' salaries and pensions, and it was duly communicated to the former Attorney-General. The Conference last year was not the only body which considered this matter—it has been dealt with by more than one District Society and the New Zealand Society on several occasions. At the last meeting of the Council of the New Zealand Law Society, held about two weeks ago, a motion was carried in much the same terms as the remit carried last year by the Conference, namely, that the question of the revision of Judges' salaries and pensions should be taken into consideration by the Government. That resolution was duly transmitted to the present Attorney-General.

MR. I. PATTERSON (Reefton): I feel sure that when Mr. O'Regan congratulated Mr. Donnelly on his paper he intended not only to endorse the statements with regard to trial by jury, but also to extend to him congratulations for having drawn attention to the deplorable condition of some of our Court-houses in this country. I rise not only to support him in that direction, but also to say that the deplorable condition of the Court-house in Christchurch is equalled by the condition of Court-houses in other parts of the country. It is incumbent on the State to provide Court-houses which will at least be of the greatest utility to those who frequent them, and I think this Conference would not be doing its duty if it did not make some recommendation to the authorities to pay more attention in future to this matter.

THE CHAIRMAN: I think it would be as well in the meantime for this Conference to deal with the motion moved by Mr. Lusk and seconded by Mr. Spratt with reference to Judges' salaries and pensions.

The motion was then put and carried.

MR. I. PATTERSON (Reefton): I have very little to add to what I have said about Court-houses. I am speaking with particular reference to the Court-houses in Christchurch and Wellington, and I now beg to move:—

"That this Conference is of opinion that the Court buildings in the cities of Christchurch and Wellington should be rebuilt or remodelled upon lines which will be more in keeping with the purposes for which they are required."

MR. S. H. MOYNAGH (Nelson): I second Mr. Patterson's motion, and in doing so I think it might be as well to draw attention to the fact that better accommodation should be provided for witnesses.

After further discussion the motion was put to the Conference, and lost.

MR. J. MELTZER (Wellington): I would like to refer to one point mentioned by Mr. Spence in his paper. He dealt with the question of the desirability of the Law Society considering the establishment of a fund to foster the correct kind of advertising, to bring before the public the high ideals of the profession. I notice that the Public Trustee is in the habit of inserting in the newspapers paragraphs to the effect that probate has been granted in certain cases to the Public Trustee, on the application of Mr. —, Solicitor—of course the name of the solicitor is given. Now that might convey an entirely wrong impression to the public inasmuch as they might think that solicitors of their own free will had applied to have the Public Trustee appointed. That, of course, is not the position, and it has occurred to me that in order to counteract such tactics the members of our profession should cause notification to be made in the newspapers when probate is granted to them. I think that would be a fair answer to the Public Trustee's advertisements.

MR. D. SEYMOUR (Hamilton): I was particularly interested in the remarks of Mr. Spence. He covered a large variety of matters, but I would like to draw the attention of the Conference to the fact that we are sitting here as a body which has no organic relationship to the New Zealand Law Society. It is a curious fact that this Conference, devoting much time and attention to important business, is nevertheless not yet a body which has a legal existence, and I suggest that that would seem to be one of the most urgent matters to be attended to—that is, the reconstitution of the New Zealand Law Society with a view to giving this Conference a "place on the map."

MR. A. F. WRIGHT (Christchurch): I think this will be an opportune time to pass a general resolution strengthening the hands of the New Zealand Law Society with regard to the various matters which have been discussed at this and the preceding Conference. I have, therefore, much pleasure in submitting for your consideration the following resolution:—

"That in view of—

(a) the many important matters engaging attention at this and the last Legal Conference requiring redress;

(b) the ever increasing inroads being made into the legitimate business of the profession;

(c) the necessity of meeting unfair competition, whether of State departments or of private concerns; and

(d) the great amount of additional work which conferences of this nature cast upon the New Zealand Law Society; it be a recommendation from this Conference to the New Zealand Law Society that an executive officer, who should be a lawyer, be appointed to assist the New Zealand Law Society to carry into practical operation the various matters dealt with at these Conferences, and also matters affecting the profession generally; such officer to devote the whole of his time to questions affecting the profession, and not to engage in private practice, and to be paid such a salary as would enable the Law Society to secure the services of a lawyer of executive ability and of standing in the profession."

If there is one thing that impresses members more than anything else during these Conferences, it is the very great debt that we owe to the New Zealand Law Society for the manner in which it has carried out the duties entrusted to it, but it has also struck all of us, I am sure, that we are casting on that Society an ever-increasing burden, and it has been brought home to me—and,

I feel confident to all of us at this Conference—what a very great amount of work the Society has done. Between the last Conference and this Conference the members of the New Zealand Law Society have been in repeated communication with Ministers and Government departments, and it is, I think, asking them to undertake too great a task to carry out the important recommendations we decide on, without giving them adequate assistance to enable them to undertake the work. The various Chambers of Commerce in New Zealand each have their salaried secretaries—some receiving as much as £750 or £800 a year. The various trades have their own organisations and organising secretaries, who are well paid, and rightly so, for their work. Surely a profession of our importance and wealth could afford to find the funds to pay an adequate salary sufficient to attract an able man to carry out these important duties. He would always have the advice, assistance and mature judgment of the members of the New Zealand Law Society. He would lighten their labours considerably. He would be able to follow up matters from time to time which required to be followed up, and he would see that the recommendations we make were not pigeon-holed. He would be able to keep the District Law Societies in touch with each other, and with what was going on. Altogether, I think it is high time that we made a move in the direction indicated. I therefore have pleasure in moving the resolution.

MR. W. J. HUNTER (Christchurch): I desire to second the motion proposed by Mr. Wright. He has stated the position fully, and I agree entirely with what he has said. I have long considered this matter and have formed the definite opinion that there is a necessity to have as an executive officer of the New Zealand Law Society a lawyer of ability who would give his whole time to the proper organisation of the profession.

THE CHAIRMAN: There is a good deal in what Mr. Wright has said. There is no doubt that the work of the Society is growing.

MR. M. MYERS, K.C. (Wellington): There is the question to be considered as to whether the New Zealand Society has power to appoint and pay such an officer.

THE CHAIRMAN: That could be considered.

MR. F. L. G. WEST (Auckland): It seems to me that this is a matter which should take the form of a suggestion from this Conference to the Council of the New Zealand Law Society to consider the employment of a secretary solely for their own purposes. It is suggested that the transactions of the previous, and the present and subsequent Conferences will involve such additional work that the appointment of such an officer is warranted. As a matter of fact, the work already placed on the shoulders of the New Zealand Council is sufficient, in my opinion, to justify an executive officer being employed solely by the Society. At present I understand the Secretary of the Wellington Society acts, in return for part of his remuneration, as Secretary to the New Zealand Council. As I have said, it is undeniable that additional work is being undertaken by the Council, and I suggest that instead of making the appointment something specially cognate to the Conference, we should merely suggest that the Council should consider the question of the appointment of a secretary to devote his whole time to its service. This Conference being a floating entity which meets only once each year and then ceases to exist, some sort of a standing Conference committee will require to be formed at some date or other, and the most appropriate body to act as that standing Conference committee are the delegates to the Council of the New Zealand Law Society. If they were appointed such a standing committee and had a secretary devoting his time entirely to their work, the position would be fully covered.

The motion was then put and carried.

MR. M. M. F. LUCKIE (Wellington): Arising out of Mr. Spence's paper, I would like to move:—

> "**That the New Zealand Law Society take into consideration the consolidation of the Law Practitioners Act with a view (*inter alia*) of giving to the various District Law Societies the powers of controlling and disciplining their members, such as are possessed by Law Societies in other Dominions, as mentioned in Mr. Spence's paper, and generally to extend similarly their powers as suggested by him.**"

This would be a very satisfactory corollary to our Solicitors' Guarantee Fund Bill if that were placed on the statute book, and would be a complete justification for us to say that we had set our own house in order.

The motion was seconded by MR. H. HOLDERNESS (Hastings) and carried.

MR. W. J. HUNTER (Christchurch): As I mentioned yesterday, the Conference Committee at Christchurch remained in existence for some months and did a great deal of work with a view to giving real effect to the resolutions passed by that Conference, and I think it would be a good thing if we adopted that procedure now. I therefore move,—

> "**That this Conference requests the Conference Committee to continue in existence, with a view to taking steps to give effect to the resolutions passed by the Conference.**"

Seconded by MR. P. THOMSON (Hawera) and carried.

PRESENTATION TO CONFERENCE SECRETARY.

MR. H. B. LUSK (Napier): I have been asked by the visiting members to this Conference to express our thanks and appreciation of the efforts made on our behalf by the Secretary to this Conference, and by his wife, who, I understand, is secretary of the Ladies' Committee. We who are visitors here can only have a slight idea of the work involved in the secretarial duties connected with a conference of this kind, but from what we have seen ourselves we know that it must involve a tremendous amount of work, and we highly appreciate all that has been done for us. We also wish to express to Mr. Leicester our thanks for the smooth way in which everything has worked. I do not think it is necessary for me to say more. I have now the very pleasant duty of asking Mr. Leicester to accept this little gift as a memento of the occasion, and as a mark of our appreciation for what has been done for us. I would also like him to accept this further gift for Mrs. Leicester, also as a memento of this occasion.

MR. W. E. LEICESTER (Wellington) in replying, said: Mr. President, Mr. Lusk, Ladies and Gentlemen: I wish to thank you very sincerely for making this presentation to my wife and myself. I may say that the work my wife and I have put into the Conference has been regarded by us as a labour of love. We were fortunate here in having on our committee men of great eminence, and at the numerous committee meetings which they attended they were very profuse in their

advice—so profuse indeed, that at the end of one meeting one irreverent member said, "If we have to pay for all this advice we shall have to requisition the National Debt." The fact that I am called upon to-day, so late in the proceedings, to make an address recalls an incident that happened some years ago. In the Flourmilling Appeal I was junior counsel—the most junior of six counsel—three for the Crown and three for the respondents—and at the end of the seventh day of the appeal the second leader for the respondents had just concluded his speech. The late Chief Justice, Mr. Skerrett as he then was, rose and said, "My learned friend, Mr. Leicester, has nothing further to add." An ineffable look of relief stole over the faces of the five Judges on the Bench and I think I can say, without boasting, that I had them all with me, unanimous on the point. To recapture the glamour of that occasion has always seemed to me to be a joyous thing and the opportunity to do so occurs now. I will therefore say, I have nothing further to add, save this—that for my wife and myself I thank you again for the fine gifts and your generosity in making them.

VOTES OF THANKS.

MR. C. G. WHITE (Wellington): I have been entrusted with the duty of proposing a very hearty vote of thanks to the gentlemen who have read papers at this Conference. I think you will agree that they have been contributions of real original thought on the matters which have been dealt with. I think it was a pity to have postponed discussion of them, but at the same time I am afraid that if we had discussed them immediately after they were delivered some of the most valuable papers would not have been reached. I have pleasure in moving that the gentlemen who have read papers to the Conference be accorded the heartiest vote of thanks from this Conference for the contributions they have made to our deliberations.

Motion carried by acclamation.

On the motion of MR. F. L. G. WEST (Auckland) seconded by MR. W. J. HUNTER (Christchurch) a hearty vote of thanks was tendered to the Conference Committee.

MR. R. CLINTON HUGHES (New Plymouth): Before we separate I think there is one other matter which needs attention. I have listened with pleasure to the votes of thanks already passed, but I think there is one other which devolves on us, and as a visitor I would like to express our thanks to our Wellington brethren for their hospitality to us and for the complete arrangements made for the Conference. I have pleasure in moving that a hearty vote of thanks be tendered to the Wellington members of the profession for their hospitality and the satisfactory manner in which they have carried out the details of this Conference.

Motion carried.

THE CHAIRMAN: I think I may express the thanks and appreciation of the Wellington members for the compliment paid to them, because I have had nothing to do with the work of the Conference Committee except in a minor capacity. The work has fallen on the shoulders of Mr. White and Mr. Leicester and the other active members of the committee, while the work of looking after the entertainment and recreation side of the Conference has been attended to by the ladies, the chief executive officers being Mrs. White and Mrs. Leicester. We were all very pleased to note that Mr. Hughes has been with us. It is very gratifying indeed to know that he has come down to take part in our deliberations—as he did last year in Christchurch.

On the motion of MR. A. H. JOHNSTONE (Auckland) a vote of thanks to the Chairman (Mr. A. Gray, K.C.) was carried by acclamation, and the Conference then terminated.

Social Functions.

The Conference Committee left nothing undone to ensure the complete success of all the social functions arranged by them for the period of the Conference. Great assistance was given on this side of the proceedings by the Ladies' Committee, consisting of Mesdames C. G. White (Chairwoman); W. E. Leicester (Secretary); H. H. Cornish, H. E. Evans, A. Gray, L. H. Herd, H. F. Johnston, H. F. O'Leary, M. Myers, W. Perry, F. C. Spratt, C. A. L. Treadwell, A. A. Wylie, and Miss Watson.

On Wednesday afternoon the Hon. T. K. Sidey, (Attorney-General) and Mrs. Sidey, held an At Home at the Parliament Buildings. The Ball, held at the Adelphi Cabaret, Cuba Street, in the evening was both largely attended and a complete success. Mr. and Mrs. C. G. White received the guests. On Thursday evening a most successful dinner was held at Kirkcaldie & Stains Ltd. After the loyal toast that of "Our Guests" was proposed by Mr. C. G. White, and replied to by Mr. F. L. G. West, and Mr. C. R. Fell. Mr. W. A. Izard proposed the toast, "His Majesty's Judges—Present and Past," to which reply was made by His Honour Mr. Justice MacGregor and Sir Frederick Chapman. The toast "Parliament" was proposed by Mr. A. Gray, K.C., and replied to by The Prime Minister, and that of "The Legal Profession" by Dr. J. S. Elliott, the Hon. T. K. Sidey (Attorney-General) responding. The functions arranged for the ladies on Thursday included a motor drive to Akatarawa, lunch at the "Brown Owl" tea-rooms there, and a bridge party in the evening at the Adelphi Cabaret.

On Friday the President of the New Zealand Law Society (Mr. A. Gray, K.C.) and Mrs. Gray, and the President of the Wellington District Law Society (Mr. C. G. White) and Mrs. White entertained those attending the Conference at afternoon tea at the Wellington Golf Club's Links at Heretaunga. The rain which had fallen unfortunately prevented tennis, but some sixty members took part in a four-ball competition for the Law Journal Cup, which it is intended should be competed for annually at future Conferences. The best cards returned were:—

S. A. Wiren	—	A. M. Cousins	9 up
C. G. White	—	J. R. E. Bennett	7 ,,
J. C. Peacock	—	J. Dolph	6 ,,
W.H.Cunningham	—	A. E. Lawry	5 ,,
F. J. Christensen	—	J. W. Card	5 ,,
J. Graham	—	F. P. Kelly	5 ,,
J. W. Ward	—	J. D. Brosnan	4 ,,
G. C. Phillips	—	E. T. E. Hogg	3 ,,
C. P. Brown	—	C. W. D. Bell	2 ,,
M. O. Barnett	—	W. B. Rainey	Square.

Earlier in the day a bogey competition and a putting competition for ladies were held. Mrs. W. B. Brown and Mrs. F. J. Hall-Jones tied, 5 down, in the bogey competition, and Mrs. W. J. Hunter won the putting competition.

New Zealand Law Society.

Annual Meeting.

The Annual Meeting of the Council of the New Zealand Law Society was held on Friday, the 22nd March, 1929, in the Supreme Court Buildings, Wellington, the chair being taken by Mr. A. Gray, K.C., the retiring President.

The following gentlemen were in attendance as the representatives of District Law Societies in the Dominion: Mr. F. L. G. West (Auckland); Mr. H. F O'Leary (Canterbury and Hamilton); Mr. M. Myers, K.C. (Gisborne); Mr. H. B. Lusk (Hawke's Bay); Mr. H. F. Johnston (Marlborough); Mr. R. H. Webb (Otago); Mr. P. Levi (Southland); Mr. G. M. Spence (Taranaki); Mr. W. A. Izard (Wanganui); and Messrs. A. Gray, K.C., C. H. Treadwell, and C. G. White (Wellington).

Before proceeding with the business of the meeting the President referred to the death of the Hon. Sir Charles Skerrett, Chief Justice of New Zealand, and on his motion it was resolved: "That the Council of the New Zealand Law Society records with very great regret, its sense of the loss which has been sustained by the Bench, the Profession and the Public in the lamented death of Sir Charles Skerrett, Chief Justice of New Zealand, and tenders to Miss Skerrett and the members of her family, its sympathy in their bereavement." It was also resolved that a copy of the resolution be forwarded by the President to Miss Skerrett.

The Report and Balance-sheet of the Society for the year ended 31st December, 1928, which had been printed and circulated was adopted.

The following appointments of officers were made for the current year: President, Mr. A. Gray, K.C. (re-elected); Vice-President, Mr. C. H. Treadwell (re-elected); Treasurer, Mr. P. Levi (re-elected).

Messrs. Clarke, Menzies, Griffin & Ross were re-elected Auditors.

The Council considered and dealt with several matters of interest to the Profession.

The question of bringing before Parliament again the Bill introduced into Parliament last year amending the Law Practitioners Act, for the purpose of establishing a Solicitors' Guarantee Fund, was discussed, and the following resolution was passed: "The Council resolves that the Solicitors' Guarantee Fund Bill brought before Parliament last year, be proceeded with as early as possible and that the Attorney-General be waited on forthwith with the object of enlisting his help in passing the measure." A committee was then set up to deal with the matter.

The Council considered the question of the present salaries and pensions paid to the Judges of the Supreme Court in the Dominion, and passed the following resolution: "That in the opinion of this Society the present salaries and pensions of the Supreme Court Judges are quite inadequate, and that legislation should be passed without delay to revise the same; and that a copy of this resolution be forwarded to the Attorney-General."

Southland District Law Society.

Annual Meeting.

The annual meeting of the Southland Law Society, which was held on 22nd March, 1929, took the form of a dinner at the Rosewood Tea Rooms. Practically all the members of the legal profession in Invercargill and a number from other provincial centres were present. Mr. J. G. L. Hewitt, S.M., Mr. H. Morgan, Registrar of the Supreme Court, Mr. J. A. Fraser, District Land Registrar, and Mr. D. Young, Examiner of Titles, were the guests of the Society for the evening.

After dinner the business of the annual meeting was transacted. The Annual Report and Balance-sheet were adopted after some suggestions had been made as to keeping down expenditure.

The election of office-bearers resulted:—President, Mr. F. G. Hall-Jones; Vice-president, Mr. B. W. Hewat; Treasurer, Mr. E. H. J. Preston; Secretary, Mr. J. G. Imlay; Committee, Messrs. H. J. Macalister, G. M. Broughton, J. Tait, G. J. Reed and T. R. Pryde; Auditor, Mr. A. M. Macdonald; Delegate to New Zealand Law Society, Mr. P. Levi.

A member from Gore referred to the inconvenience that practitioners and the public suffered through the fact that the centre has no resident Magistrate, and the matter was left to the newly-elected Council to deal with.

At the conclusion of the business a short toast list interspersed with musical items was honoured. After the Loyal toast Mr. H. Morgan proposed the toast of "The Law Society." This was replied to by Mr. A. W. Stout, who at the request of the chairman included a brief address to members of the profession in his reply. Mr. Stout referred to the important part played in the government of Great Britain, France and the United States by lawyers, mentioning the names of Asquith, Isaacs, Smith, Briand, and Poincare as instances of eminent lawyers who had played such prominent parts in the politics of their country. In the United States it was an accepted fact that lawyers were to the fore in government. The accusation of conservatism was often levelled against the legal profession, but Mr. Stout referred to the many important reforms that were attributable to the profession. There was no doubt that the profession was not only most valuable in civilised countries, but was essential. He concluded by appealing to all members to uphold its great traditions.

The toast of "The Bench" was proposed by Mr. H. J. Macalister and was replied to by Mr. J. G. L. Hewitt.

Hamilton District Law Society.

At the annual meeting of the Hamilton District Law Society, held on the 13th ult., the following officers were elected for the ensuing year:—

President, Mr. F. A. Swarbrick; Vice-President, Mr. C. L. MacDiarmid; Council, Messrs. E. A. Cox, N. S. Johnson, E. M. Mackersey, E. V. Stace, and W. Tudehope; Honorary Auditor, Mr. H. M. Hammond.

London Letter.

Temple, London,
30th January, 1929.

Dear N.Z.,

The result of the Goddard case is for the most part very welcome. As the Police Officer's defence developed it was felt by many that he was likely to get away with the proceeds of his corruption, and that the Police system in this country would prove to be worse than useless. You will remember the circumstances; how the sum of £12,000 in currency notes was found in a safe deposit kept in the Police Officer's name, representing a very different sum in a very different form, from any remuneration he could have gained even by his so-much-commended services to Scotland Yard. Dumbfounded though he was on this ultimate discovery, he was not long in furnishing an explanation of his astonishing fund, which, if it reflected ill on himself, at any rate cleared him of the charge of taking money from members of night clubs and disorderly houses, and of warning them of impending raids and generally protecting them against the Force of which he was a member.

The defence was that he made this money in various forms of speculation, and that his concealment of the matter was due to the fact that his speculative traffic was improper from a disciplinary point of view. As I say, many people believed that this defence, though it entirely failed to convince themselves, might succeed in convincing the jury. I heard a very good prophecy with regard to this: the defence, it was said to me, was such as might well deceive a kindly judge accustomed rather to logic than humanity; but, though it might make a dent upon the first impression of a jury, it could never prevail against that better, inexplicable instinct which guides twelve minds associated in one. Of course, it was also felt that there was less chance of the defence succeeding in a trial conducted by Mr. Justice Avory, than in a trial conducted by any less experienced criminal Judge. Both these forecasts turned out to be true. The length of time of the jury's retirement showed that the defence raised had given them some trouble, and that Sir Henry Curtis Bennett, K.C., had made the most that could be made of this potential means of escape. You have only to turn to the summing-up to see that Avory, J., was never in the least moved by the plausibility of the explanation; indeed with the ingenuity that reminds one of his great days at the Criminal Bar, he turned it round so that it became one of the most deadly points against the prisoner. It would have been a disastrous matter if the police officer's peculiarly thorough experience of criminal trials had produced in him an impregnable "accused." The Police rarely being on their trial I do not think it has occurred to many of us before what dangerous criminals they might make, if they took to crime, by reason of the fact that their very training in giving evidence makes them less likely to be convicted when in the dock themselves.

There is a good story given of Mr. Justice Avory whose severity as a criminal Judge is well known, and of whom it has been said by a distinguished lawyer, who shall be nameless: "I would not like to be tried by Avory if I had done it. Nor indeed, if I had not done it and Avory thought I had done it." The learned Judge presided over another trial which the plaintiff conducted in person and easily won his case. The jury having returned a verdict, Avory, J., waited for the usual, proper request, necessary to give to a verdict of the jury the effect of a judgment. The plaintiff, who had been treated with no unkindliness but with all the learned Judge's usual coldness, and who was in addition to this thoroughly terrified of the Judge, by reason of his well known sternness in criminal courts, was by this time come to the end of his nervous resources. The Judge regarded him unhelpfully; he looked at the Judge in dumb agony. At last Avory, J., to help him said: "Do you not ask for judgment?" The terrified litigant replied: "No, my Lord, I ask for mercy."

The proceedings in the Judicial Committee are, I think, the most interesting at the moment. A Succession Duty case coming from Australia, is the latest to receive their Lordship's attention. We come before the Board next with our Appeal from the Straits Settlements, in one of which there is no great substance, and, therefore, no leader, and in the other of which Wilfrid Green, K.C., who is doing an enormous business in this forum at the moment, leads me. The Lord Chancellor has hitherto presided in person in the first court, and, I hope, will preside to-morrow; for if he is an austere person, he is at the same time extremely human; he is surprising even his own admirers by the judicial manner he develops. We won our last appeal from the Strait Settlements, the one you know of with the unpronounceable name, in which an eminent, indeed the most eminent, leading Counsel of the day, had previously advised our clients that success was not to be contemplated. I hope this happy state of things may continue in its next instalment to-morrow; meanwhile I have another good story to tell you, this time with reference to a Board of the Judicial Committee over which my Lord Sumner was presiding.

The case was an Admiralty case, and Butler Aspinal, K.C., opened the proceedings by producing a somewhat cumberous chart, somewhat awkwardly folded; a copy of this chart was, of course, given to each of their Lordships. There was a pause at the beginning of Butler Aspinal's speech to enable them to become safely seised of it. As is not unusual in these matters, various various of their Lordships, who had taken a fleeting glance at the "Book," started to bombard the defending advocate with a number of lengthy questions, which he was as yet in no real position to answer. However, their various Lordships continued to bombard him with these questions, Lord Sumner, who is as you know particularly illogical and particularly methodical, growing more and more impatient the while. At last Lord Sumner could stand it no longer. He looked up from busying himself with the papers and his face assumed that mildly interrogative expression which always precedes the coming of his deadliest sarcasms. So impressed was everybody by the importance of what he was going to say, that one of their Lordships even desisted from his own interrogation and asked the others to do the same, praying silence for My Lord Sumner who was about to speak. My Lord Sumner spoke: "Mr. Aspinal," said he, "I wish you would help me at the outset of this case." Mr. Aspinal, temporarily relieved from the bombardment of questions, expressed his immediate readiness so to do. Lord Sumner said: "I wish, Mr. Aspinal, you would inform me of a particular matter?" "I am at your Lordship's service to do so," said Mr. Aspinal. "Will you

please tell me," said my Lord, "how do I fold this chart?" After this the advocate was left to proceed without further interruption.

I have no news for you this week since there has been no news that anybody I know knows of. There have been reiterations of judicial complaints on the unpreparedness of the litigant when his case comes on for trial. The most recent came from Mr. Justice Rowlatt; and from the Lord Chief Justice, protesting almost as an advocate having a good point against his opponent, the litigant! Both learned Judges pointed out that this delay on the part of the litigant is singularly inconsistent with the complaint of the same litigant as to the law's delay. I do not think that anybody is very much impressed by all this; the significant matter is that it looks as if it will be almost impossible soon, under any circumstances, to get a case taken out of the List!

Yours ever,

INNER TEMPLAR.

Bench and Bar.

The Victoria University College Council has conferred upon Professor J. M. E. Garrow, who recently resigned from the Chair of English and New Zealand Law at that College, the dignity of Professor Emeritus.

Mr. W. H. Woodward, who was appointed recently to the Magistracy, was educated at the Auckland Grammar School and at Auckland University College, where he took the degree of LL.B. He went to Samoa with the Expeditionary Force in 1914, and was Registrar and Acting-Judge of the German District Court until 1917. After the War he received the appointment of Commissioner of the High Court in the mandated territory of Western Samoa, and in 1923 he became Chief Judge of the High Court at Apia.

Mr. H. E. Anderson has been elected to a vacancy on the Council of the Wellington District Law Society.

Mr. E. J. Stewart has disposed of his practice at Hamilton to Mr. M. Prust Stewart, who will carry on the business with Mr. E. F. Clayton-Greene.

Mr. O. N. C. Pragnell and Mr. N. J. Lewis have commenced practice in partnership in Wellington.

Mr. C. Blenkhorn, of Levin, has taken into partnership Mr. D. P. Todd, who has been for the past two years his managing clerk. The firm will practise under the style of Blenkhorn and Todd.

Mr. Stewart Hardy has commenced practice as a solicitor in Wellington.

The following admissions to the profession were made recently at Napier: Mr. V. J. Langley (barrister); Mr. H. R. Moss (solicitor).

Mr. N. R. Bain has been appointed Crown Solicitor at Wanganui, in succession to Mr. W. H. Cunningham.

Messrs. F. B. and H. S. Adams, Dunedin, have admitted into partnership Mr. J. B. Deaker, LL.B., and Mr. W. D. Taylor. The firm will continue to practise under the style of Adams Bros.

Legal Literature.

Lotteries and the Law.

By C. F. Schoolbred, B.A., LL.B.
(pp. xii; 100; vi: Solicitors' Law Stationery Society Ltd.)

Lotteries and the Law, by Mr. C. F. Schoolbred, is a particularly happy little work giving in the modest compass of a hundred pages a lucid and accurate statement of the law relating to this, probably the most popular, form of gambling. The question as to whether or not a given scheme is a lottery frequently causes difficulty: for instance, schemes offering prizes for the forecasting of the results of horse-racing, or of the number of births and deaths in a locality have been held not to be lotteries, while a scheme for the forecasting of the number of hours of sunshine and the number of rainy days in a district has been held to infringe the law. The dividing line is indeed thin. The author's treatment of this aspect of his subject is helpful and the table on pages 32 and 33 showing, as it does, at a glance the schemes which have been held to constitute and not to constitute lotteries is a commendable feature. The historical introduction and the chapter on automatic gaming machines deserve special mention; but the appendix on the American law should, in the opinion of this reviewer, either have been omitted altogether or have been written in greater detail. The author says that there have been probably more cases relating to lotteries decided in America than in England, and yet he refers to only two of them.

Analysis of Pollock's Law of Torts.

Fourth Edition: by J. K. Mannooch, LL.B.
(pp. viii; 109; 3. Stevens & Sons, Ltd.)

This reviewer is not among those who condemn altogether the use by students of analyses of recognised text-books, nor does he approve the attempts of correspondence tutors and the like to get students through their examinations solely by the use of "cram-books." To him the middle course seems to be the best and fairest—ensure that the student has read from cover to cover a recognised treatise in the particular subject, but let him by all means use an analysis of the work for the purposes of final preparation for his examination, or indeed to get a rough idea of the subject before going through the larger work in detail. His point can, it is thought, be well illustrated by the analysis at present under review. What student put to *Pollock on Torts* for the first time is not in danger of failing in his final examination simply through his inability to see the wood for the trees, although he may have intelligently read this prominent treatise not once, but several times, from cover to cover? Put, however, an analysis in the hands of the student and he can at once distinguish the fundamental principles from the matters of mere detail, and, the essentials having once been clearly grasped, it is a comparatively easy task for him to build the detail around the fundamental.

Mr. Mannooch's analysis is without doubt an excellent work of its class and should assist any student to get a clear perspective of the subject. Throughout a most commendable discretion seems to have been exercised, and it is difficult to find any portion of the subject which has been too lightly or too fully treated. There are, however, one or two cases which might with propriety have been included and among them may be mentioned: *Fairman v. Perpetual Investment Building Society*, (1923) A.C. 74; *Admiralty Commissioners v. S.S. Volute*, (1922) 1 A.C. 129; *Sorrell v. Smith*, (1925) A.C. 700. In the realm of torts these are leading cases and they should certainly be known to every student.

New Books and Publications.

Adulteration of Food. Fourth Edition. By Douglas C. Bartley. (Stevens & Sons). Price 15/–.

Rogers' Elections. Vol. 1. Registration. By C. Willoughby Williams, LL.M. (Stevens & Sons). Price 18/–

Annual County Court Practice, 1929. Forty-eighth Edition. By Judge Ruegg, assisted by H. P. Stawes. (Sweet & Maxwell). Price 45/–.

The Bloody Assize. By His Hon. Sir Edward Parry. (E. Benn, Ltd.). Price 24/–.

A Short History of English Law. By E. Jenks. (Methuen). Price 15/–.

A History of the English Bar and Attornatus No. 1450. By Herman Cohen. (Sweet & Maxwell). Price 35/–.

Alpe's Law of Stamp Duties. Nineteenth Edition. By A. R. Rudall and H. W. Jordan. (Jordan). Price 18/–.

Ashanti's Law and Constitution. By Capt. R. S. Rattray, M.B.E., B.Sc. (Oxford Press). Price 29/–.

Statutes, Documents and Reports Relating to British Banking 1832-1928. (2 Volumes). Intro. by T. E. Gregory. (Oxford Press). Price 24/–.

Kelly's Conveyancing Draftsman. Seventh Edition. 1929. (Butterworth & Co. (Pub.) Ltd.). Price 35/–.

Police Law. 1929. By Cecil C. H. Moriarty, O.B.E., B.A., LL.B. With a Foreword by Sir Charles H. Rafter, K.B.E. (Butterworth & Co. (Pub.) Ltd.) Price 6/–.

Paterson's Licensing Acts with Forms. Thirty-ninth Edition, 1929. (Butterworth & Co. (Pub.) Ltd.). Price £1/6/–.

Law Notes Year Book, 1929. By the Editors of Law Notes. (Solicitors Law Stationery Society). Price 9/–.

Chitty's Annual Statutes, 1928. (Sweet & Maxwell). Price £1/3/–.

Disney's Law of Carriage by Railway. Eighth Edition. By H. Mackworth, LL.B. (Stevens & Sons). Price 15/–

Law of Torts. Thirteenth Edition. By Rt. Hon. Sir Fred. Pollock, Bt. (Stevens & Sons). Price £1/15/–.

Yearly County Court Practice, 1929. (Butterworth & Co. (Pub.) Ltd.). Price £2/5/–.

The London Building Acts, 1894-1928. Fifth Edition. By Bernard Dicksie, F.R.I.B.A. (E. Stansfield). Price £1/4/–.

A Magistrate's Handbook. By S. R. C. Bosanquet, K.C., and W. H. Chalmer and G. Olver. (E. Benn.) Price 15/–.

Canterbury College Law Students' Society.

Annual Meeting.

The annual meeting of the Canterbury College Law Students' Society was held on the 12th March, at 8 p.m. Mr. D. Laurenson was in the chair, and there was a good attendance of members.

In reading the report, the Secretary mentioned that the opening address was delivered by Mr. A. Gray, K.C., the President of the New Zealand Law Society. On April 26th Messrs. P. H. Wood and L. P. Barrett delivered short addresses on "English University Life, and the Inns of Court." On June 23rd Mr. Roy Twyneham addressed the Society upon the various aspects of legal life. On September 1st Mr. W. R. Lascelles gave a very interesting address on "Crime from the Investigator's Point of View." The final lecture was delivered by Mr. A. W. Brown, on September 29th, he took as his subject, "The Humour of Law."

The first of a new series of Mock Trials was held on the 2nd June, Mr. M. J. Gresson acting as Judge. Messrs. M. J. Burns, K. G. Archer, A. W. Smithson, E. S. Bowie, A. C. Perry and J. A. Kennedy took the part of counsel. Mr. Gresson said that he was agreeably surprised at the standard of the argument advanced, and urged the Society to continue to hold the Courts as they should prove invaluable to those who intended to follow up the Common Law side of the profession.

For the second time a debating team from the Society met and defeated a team from the Dialectic Society, in a debate upon the subject, "That modern advertising is detrimental to the community." Messrs. C. E. Purchase, E. B. E. Taylor, and R. A. Young represented the Society.

During the year the Society held a dance and a dinner both of which proved very enjoyable functions.

The election of officers resulted: President, Mr. A. C. Perry; Honorary Secretary, Mr. J. G. D. Ward; Honorary Treasurer, Mr. C. E. W. Wacher; Committee, Messrs. L. T. Roberts, C. F. Jones, E. E. England and J. T. Watts; Honorary Auditor, Mr. C. Evans.

Mr. A. C. Brassington addressed the members on important matters affecting the Society, and arrangements were made for the coming annual dance and dinner.

Rules and Regulations.

Animals Protection and Game Act, 1921-22. Notice calling attention to certain provisions of the Act. Lists of native game and of absolutely protected birds. Open season for imported game and native game in certain Acclimitization Districts.—Gazette No. 17, 13th March, 1929. Open season for chamois and thar shooting in certain Acclimitization Districts.—Gazette No. 18, 14th March, 1929.

Customs Act, 1913. Amended regulations. Amended form of baggage sufferance.—Gazette No. 20, 21st March, 1929.

Industrial Conciliation and Arbitration Act, 1925. Amendment to regulations as to travelling allowance payable to assessor appointed to a Conciliation Council.—Gazette No. 18, 14th March, 1929.

Motor-spirits Taxation Act, 1927. Amended regulations relating to refunds of motor-spirit tax.—Gazette No. 22, 28th March, 1929

Motor-vehicles Act, 1924. Additional regulations *re* compulsory stop signs.—Gazette No. 23, 4th April, 1929.

Motor-vehicles Insurance (Third Party Risks) Act, 1928. General regulations.—Gazette No. 20, 21st March, 1929. List of insurance companies undertaking insurance business in terms of Act.—Gazette No. 23, 4th April, 1929.

Surveyors Registration Act, 1928. Additional rules for conducting the survey of land.—Gazette No. 18, 14th March, 1929.

Court of Arbitration Sitting.

The Court of Arbitration will hold a sitting at Dunedin, commencing on Friday, 10th May, at 10 a.m.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"The common law of England has been, still is, and will continue to be, wherever English communities are found, at once the organ and the safeguard of English justice and English freedom."

—Earl of Oxford and Asquith.

Vol. V. Tuesday, May 14, 1929. No. 6

The Office of Chief Justice.

The newly appointed Chief Justice ascends the Bench as the sixth holder of the highest judicial office in New Zealand. The first two to hold the office, Sir William Martin and Sir George Arney were English barristers sent to New Zealand for the express purpose of assuming the office. Sir James Prendergast, who was appointed in 1875, was a member of the English Bar, the Melbourne Bar and the New Zealand Bar. Sir Robert Stout and Sir Charles Skerrett, like the present Chief Justice, practised in New Zealand only, and all three have enjoyed substantial practices as solicitors as well as barristers.

Sir James Prendergast was for a short period Solicitor-General in the Vogel Government, but practically the only Chief Justice who prior to his elevation to the Bench took politics as a career was Sir Robert Stout, who not only entered the political field, but captured its highest prizes and served the country both as Attorney-General and Prime Minister. Of the present members of the Bench Mr. Justice Herdman, who was for several years Attorney-General in Mr. Massey's Government, is the only one who has held a seat in Parliament.

In England the highest judicial offices are almost invariably given to the members of the party for the time being in power who have served in Parliament as law officers of the Crown, and till recent years the greater number of English puisne Judges have had parliamentary experience. Resolutions protesting against political services alone being sufficient ground for appointment to the Bench have in late years been passed by District Law Societies. Probably no Government in New Zealand would be inclined to make judicial appointments without being satisfied that in the appointee legal attainment was joined to political service, and it may be that such resolutions had their origin only in the fact of so few leading lawyers finding seats in Parliament in recent years. Parliamentary experience just as much as experience in other of the major functions of constitutional government is of as great value to an administrator of justice as to any other high official and in English life it has not in the past seemed unfitting that reward for the sacrifice entailed in the case of a barrister giving distinguished service in Parliament should be appointment to the Bench, provided of course the necessary legal attainments were present. Such a practice would not last a moment in a country where the morale of both politicians and members of the Bar was not high, and even in England it was inevitable that when judicial interpretation involved the legality or illegality of a party theory, a Judge with a political past would be subject to the criticism that his views were tainted by his old party allegiance. In New Zealand the reputation of both politics and Bar is sufficiently high to allow political experience to play its part in judicial equipment, but if the career of a politician in New Zealand sinks to the level it seems generally to have reached in the estimation of the American public in regard to their own politicians, New Zealand will be fortunate if in the future no more politicians than in the past find their way on to the Bench. The Bench in New Zealand indeed seems to have got on very well indeed without any great knowledge of parliamentary procedure in its personnel, and absence of past party labels has admitted of no more pointed criticism that that advanced in the "flour case," that the opinions of the Judges would probably follow their individual predilections in favour of protection or free trade.

The eminent services to the public life of New Zealand and the high standing at the Bar that made the appointment of Sir Robert Stout to the office of Chief Justice so natural and fitting was due to the high regard paid to the office by the public. No other office could have so well rewarded those services and attainments and given scope to the character that supported them. But the office of Chief Justice as opposed to that of puisne Judge does not in public estimation require any greater political sophistication. It is true that the office includes a measure of political contact and in certain possible circumstances a knowledge of constitutional practice and procedure not required of a puisne Judgeship. In the first set of circumstances the Chief Justice as *primus inter pares* is spokesman of the Bench in communications with executive Ministers of the Crown, and administrator of judicial routine, and the latter condition arises from the fact that under Patent of Royal authority, either under the Patent to the Governor-General, or under a dormant commission, the Chief Justice in certain cases represents the Sovereign in the Dominion. Sir Robert Stout during his long tenure of office may have found his political training of use in the performance of the extra duties and responsibilities attaching to the office of Chief Justice, but they are not of a nature to prove unduly difficult to a man with the experience of Parliament, though not gained within the Chamber, enjoyed by our newly-appointed Chief Justice.

The difference that arose between Sir Robert Stout and Mr. Seddon concerning the respective precedence to be attached to the office of Chief Justice and that of Ministers of the Crown, resulted in a victory for the Minister, but on paper only. The office still holds its high position and there is no doubt that the present occupant and will see, is capable of seeing, that that high position is maintained, and recognised.

The appointment of the Chief Justice brings the Bench once more up to full strength. During the last nine months members of the Bench have worked at high-pressure, and practising members of the Bar can only admire the cheerful courage and willing spirit with which the burden of a great amount of extra work has been borne.

Court of Appeal.

Herdman, A.C.J.
Adams, J.
Ostler, J.
Kennedy, J.

March 21, 22; April 11, 1929.
Wellington.

COASTAL SHIPPING CO. LTD. v. WANGANUI HERALD NEWSPAPER CO. LTD.

Shipping—Seaworthiness—Danger of Sea—Goods Damaged Owing to Leak in Hull of Ship—Leak due to Corrosion of Steel Plates from Inside—Loss Caused by Unseaworthiness and Not by a Danger of Sea—Unseaworthiness Proximate and Efficient Cause—Absolute Warranty of Seaworthiness at Common Law—Warranty Not Affected by Sea Carriage of Goods Act, 1922.—Sea Carriage of Goods Act, 1922, Sections 3, 4.

Appeal from judgment of Mr. Justice Smith on a case stated under Rule 154 of the Code of Civil Procedure, reported 4 N.Z.L.J. 361, where the facts agreed upon are stated. The question submitted in the case was whether, in a contract made in New Zealand for the transportation of merchandise or property by sea to or from any port in New Zealand, there was implied an absolute warranty on the part of the shipowner of the seaworthiness of the ship transporting such merchandise or property, or whether Section 3 of the Sea Carriage of Goods Act, 1922, in any way negatived an absolute warranty and substituted therefor merely an obligation on the shipowner to exercise due diligence to make such ship in all respects seaworthy and properly manned, equipped and supplied. At the hearing in the Supreme Court the further question was added whether upon the facts admitted, the loss was caused to the plaintiff's goods by a "danger of the sea" or by the "unseaworthiness" of the steamer?"

Myers, K.C., and Stevenson for appellant.
Upham for respondent.

ADAMS, J., delivering the judgment of the Court, said that at the close of his argument Counsel for the appellant suggested that the real question was whether the loss was caused by a "danger of the sea" within the meaning of Section 3 of the Sea Carriage of Goods Act, 1922. Counsel for the appellant rested his case upon Section 3 of the Sea Carriage of Goods Act, 1922, which provided "If the owner of any ship transporting merchandise or property to or from any port in New Zealand exercises due diligence to make the ship in all respects seaworthy, and properly manned, equipped, and supplied, neither the ship, her owners, or agent shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the ship, nor shall the ship, her owners, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters. . . . ."

As their Honours understood Mr. Myers' argument, it was that the expression "dangers of the sea" in the Section was to be read in its widest sense, i.e., as it would be read in a simple case where no cause of damage other than the intrusion of the sea had to be considered. For that purpose Counsel adopted the definition in **Scrutton on Charter-Parties and Bills of Lading,** 12th Edn., 257 *et seq.* In that simple case, he said, the inquiry was directed only to the question whether a loss had been caused by the intrusion of the sea, and no question of unseaworthiness, negligence, or other disturbing element was to be considered. That being conceded, he said that the immunity conferred by the Section covered all the cases of dangers of the seas in that widest sense, and the Court was not at liberty to say that a case of loss which was within that widest sense of the expression was nevertheless to be regarded as a loss caused by unseaworthiness. That argument followed upon an admission that, apart from the Section, the common law warranty of unseaworthiness was absolute, and that at common law the Court would look beyond the direct or immediate cause, and, if it found unseaworthiness without which the loss would not have happened, would be bound to hold that that unseaworthiness was to be regarded as the proximate cause of the loss. The argument was, in the opinion of their Honours, ingenious but fallacious. It ignored the fact that in the cases in which unseaworthiness had been held to be the determining factor, the liability of the shipowner was based solely upon the breach of the warranty implied in every contract of sea carriage and the cause of loss was taken out of the category of "dangers of the sea."

In every case which might arise under Section 3 the problem was to ascertain the proximate cause of the loss, and when that had been ascertained the cause fell naturally into its own category. If the proximate cause of the loss was the unseaworthiness of the vessel it was not to be regarded as a loss from the dangers of the sea. Their Honours referred to the very full discussion upon this question of causation by Lord Shaw of Dunfermline in **Leyland Shipping Co. v. Norwich Union Fire Insurance Society,** (1918) A.C. 350, 369, 370. Applying the principle there stated to the present case, there could, in their Honour's opinion, be no question that the real, predominant and efficient cause of the loss was the unseaworthiness of the vessel and not the entry of the sea water. Their Honours referred to the observations of Lord Finlay, in **P. Samuel and Co. v. Dumas,** (1924), A.C. 431, 455, and to the judgment of the Court of Appeal in **The Christel Vinnen,** (1924) P. 214. Section 3 applied to, and was in effect incorporated in, every contract for the carriage of goods by sea to or from any place in New Zealand which was within the ambit of the Statute. Why then, should it be said, when using the expression "dangers of the sea" in the setting in which it was usually found in shipping documents, and in a Section which was concerned with the same subject-matter, the Legislature intended that expression to bear a meaning differing in any way from its accepted meaning in such documents? In **Thames and Mersey Marine Insurance Co. v. Hamilton Fraser and Co.,** 12 A.C. 484, the House of Lords declined to place a meaning on the phrase "peril of the seas" in a policy of insurance differing from its settled meaning in shipping documents. Their Honours also referred to the judgments of Lord Herschell and Lord Bramwell in **The Xantho,** 12 A.C. 503, 510, 514, and to **Sassoon and Co. v. Western Assurance Co.,** (1912) A.C. 561. Their conclusion from those cases was that the expression "dangers of the sea" in Section 3 must be read in the same sense and subject to the same limitations as in exceptions in shipping documents.

It was not disputed that, if the vessel had been seaworthy the loss complained of, had it happened, would have been a loss by the dangers of the sea. But it was finally settled in **Steel v. State Line S.S. Co.,** 3 A.C., 72, that there was implied in every bill of lading an absolute warranty that the ship was seaworthy at the commencement of the voyage. Lord Selborne, in that case, (pp. 84, 85) took the view that the words "perils of the sea" ought to receive a construction, not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he had undertaken. That was a case of warranty of fitness to, receive and carry cargo. In **Carver on Carriage by Sea,** 7th Edn. Section 21, p. 30, it was stated that the warranty in truth appeared to be a double one—that the ship should be fit to receive the cargo when receiving it, and should be fit to sail at the time of sailing. In **Sassoon and Co. v. Western Assurance Co.** (*cit. sup.*) opium had been stored on a wooden hulk moored in a river and was damaged by water percolating through a leak caused by the rotten condition of the hulk unknown to the plaintiffs. It was held that the loss was not caused by the perils of the sea within the meaning of a time policy of insurance against marine risk but by unseaworthiness. Lord Mersey said (p. 563): "The learned Judge held that the damage was not due to a sea peril at all, but was solely due to the weakness of the hulk. . . . . Their Lordships are of opinion that the learned Judge was right. There was no weather, nor any other fortuitous circumstances, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea . . . . it must be a peril of the sea." The facts in the present case were very like those in **Sassoon and Co.'s case.** There the leak was caused by decay from natural causes and lapse of time of part of the hulk's wooden bottom which was entirely covered by copper sheathing and so could not be detected; the damage was not caused by anything unusual in the weather or state of the river, but by the natural decay of the vessel. It appeared from the report in 17 Com. Cas. 274 that the river was a tidal river. No doubt, in the present case the vice in the bottom of the vessel arose in the first instance from the fact that there was what had been described as a "capillary opening" in the cement skin, but the whole sequence of events might with propriety be comprehended in the term "natural causes" and lapse of time. Their Honours agreed with Smith, J., that the unseaworthiness of the vessel was, to use Lord Shaw's phrase, the real efficient cause—the proximate cause—to which the damage to the respondant's goods must be

ascribed, and therefore that the loss was not a loss by "dangers of the sea" within Section 3 of the Act.

Counsel for the appellant relied upon the decisions under Section 502 of the Merchant Shipping Act, 1894 (Eng.), relating to losses by fire and referred to **Virginia Carolina Chemical Co. v. Norfolk and North American S.S. Co.,** (1912) 1 K.B. 229; **Ingram and Royle, Ltd. v. Services Maritimes du Treport Ltd.,** (1914), 1 K.B. 541, and **Asiatic Petroleum Coy. Ltd. v. Lennard's Carrying Coy. Ltd.,** (1914) 1 K.B. 419, (1915) A.C. 705, all of which were cases on that Section. In the first case it was held by Bray, J., and by the Court of Appeal that a shipowner was not deprived of the protection of the Section merely by reason of the fact that the fire was caused by unseaworthiness, but that a clause in the bill of lading, that the shipowner was not responsible for any loss or damage to the goods occasioned by *inter alia* fire or unseaworthiness, provided all reasonable means had been taken to provide against unseaworthiness, precluded him from setting up the Section as an answer to a claim for loss by fire on board caused by unseaworthiness. Bray, J., was of opinion that the words of the Section were to be given their most literal interpretation and that, so construed, they applied whenever there had been damage to goods by fire without the shipowner's actual fault or privity, whether there had been a breach of the warranty of unseaworthiness or not. That decision was upheld by the Court of Appeal. In **Asiatic Petroleum Co. Ltd. v. Lennard's Carrying Co. Ltd.** (*cit. sup.*) it was held in the House of Lords that the onus of proving that the unseaworthiness of the ship was without their fault or privity was on the shipowner. The language of the Section was perfectly general. Moreover, as was clearly pointed out by Vaughan Williams and Buckley, L.J.J., in the **Virginia Carolina Chemical Co. v. Norfolk and North American S.S. Co.** (*cit. sup.*) at pp. 238, 240, in order to except fire occasioned by unseaworthiness from the general words it would be necessary to read into the section some such expression as "seaworthy" after "sea-going." In the view their Honour's took there was no need to read any words into Section 3 of the Sea Carriage of Goods Act, 1922.

Their Honours next proceeded to discuss the provisions of Section 4 of the Sea Carriage of Goods Act, 1922. **McFadden and Co. v. Blue Star Line,** (1905) 1 K.B. 697, was a decision upon the construction of Sections 1, 2 and 3 of the Harter Act (U.S.A.) and was cited and approved by the Judicial Committee in **Royal Exchange Assce. Coy. v. Kingsley Navigation Co.,** (1923), A.C. 235, 246. It was therefore authoritative. Sections 1 and 2 of the Harter Act corresponded with Section 4 of the New Zealand Act; Section 3 corresponded to Section 3. The decision was, therefore, directly relevant on the construction of Sections 3 and 4 of the New Zealand Act. Channell, J., found that there had been a breach of the warranty of fitness to receive the cargo which was included in the term "unseaworthiness" in an exception clause. The learned Judge then discussing the provisions of the Harter Act, said (p. 707): "Does the incorporation of the Harter Act have the effect of cutting down the absolute warranty of fitness to an undertaking to use diligence to make the ship fit? In my opinion it does not . . . . The incorporation of Section 3 does nothing more than give immunity in respect of losses arising from certain specified causes in the course of the voyage, provided the ship-owner has exercised due diligence to make the ship seaworthy. The reference to due diligence is a mere qualification upon that immunity; it is not a limitation of the obligation under the warranty. There has, therefore, been a breach of the warranty of the fitness of the ship to receive cargo, and the defendants are, therefore, liable." Their Honours referred also to a passage from the judgment of the Circuit Court of Appeal (U.S.A.) in **The Carib Prince,** 170 U.S. 655, 662, where it was held that neither Section 2 nor Section 3 of the Harter Act raised any implication that the law had relieved the shipowner from the duty of furnishing a seaworthy ship. Turning to the recognised text-books on the subject, their Honours found that there was practical unanimity on the question, and none of the learned authors suggested doubts as to the accuracy of the decision of Channell, J. See **Carver on Carriage by Sea,** 7th Edn. Ss. 103c., p. 165; **Scrutton on Charter-Parties,** 12th Edn., 107, 518, note (1); **MacLachlan on Merchant Shipping,** 6th Edn., 305, note 4; 41 **English and Empire Digest,** par. 2796. The appellant, therefore, could not pray in aid the provisions of Section 3 or Section 4 of the Sea Carriage of Goods Act, 1922. The first question submitted was in fact two questions which ought to be severed. The answers to the questions before the Court were as follows:— 1 (a) There being no modification or exclusion of the common law warranty of seaworthiness in the contract of carriage, there is implied in that contract an absolute warranty of the seaworthiness of the ship. (b) Section 3 of the Sea Carriage of Goods Act does not in any way affect that warranty. 2. The loss or damage to the respondent's goods was caused by the unseaworthiness of the ship, and not by a danger of the sea.

Appeal dismissed.

Solicitors for appellants: **Izard, Weston, Stevenson and Castle,** Wellington.

Solicitors for respondent: **Harper, Pascoe, Buchanan and Upham,** Christchurch.

Herdman, A.C.J.
Adams, J.
Ostler, J.
Kennedy, J.

March 19, 20; April 11, 1929
Wellington.

WELLINGTON CITY CORPORATION v. DEALY.

Municipal Corporation—Street Widening—Power to Take More Land Than Required for Street Widening if Deemed Expedient—Land Not Fronting Street Taken in Order to Transfer to Owner of Adjoining Land Fronting Street in Exchange for Land Taken from him for Purposes of Street Widening—Corporation Bona Fide Believing it Expedient to Take Land in Connection with Street Widening Scheme—No Evidence that Corporation Exercising Powers in Furtherance of Ulterior Objects or for Purposes Different from those Specified in Statute—Taking Upheld—Municipal Corporations Act, 1920, Section 192—Public Works Act, 1908, Section 18.

Appeal from a judgment of MacGregor, J., reported 4 N.Z.L.J. 315, restraining the appellant, the Wellington City Corporation, from taking under the Public Works Act, 1908, certain lands belonging to the respondent, Dealy. The appellant Corporation proposed to widen a public street known as Thorndon Quay in the City of Wellington, and on 2nd December, 1927, gave notice to the plaintiff under the Public Works Act, 1908, of its intention to take from him the strip of land in question ostensibly for that purpose. The respondent's land did not itself front or abut on Thorndon Quay. Immediately in front of the respondent's land, however, there was a section of land belonging to one, Khouri, which had a frontage to Thorndon Quay, and separated the respondent's land from that street. By the same notice under the Public Works Act, 1908, the appellant Corporation gave notice of its intention to take the whole of Khouri's property. That piece of land was apparently taken in two pieces (1) the strip actually fronting Thorndon Quay containing 2.79 perches, and (2) the back portion (immediately in front of the respondent's property containing 12.18 perches. The front strip of land taken from Khouri corresponded precisely in area with the strip of land taken from the respondent. It was admitted by counsel for the appellant for the purpose of the appeal that the appellant Corporation took the strip of land in question from the respondent in order to be able to hand it over to Khouri in exchange for the front strip taken from him for the widening of the street. The respondent pleaded that the proposal to take his land was not within the powers of the appellant and was not a *bona fide* proposal for the purpose of widening the street in question.

O'Shea for appellant.

C. A. L. Treadwell for respondent.

KENNEDY, J., delivering the judgment of the Court, said that the principles of law to be applied were stated by Earl Loreburn, in the House of Lords, in **Marquess of Clanricarde v. Congested Districts Board,** 79 J.P. 481 The question accordingly arose on the appeal whether a municipal corporation, when widening a street, might acquire, on either or both sides of the proposed street, more land than was in fact required for the purpose of widening the street, if the corporation deemed it expedient to acquire that land so that it might be in a position to resell such additional land as back land to an owner from whom the corporation had taken land fronting the street. In the opinion of the Court a municipal corporation had such power. His Honour read Sections 192 and 164 (c) of the Municipal Corporations Act, 1920. The wording of Section 192 was inartistic but, in the opinion of the Court, it empowered a municipal corporation, when widening a street, to acquire not only what was required for that purpose but also to acquire, if the corporation deemed it expedient, land additional thereto, on either or both sides of the proposed street. The power was to acquire "more" land than was required for such purpose, i.e.,

land additional to that required for street widening purposes. Land "required" for the purpose of widening any existing street would, in the opinion of the Court, include not only that which was actually thrown into the widened street, but also that which, having regard to the circumstances of the case, it was necessary to acquire in addition: **J. L. Denman & Co. Ltd. v. Westminster Corporation,** (1906) 1 Ch. 464, per Buckley, J., at p. 475. The Section did not provide, as had been submitted, that such additional land must also be required for street widening purposes. Such an interpretation ignored the fact that power was expressly given to acquire more land than was required for street widening purposes. There was, then, in their Honours' opinion, no warrant for adding by construction, the limitation on the powers of the Corporation to acquire the additional land contended for by the respondent. The power to acquire such additional land did not, however, arise unless the following conditions were satisfied: firstly, that the land was required for the purpose of laying out any new street, or in order to divert, extend or widen any existing street; secondly, that the land to be taken was on either or both sides of the proposed street which, in the context in which the words "proposed street" occurred in the Section, would refer, as the case might be, either to the new street to be laid out or to the existing street, where and when diverted, extended or widened; and thirdly, that the Corporation deemed it expedient to acquire the additional land. If the power, so conferred and so limited, were deemed excessive and arbitrary, as argued by counsel for the respondent, it was for the Legislature, which conferred that power, to withdraw it, if it thought fit, but it was not for the Court to add an arbitrary limitation additional to those appearing in the statute. The real inquiry then must be not, whether the respondent's land was taken for the purpose of street widening, or in order to widen the street, as stated in the Court below, but, in the circumstances of the present case, whether the respondent's land was additional to that required for the purpose of widening the street, whether it was on either or both sides of the proposed street, and whether the appellant deemed it expedient to acquire it. It was not the law that any such taking of land as that proposed would not be justified unless the land taken was in fact taken to widen the street in question. Several authorities were cited in support of the respondent's contention, but it was unnecessary to consider them in detail as they would have been applicable only if the statute had given no further power than a power to acquire land for street widening purposes. The observations of Lord Cranworth, L.C., in **Galloway v. The Mayor and Commonalty of London,** L.R. 1 H.L., 34, 45, might disclose the reasons why municipal corporations were given the additional power previously mentioned. Nor was a municipal corporation authorised by Section 192 of the Municipal Corporations Act, 1920, to acquire land actually fronting the proposed street, but not authorised to acquire, together therewith, land separately owned, lying behind and contiguous to such land fronting the proposed street. The expression "more land," included land howsoever owned, and whether as to part by one owner, and as to part by another owner, and whether included in one title or in several. The words of the Section, then, did not, in the opinion of the Court, support the limitation contended for by the respondent, that a municipal corporation might, under Section 192, take for recoupment purposes only land contiguous to the highway and owned by one person. It might be stated, lest there be misunderstanding, that there was no gap between the respondent's land and that land, belonging to Khouri, which the appellant Corporation proposed to take. The Court found it unnecessary for the purposes of the decision of the appeal, to consider whether or not the appellant Corporation was also so empowered by Section 5 of the Wellington City Empowering and Amendment Act, 1927.

There remained for consideration the respondent's submission that the proposal to take the respondent's land was not a *bona fide* proposal for the purpose of widening the street. Admittedly the respondent's land was not taken for the purpose of widening the street but that objection was not necessarily fatal. There was no evidence before the Court that the appellant Corporation did not deem it expedient to take the respondent's land. The Court thought that the Council of the appellant Corporation might deem it expedient to take the respondent's land if that land was taken thereafter to sell to Khouri in exchange for that taken from him. The statute had entrusted the determination to the Council and the Court would not interfere unless it were affirmatively proved that the appellant Corporation did not deem it expedient to acquire the respondent's land. Their Honours had been referred to the form of the notice published in the New Zealand Gazette relating to the taking of the respondent's land. That notice, following the language of Section 18 of the Public Works Act, 1908, referred to the appellant's proposal to execute a certain work, which was described as the widening of Thorndon Quay, and then referred to the fact that the land described in that notice was to be taken for the purpose of the said work. Section 18 required plans to be prepared showing the names of the owners and occupiers of the land, and a notice to be gazetted and publicly notified stating where the plan was open for inspection with a general description of the works proposed to be executed and of the land required to be taken. A copy of such notice and description was to be served on the said owners and occupiers so that the persons affected might object to the execution of the proposed work or to the taking of the lands described. There was no statutory requirement that where additional land was taken, as in the present case, not so much for the purpose of a public work as in connection with such a work for the purposes of recoupment, that the municipal corporation must, in its notice, insert a statement defining what portion of the land required to be taken was to be taken for the purposes of recoupment under the authority of Section 192 of the Municipal Corporations Act, 1920. The mere statement, in such notice, that the land to be taken, including the respondent's land, was taken for the purpose of a public work, namely the widening of Thorndon Quay, was not, in their Honours' opinion, sufficient to show that the appellant Corporation did not *bona fide* deem it expedient to take the respondent's land in addition to the other land taken. On the contrary, the form of notice used followed Section 192 of the Municipal Corporations Act, 1920, in treating the acquisition of more land than was acquired for the purpose of laying out any new street or widening any existing street as being (although it appeared to involve a contradiction) land which it was deemed expedient to acquire "for the purpose of laying out any new street or in order to widen any existing street."

None of the authorities cited in argument laid down any principle which in the present case would in the opinion of the Court necessitate a different conclusion from that reached. It would be sufficient to refer to three of the authorities relied upon by Counsel for the respondent. **In Gard v. Commissioners of Sewers of the City of London,** 28 Ch. D. 486, Kay, J., and the Court of Appeal held upon the facts of the case that the Commissioners had no power to adjudicate that possession of a piece of land was necessary for the purpose of improvements when they only wanted to use a small part of it for that purpose. That case would apply only if it were admitted or proved that the appellant Corporation did not deem it expedient, or could not have deemed it expedient, to acquire the respondent's land, and as shown above, there was no admission or evidence to support such a conclusion. In **Fernley v. Limehouse Board of Works,** 68 L.J. (Ch.) 344, a Board of Works contracted to sell to a purchaser such part of the land occupied by two houses as was not required to carry out a scheme for street widening. Thereafter a resolution was passed by the Board adjudging that it was necessary to acquire the whole of the two houses and notice was given to the owner under Michael Angelo Taylor's Act. It was obvious that the Board could not have honestly adjudicated that the whole of the land was necessary to carry out the improvements contemplated when, in fact, part of the land, was pursuant to the contract, to be sold as unnecessary. In **J. L. Denman and Co. Ltd. v. Westminster Corporation,** (1906) 1 Ch. 464, it appeared that a local authority was entrusted by Michael Angelo Taylor's Act with statutory powers to take land compulsorily for the purpose of widening streets, and that the local authority had contracted that it would, at the request of a syndicate, use its statutory authority for the purpose of acquiring other and additional land for the purposes of the syndicate rather than for the purpose of widening the street. His Honour quoted from the judgment of Buckley, J., at p. 476, and said that there was no evidence to prove that the Council did not deem it expedient to acquire the respondent's land. The power to take additional land, where the Council deemed it expedient, would in the opinion of the Court, authorise the Council to purchase the respondent's land even if the Council deemed it expedient to acquire it so that it might by a subsequent sale to Khouri reduce the expense of the street widening. The Council did not, before proceeding to take the respondent's land, agree to sell it, but the appellant Corporation sought to acquire it, according to the admission agreed on, in order that the Corporation might be in a position to sell it to Khouri. There was nothing in that transaction inconsistent with a *bona fide* determination that it was expedient to acquire the respondent's land. In **Municipal Corporation of Sydney v. Campbell and others,** (1925) A.C. 338, which was cited by Counsel for appellant Corporation, a municipal council was restrained from exercising its powers for a purpose different from those specified by the statute. The legal principles to be applied were thus stated by Duff, J., delivering the judgment of the Judicial Committee, at p. 343: "A body such as the Municipal Council of Sydney, authorised to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so,

the Courts will interfere. As Lord Loreburn said, in **Marquess of Clanricarde v. Congested Districts Board**: 'Whether it does so or not is a question of fact.' Where the proceedings of the Council are attacked upon this ground, the party impeaching those proceedings must, of course, prove that the Council though professing to exercise its powers for the statutory purpose, is in fact employing them in furtherance of some ulterior object." Applying those principles the Court was of opinion that it had not been proved, as a fact, that the appellant Corporation did not deem it expedient to acquire the respondent's land in addition to land required for the purpose of street widening.

Appeal allowed.

Solicitor for appellant: **John O'Shea,** City Solicitor, Wellington.
Solicitor for respondent: **Treadwell and Sons,** Wellington.

Herdman, A.C.J.
MacGregor, J.
Kennedy, J.

March 26, 27, 1929.
Wellington.

IN RE MacPHAIL: EX PARTE HOLT.

Bankruptcy—Creditor's Petition—Bankruptcy Notice—Bankruptcy Notice Served After Expiry of One Month from Date of Issue—Notice by Debtor of Intention to Oppose Adjudication on Ground that Bankruptcy Notice Not Served in Time and on Further Ground that Petitioner Had Underestimated Value of Security—No Available Act of Bankruptcy—Irregularity Not Waived by Notice of Intention to Oppose Adjudication—Bankruptcy Act, 1908, Section 39—Bankruptcy Amendment Act, 1927, Section 2 (2).

Appeal from judgment of Smith, J. The facts were as follows: A judgment was obtained against appellant on 4th September, 1928, and a bankruptcy notice issued by respondent on 7th September, 1928. This was served on 15th October, 1928, more than a month after it was issued. On 26th October, 1928, the respondent filed a petition alleging as an act of bankruptcy the foregoing bankruptcy notice which had been served after time. The appellant then filed a notice in the following terms: "I the abovenamed Duncan Carmichael MacPhail do hereby give you notice that I intend to oppose the making of an order adjudicating me a bankrupt as prayed and that I intend to dispute the act of bankruptcy and contend that the bankruptcy notice referred to in the petition was at the time of service invalid on the face of it and to dispute the petitioning creditor's estimate of the value of her security." An affidavit was filed in support of this notice.

Smith, J., held (see 4 N.Z.L.J. 362) that the filing of this notice constituted a waiver of the irregularity in the service of the petition. The appellant was subsequently adjudicated bankrupt.

T. H. G. Lloyd for appellants.
Gray, K.C. and J. F. Stewart for respondents.

HERDMAN, A.C.J. (orally) said that Rule 88 of the Bankruptcy Rules provided that a bankruptcy notice should be served within one month from the issue thereof subject to the power of the Court to extend the time. In the present case no application had been made to the Court to extend the time. Having served the notice too late the petitioner nevertheless filed a petition in bankruptcy founded upon it. For the purposes of His Honour's judgment it was not necessary to decide that after the month fixed by the Rules had expired the notice became a nullity. But it was necessary to decide whether, when the petition reached the hearing stage in the Court below, the learned Judge had before him proper proof that an act of bankruptcy had been committed by the debtor. His Honour referred to Section 39 of the Bankruptcy Act, 1908. The act of bankruptcy which the petitioning creditor had to prove was non-compliance with a bankruptcy notice. An examination of Subsection (2) of Section 2 of the Bankruptcy Amendment Act, 1927, made it obvious that service of a bankruptcy notice must be proved, but in the present case the only proof of service that could be given was service out of time. In considering such a case as the present one it was necessary to ascertain whether all the formalities had been strictly complied with. See **In re Collier,** 8 Morr. 80. It was certain that when the matter came before the Court below the formalities had not been strictly observed. The Court had proof of service of a notice after time and the debtor was adjudicated a bankrupt without further proof of an act of bankruptcy. If the service after time was ineffectual how could it be said that he had failed to comply with the requirements of a bankruptcy notice? The notice when served upon him was no longer operative. It had run its course. To revive it an application to the Court for an extension of time was necessary but that application was never made.

It had been said that there had been a waiver by the debtor of the failure of the petitioner to comply with the regulations; but His Honiur was unable to accept that view. The debtor in sending his notice stated that he proposed to contend that the bankruptcy notice was invalid and then he proceeded to say that he would dispute the petitioning creditor's estimate of the value of her security. He gave notice of an irregularity and proceeded to intimate that if the Court should hold that he had been properly served he would raise another matter. That could not amount to a waiver. Mr. Gray argued that the present case was analogous to the case of a writ that had not been served within the time fixed by the rules. But proceedings in bankruptcy differed fundamentally from a proceeding in a civil action. In a civil action only two persons need be considered and if the defendant although served after twelve months determined of his own will to appear in Court and take part in proceedings it might well be that, in such circumstances, the Court would hold that the irregularity had been waived. But on the other hand in bankruptcy proceedings there were persons other than the creditor and debtor to consider. There was the general body of creditors. Moreover an order of adjudication might lead the way to criminal proceedings. In such circumstances His Honour thought that the formalities required by the Rules and by the Act must be complied with, and as in the present case there had been a palpable disregard by the petitioning creditor of the rule as to service of a bankruptcy notice within time, the appeal should be allowed.

MacGREGOR, J. and KENNEDY, J., also delivered separate oral judgments agreeing that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: **Lloyd and Lloyd,** Dannevirke.
Solicitors for respondent: **Humphries and Humphries,** Napier.

Full Court.

Herdman, A.C.J.
Adams, J.
MacGregor, J.
Ostler, J.
Kennedy, J.

March 13; 21, 1929.
Wellington.

J. A. REDPATH AND SONS LTD. v. NEW ZEALAND FRUIT EXPORT CONTROL BOARD.

Fruit Control Act—Notice of Intention to Assume Control—Failure to Publish Notice in New Zealand Gazette a Bar to Exercise of Control—Statute Providing for Publication of Notice in any "Newspaper or Newspapers" in accordance with Such Conditions as might be Prescribed—Order-in-Council Requiring Publication in New Zealand Gazette *intra vires* and Valid—Gazette a Newspaper—Fruit Control Act, 1924, Section 8 (3), Section 36 (d).

Originating summons under the Declaratory Judgments Act, 1908, to determine the question whether the omission by the New Zealand Fruit Export Control Board to publish in the New Zealand Gazette notice of its intention to assume limited control of fruit in the manner and to the extent prescribed by such notice precluded the Board from exercising the powers of limited control in respect of the fruit specified in such notice. Section 8 (3) of the Fruit Control Act, 1924, provides that "Notice by the Board of its intention to assume control of any fruit may be given either by service on the owner of any such fruit or on any person having possession thereof, or by publication in any newspaper or newspapers in accordance with such conditions as may be prescribed."

An order-in-council was gazetted in the New Zealand Gazette of 23rd December, 1926, prescribing the conditions subject to which a Control Board might give notice of its intention to assume control, and Clause 2 thereof expressly provided: "Where notice is given by publication in a newspaper or newspapers, such publication shall be made in the New Zealand Gazette and

in at least two newspapers published and circulating in the provincial districts in which such control is to be assumed." The Board elected to give notice by publication in a newspaper or newspapers. It accordingly published a notice in newspapers circulating in the provincial districts within the boundaries of which the Board claimed to exercise its authority, but omitted to publish a notice in the New Zealand Gazette. The question arising was whether such omission was fatal to the exercise of the power of control conferred.

Parry for plaintiff.
Gray, K.C., and Stewart for defendant Board.
Currie for Attorney-General.

HERDMAN, A.C.J., delivering the judgment of the Court, said that it would be noted that Subsection 3 of Section 8 provided that publication of a notice was to be "in accordance with such conditions as may be prescribed." Those words, in the opinion of the Court, meant that the publication of a notice must be in conformity with any regulations which might be made under the authority of Subsection 3 of Section 8 of the Act read in conjunction with Section 36 paragraph (d) which gave a general power to make regulations. The Board having failed to publish its notice in the New Zealand Gazette in accordance with clause 2 of the order-in-council appearing in the New Zealand Gazette of 23rd December, 1926, the serious question arose whether the Board could lawfully proceed to exercise the formidable power of control conferred upon it by the statute. It was plain that the Board was impotent in that respect until notice was given in conformity with the provisions contained in the Act. Subsection 2 of Section 8 impliedly said so. If no valid notice was given no lawful control existed. How, then, must such notice be given? The statute said by publication in a newspaper or newspapers in accordance with such conditions as might be prescribed. What conditions had been prescribed? His Honour need not refer to all of them. The one condition that concerned the Court was that which provided that there should be publication in the New Zealand Gazette. That condition had not been complied with. It was now contended on behalf of the Board that the provision requiring publication in the Gazette was *ultra vires* of the authority to make regulations created by the Act, and it was claimed that in all other respects there had been a complete compliance with the law as to notice. It was submitted on behalf of the defendant that the power to make conditions or regulations for publication of a notice having been restricted to publication in newspapers, the provision requiring publication in the New Zealand Gazette was unauthorised for the reason that the New Zealand Gazette was not a newspaper. Their Honours had been invited to restrict the meaning of the term "newspaper" to publications which were the product of the journalist and which chronicled the current events and gossip of the day; but having regard to the objects and scope of the legislation under consideration the Court could find no justification for placing that narrow interpretation upon the word.

The general powers of control created by a statute of such a kind involved a substantial interference with the right of the individual to carry on his own business in his own way. The control might be absolute or it might be limited. The Board was to have authority to arrange for the packing and handling of fruit, for the shipping of fruit, for marketing, for insurance and generally to arrange for the carrying on of the fruit export business for part of New Zealand. It was obvious, therefore, that it was in the public interest that the very widest publicity should be given to the fact that the coming into operation of control was imminent. The New Zealand Gazette was published by the Government Printer. Its weekly numbers contained miscellaneous information of interest and value to people in the community. State Departments, public bodies and private persons were compelled to make frequent references to its contents and its circulation extended throughout the length and breadth of the Dominion. The Gazette was the official journal of the Government, but in the opinion of the Court it was nevertheless a newspaper. In Webster's Dictionary a newspaper was defined as "a paper printed and distributed at stated intervals, usually daily or weekly, to convey news, advocate opinions, etc., now usually containing also advertisements and other matters of public interest." The New Zealand Gazette did not advocate opinions, but it nevertheless possessed all the other characteristics of a newspaper. Webster also supplied a definition of the word "Gazette." It was there termed: "a newspaper, a printed sheet published periodically, an official journal, one of the three official papers of Great Britain published twice a week in London, Edinburgh and Dublin." It was suggested by Mr. Gray that, because the Fruit Control Act, 1924, specifically provided in certain Sections, for instance in Sections 3 and 4, that the result of a poll and the exclusion of a district from the operation of control should be published in the Gazette but was silent as to publications in the Gazette in Section 8, the meaning of the word "newspaper" should be limited; but if the term "newspaper" connoted such a publication as the "Gazette," as the Court thought it did, there was no need to make express reference to it in that section.

In the judgment of the Court clause 2 of the order-in-council was *intra vires* and as it had not been complied with the control of the Board was not in operation, and the plaintiff company was at present entitled to export fruit free from the Board's control.

Solicitors for plaintiff: **Buddle, Anderson, Kirkcaldie and Parry**, Wellington.
Solicitors for defendants: **Gray and Sladden**, Wellington.

Supreme Court.

Adams, J. February 21; March 25, 1929. Christchurch.

NATIONAL MORTGAGE AND AGENCY CO. OF N.Z. LTD. v. TAIT.

Payment—Appropriation of Payments—Rule in Clayton's Case Not Excluded—Guarantee of Current Account of Two Partners Carrying on Farm—Dissolution of Partnership—One Partner Carrying on Farm—Current Account Continued—Requests by Guarantors that Company Finance Partners and after Dissolution the Partner Carrying on the Farm—Requests for Time for Payment of Guarantee—Account Showing Large Sum Owing to Company at Date of Dissolution—Subsequent Credits Sufficient to Discharge Sum Owing at Date of Dissolution—No Special Circumstances Preventing Appropriation of Credits to Payment of Debits in Accordance with Clayton's Case.

Action to recover from the defendants the sum of £400 and interest alleged to be due to the plaintiff company by the defendants in respect of a guarantee. By the terms of the guarantee the defendants had agreed, in consideration of the company having at their request agreed to advance to Archibald James Tait and Francis Henry Milton Tait, any sums of money they might require not exceeding the sum of £1,000, to guarantee the repayment by the said Archibald James Tait and Francis Henry Milton Tait to the company upon demand of all sums of money so advanced by the company with interest as therein provided. The maximum liability of the sureties under the guarantee was expressed to be £1,000. After the date of the guarantee A. J. Tait and F. H. M. Tait carried on farming operations in partnership and the company from time to time made advances to them. The usual account current was kept in the company's ledger. On 25th August, 1923, the partnership was dissolved, A. J. Tait taking over the business and assets of the partnership and covenanting with the outgoing partner to pay and satisfy all the partnership debts and liabilities. The company had notice of the dissolution of partnership and of its terms. At the date the current account in the company's ledger showed the sum of upwards of £4,000 due to the company. The maximum liability of the defendants had by that time been reduced by payments to £650.

After the dissolution the company carried on the old current account in its ledger without a break, and the old pass-book was continued in the same way, the only change made being that the name at the head of the account and on the first page of the pass-book was altered to "A. J. Tait." The account and pass-book were ruled off and the debit balance carried down on 31st March and 30th September in each year. It was admitted that the credits in the account and pass-book from the date of the dissolution of partnership to 31st January, 1926, were more than sufficient to satisfy the partnership debt. The question arising was whether the application of the rule in **Clayton's case** was in the circumstances excluded so as to prevent the credits in the current account since the dissolution of the partnership from being appropriated to and in discharge of the monies owing to the company under such account at the date of dissolution. There was evidence that both the defendants had requested the company to carry on the farm, and, later,

A. J. Tait, until the property was sold, and that they had from time to time asked for time for payment of their guarantee. W. F. Tait, however, made no requests after April, 1925, and it was clear that the old partnership debt was not discharged by credits until 31st January, 1926.

Donelly and Wilding for plaintiff.
Upham for defendant.

ADAMS, J., said that the main contention of counsel for the company was that in the circumstances of this case the application of the well known rule in **Clayton's case**, 1 Mer. 572, to the account between the company and A. J. Tait was excluded by the circumstances. His Honour, after referring to the statement of the rule in **Rowlatt on Principal and Surety**, 2nd Edn., 126, 127, and to the cases of **City Discount Co. v. McLean**, L.R. 9 C.P. 692, 700, 701; **Hallett's case**, 13 Ch. D. 696, 728; **Henniker v. Wigg**, 4 Q.B. 792, and **The Mecca**, (1897) A.C. 286, said that it was clearly established by those cases that the rule in **Clayton's case** might be excluded by evidence of an agreement to the contrary or of circumstances from which a contrary intention might be inferred. The latest case in point to which His Honour had been referred was **Deeley v. Lloyd's Bank Ltd.**, (1912) A.C. 756. In the circumstances of that case it was held that the rule was not rebutted. His Honour referred to the case because in his judgment Lord Atkinson, at pp. 771, 772, there pointed out that the facts governing the decision in **Henniker v. Wigg** (*cit. sup.*); **City Discount Co. v. McLean** (*cit. sup.*), and **The Mecca** (*cit. sup.*) were in each case very special. They were also very special in **In re Hallett** (*cit. sup.*). Conceding everything to the plaintiff His Honour was unable to find any such special facts in the present case. Taking the view of the evidence most favourable to the plaintiff, it amounted to this: that the defendants knew the position of the account at all times; that they requested the company to carry on the farm, and, later, A. J. Tait, until the property was sold; that from time to time they asked for time to pay the sum due on their guarantee and made promises to pay; that in March, 1925, the defendant W. F. Tait asked the company to pay the interest due on the mortgage of the farm to allow A. J. Tait to carry on, and that he then examined the company's ledger account. It was admitted that the defendant W. F. Tait made no further promises or requests after April, 1925. The accounts showed that the old partnership debt was not fully discharged by the credit entries until 31st January, 1926, and that was definitely ascertained for the first time during the hearing. It was therefore plain that during the whole period up to 1926 the defendants remained liable for something under their guarantee and that even after that date they did not know that such liability had ceased. It followed that all the requests for time and promises to pay were referable to the fact that they believed themselves to be, as they actually were, still liable on the guarantee. There was, therefore, nothing to support the contention that the rule in **Clayton's case** had been excluded. His Honour did not wish to be understood as saying that the facts relied upon in the present case would in any event be sufficient to exclude the application of the rule.

Judgment for defendant W. F. Tait and against defendant J. A. Tait.

Solicitors for plaintiff: **Wilding and Acland**, Christchurch.
Solicitors for defendant: **Harper, Pascoe, Buchanan and Upham**, Christchurch.

Court of Arbitration.

Frazer, J. March 19; 25, 1929.
Auckland.

HILL v. WAIPA RAILWAY AND COLLIERIES LTD.

Workers' Compensation—Worker Sustaining Injuries to Head and Ankle as Result of Fall from Viaduct—Subsequent Insanity of Worker Resulting in Suicide—Insanity Held on Evidence to be Result of Accident—Widow Entitled to Compensation in Respect of Death.

Claim by the plaintiff, the widow of one Hill, against the defendant company for compensation in respect of the death of her husband, who was injured at his work on 17th November, 1927, and committed suicide on 8th June, 1928. The deceased was employed as a surfaceman on the defendant company's railway line. On 17th November, 1927, the deceased, as the result of the collision of two trollies being used in connection with the work, was thrown over the side of a viaduct. He was found to be suffering from a fractured right ankle, a surface wound on the right temple, and a bruise, said to be about the size of a florin, over his right ear. The deceased was taken to his home, where he was treated by Dr. Martin until 21st November, 1927, when Dr. Brewis saw him and ordered his removal to the Hamilton Hospital. The head injuries were not regarded as of any importance at the time, and had practically disappeared within a few days after the accident. The broken ankle, however, necessitated a surgical operation, after which the condition of the ankle improved and the deceased was discharged from hospital some weeks later, though he attended for treatment as an out-patient until 21st May, 1928. There was no medical evidence as to the deceased's mental condition while in hospital, except that of the Surgeon-superintendent, Dr. Gower, who said that the deceased a few days after his admission exhibited coarse tremors, which, in the opinion of the witness, were indicative of the onset of an attack of delirium tremens, a not uncommon sequel of an accidental injury to an alcoholic subject. From enquiries made, however, it was ascertained that he was a particularly sober man. The evidence of the plaintiff, her daughter, and a fellow-worker of the deceased, one Herbert, who was injured in the same accident and occupied a bed in the same ward in the hospital, was that the deceased before the accident was a genial, care-free man, with a cheery disposition and a habit of whistling and singing at his work. Within a few days after the accident he became silent and morose, and could only with difficulty be induced to converse at all beyond answering questions. There was no evidence at that time of delusions or other marked indicia of insanity. After his discharge from hospital, the evidence of the plaintiff, her daughter, and Herbert was that the deceased began to have delusions of persecution. He imagined that the police were working up a criminal charge against him, and he suspected his solicitors of acting against his interests. He suffered from insomnia, complained frequently of pains in his head, and sometimes said that he thought he was going mad. He rarely mentioned his ankle or complained of pains in it. The plaintiff, though afraid that her husband might become insane, did not anticipate that he would commit suicide, and seemed to be more apprehensive of his eventual committal to a Mental Hospital than of anything else. During that time the deceased was seen by three Hamilton medical practitioners, Drs. Joseph, Brewis, and Douglas. Dr. Joseph, who saw him on 4th May, 1928, found him in a restless, agitated condition. He appeared to be terrified, as if he were exhausted, and he kept looking over his shoulder towards the door of the room. Dr. Joseph formed the opinion that the deceased's mental condition was far from sound, and he considered that the accident must have caused a nervous shock that had deranged his mental balance. On 5th May, 1928, Dr. Brewis was asked by the plaintiff to see her husband, who was suffering from insomnia. He prescribed sedatives, and next day saw the deceased. The deceased had then had a good night's rest, and did not exhibit any mental abnormality, though he told Dr. Brewis that he thought his solicitors would "let him down." On 31st May, 1928, Dr. Douglas examined the deceased with a view to ascertaining the condition of his ankle. He found no trace of mental instability, though he did not discuss with him any matters bearing on his mental condition. His examination was purely physical, but the deceased spoke and acted in a perfectly normal manner. Dr. Douglas was of the opinion that the deceased, if insane when he took his life, had become insane through brooding over his injuries and his prospects of obtaining employment, and not as a direct consequence of the accident of 17th November, 1927. It was on the morning of 8th June, 1928, that the deceased worker committed suicide.

G. P. Finlay for plaintiff.
Parry for defendant.

FRAZER, J., said that three questions arose for determination: (1) did the deceased commit suicide? (2) was the suicide due to insanity? (3) was the insanity the result of the accident? The law on the subject was fully covered by the judgments in **Grime v. Fletcher**, 8 B.W.C.C. 69; **Malone v. Cayzer, Irvine and Co.**, 1 B.W.C.C. 27; **Withers v. London, Brighton, etc. Railway Co.**, 9 B.W.C.C. 616; **Marriott v. Maltby Main Colliery Co. Ltd.**, 13 B.W.C.C. 353; and the more recent case of **Jenkins v. Lancaster's Steam Collieries**, 16 B.W.C.C. 11. It might be summarised as follows: the mere fact of suicide was not in itself evidence of insanity. If insanity was found to be the cause of the suicide, it must be shown that the insanity was the result of the accident

and the injury, and not the result of depression arising from brooding over the consequences of the injury. It must be shown to be due to some direct injury to the brain, or to melancholia or depression occasioned by the shock of the accident itself.

The first question was, of course, answered in the affirmative. As to the second question, the evidence of a number of witnesses indicated that the deceased's mind had become unhinged some months before his death, though he could pull himself together and exhibit no signs of mental instability when interviewed for a brief period by Dr. Douglas and by other persons who had occasion to visit him at intervals. There was no doubt that his suicide was due to insanity. The third question presented greater difficulty. There was evidence that a mental change occurred within a few days after the accident, but it was not of such a nature as to be considered insanity. There was doubtless an element of neurasthenia in the case, but mere brooding over the consequences of an accident did not provide a sufficient causal link between that accident and the insanity into which neurasthenia, through excessive brooding over consequences, sometimes deepened to justify a finding that suicide was the result, without any *nova causa interveniens*, of the accident. In the present case, however, there was no evidence of excessive brooding over the consequences of the accident, which, so far as the deceased knew, were confined to his ankle. The pronounced mental symptoms that he developed after his discharge from hospital were of a distinctly delusional nature, and the subject matter of the delusions was apparently something quite apart from the fear of unemployment or of incurable injury that was usually met with in ordinary neurasthenic cases. The Court, then, must ascertain whether the comparatively trivial mental symptoms observable shortly after the accident while the deceased was in hospital were directly connected with, and formed part of a progressive mental change that deepened into insanity, culminating in suicide, and whether those symptoms were the result of some shock or brain injury arising from the accident. In the absence of expert medical evidence, the Court decided, with the consent of counsel, to refer that aspect of the case for the opinion of Dr. Prins, Medical Superintendent of the Auckland Mental Hospital. Dr. Prins was of the opinion that the small bruise on the head might have been connected with an injury to the brain, which produced changes in the brain-substance, leading progressively to insanity. A post-mortem examination of the brain, which unfortunately was not made, would have indicated whether that was so or not. The history of the development of mental symptoms was, in Dr. Prins's opinion, quite consistent with such a condition. Apart from that, however, Dr. Prins expressed the opinion that the history of a change of outlook and disposition following almost immediately upon the happening of the accident, and the later development of delusional insanity, indicated a progressive mental degeneration, arising either from direct brain injury or from shock due to the accident. In the case of a man of normally genial and care-free disposition, the history as given was evidence of a mental change caused directly by the accident. The moroseness and taciturnity at first observable were *indicia* of a mental disturbance, that later crystallised into specific delusions. The proper inference to be drawn from the facts of the case, as found by the Court, was that the insanity from which the deceased suffered was directly caused by the accident. Accepting, as it did, Dr. Prins's opinion as to the causal relation between the accident and the insanity which led to the deceased committing suicide, the Court was satisfied that the requirements of the law, as summarised above, had been complied with, and that the plaintiff had established her claim to compensation.

Judgment for plaintiff.

Solicitors for plaintiff: **Watts and Armstrong,** Hamilton.

Solicitors for defendant: **Buddle, Anderson, Kirkcaldie and Parry,** Wellington.

Legal Education!

The examiners in the recent March Law Examinations appear to have been subjected to the usual measure of nonsensical answers. In this respect one of the most humourous is the statement of a candidate in *Evidence* that "witnesses called merely to oppress and to annoy cannot be cross-examined." Another candidate in one of the papers on *Contract* asserts: "'Undue Influence' in the Freudian philosophy is the exercise of a 'superiority complex over an inferiority complex.'"

Family Protection Act, 1908—Part II.

A Review of the Decisions Thereunder.

By A. C. Stephens, LL.M.

(Continued from page 25)

INCIDENCE OF PROVISION.

See Act, Section 33, Subsections (4) (5) and (8).

The Court will frame the order so that the burden of the provision falls as far as possible on those who are better able to support it: *Rowe v. Lewis*, 26 N.Z.L.R. 769. See also *Cook v. Webb*, (1918) N.Z.L.R. 664 C.A.; *Re Higgins*, (1918) G.L.R. 387, 390; *Fletcher v. Usher*, (1921) N.Z.L.R. 649. If there is no reason to differentiate between the beneficiaries, the burden will be thrown upon them equally: *Re Roper*, (1927) N.Z.L.R. 731. But see also *Shepherd v. Preen*, (1918) G.L.R. 60.

The widow's priority over the children holds here also: see *Davidson v. Sundstrum*, 33 N.Z.L.R. 212.

In some cases the Court has directed that the total amount of periodic payments made to the applicant or a part thereof shall be charged against his interest under the will. See *Re Bleasel*, 25 N.Z.L.R. 974; *Marshall v. Public Trustee*, (1921) N.Z.L.R. 714; *Allen v. Manchester*, (1922) N.Z.L.R. 218. See also *Fletcher v. Usher* (supra).

It is to be noted that the case of *Parker v. Carr*, 24 N.Z.L.R. 895, is deprived of effect by Section 33 (4), as also is *Plimmer v. Plimmer*, 9 G.L.R. 10 C.A., so far as it deals with the incidence of the provision.

The Court will not make any inroads upon capital beyond what is reasonably necessary: *Hutchison v. Hutchison*, (1921) N.Z.L.R. 743.

MODE OF PROVISION.

The Court may attach to the order such conditions as it thinks fit: Section 33 (2). See *Fletcher v. Usher*, (1921) N.Z.L.R. 649; *Re Roper*, (1927) N.Z.L.R. 731.

The discretion of the Court as to the nature and terms of the order is unrestricted: Section 33, subsections (1) (3) and (6).

There is no doubt as to the power of the Court to order payment of a lump sum, *Plimmer v. Plimmer*, 9 G.L.R. 10 C.A., being deprived of authority on this point by the Testators' Family Maintenance Act, 1906, but, as the terms of the order are entirely in the discretion of the Court and depend on the circumstances of each case, it is not possible to give anything more than a general indication as to the manner in which the Court has exercised its power in the past.

(a) It was stated in one of the first cases decided under the Testators' Family Maintenance Act, 1900, that the testator's duty was merely to provide for an adequate maintenance for his wife for her lifetime and did not extend to providing her with a fund which she could give to others at her death: *Rush v. Rush*, 20 N.Z.L.R. 249, 254. See also *Plimmer v. Plimmer*, 9 G.L.R. 10, 20 C.A.

This attitude has been generally maintained by the Court as regards claims by the widow. See *Bell v. Hunter* (No. 2), 34 N.Z.L.R. 1068. It cannot be said, however, that the practice in the past would prevent

the Court from ordering the payment of a lump sum, even to a widow, under appropriate circumstances: See, for example, *Public Trustee v. Denton*, (1917) N.Z. L.R. 263; *Paxton v. Nicholson*, (1918) G.L.R. 393; *Jackson v. Hunger*, (1919) G.L.R. 69.

(b) In the case of children also the Court appears to prefer periodic payments to lump sum payments, as the former are more frequently ordered than the latter. A lump sum was ordered to be paid in the following cases: *Munt v. Findlay*, 25 N.Z.L.R. 488; *Kerr v. Bridge*, 25 N.Z.L.R. 907; *Re Estall*, 16 G.L.R. 185; *Lean v. Tipping* (No. 2), (1917) G.L.R. 355; *Brown v. Public Trustee*, (1918) G.L.R. 209; *Cook v. Webb*, (1918) N.Z.L.R. 664, C.A.; *Rose v. Rose*, (1922) N.Z.L.R. 809 C.A.; *Re Herd*, (1923) G.L.R. 118; *Corbey v. Boonstra*, (1923) G.L.R. 433; *Welsh v. Mulcock*, (1924) N.Z.L.R. 673, C.A.; *Smith v. Public Trustee*, (1927) N.Z.L.R. 342; *Collins v. Public Trustee*, (1927) N.Z.L.R. 746; *Copeland v. Wakelin*, (1927) N.Z.L.R. 846. See also *Davidson v. Sundstrum*, 33 N.Z.L.R. 212; *Public Trustee v. Brown*, 34 N.Z.L.R. 951; *Carroll v. Carroll*, (1917) G.L.R. 600.

(c) Payment of a lump sum will not be ordered where the immediate effect will be to reduce unduly the provision for those entitled to preferential consideration. *E. v. E.*, 34 N.Z.L.R. 785 C.A. See also *Collins v. Public Trustee* (supra).

As to the date of the commencement of the provision, the Court will direct that the order shall operate from such date as seems reasonable under the circumstances. Orders for periodic payments have been made to operate from the date of death (*Allardice v. Allardice*, 29 N.Z.L.R. 959 C.A.; *Re Roper*, (1927) N.Z.L.R. 731, where seven years had elapsed since the death of the testator), the date of the order, (*Marshall v. Public Trustee*, (1921) N.Z.L.R. 714), or from other specific dates (*Nosworthy v. Nosworthy*, 26 N.Z.L.R. 285; *Hoffman v. Hoffman*, 29 N.Z.L.R. 425; *Severn v. Public Trustee*, (1916) N.Z.L.R. 710). Provision has also been made for a future contingent liability, but there is a distinction between orders which amount to an actual present exercise of the jurisdiction to order provision for the applicant, and orders which merely impose a charge on the whole or a part of the estate to meet payments to be made under any future order. Orders of the latter class were made in *Parish v. Valentine*, (1916) N.Z.L.R. 455; *Blackburn v. Mapp*, (1917) N.Z. L.R. 565, and *Toner v. Lister*, (1919) G.L.R. 498. But subsequently Salmond and Reed, JJ., in the Court of Appeal expressed the opinion that the Court had no jurisdiction to make such orders. See *Welsh v. Mulcock*, (1924) N.Z.L.R. 673, 687, C.A. In *Toner v. Lister*, (1925) G.L.R. 323, Adams, J., pointed out that this opinion had not the authority of a decision of the Court of Appeal. There is clearly jurisdiction to make an order of the former class even though the enjoyment of the benefit of the order by the applicant is future or contingent: *E. v. E.*, 34 N.Z.L.R. 785 C.A.; *Welsh v. Mulcock* (supra). See also *Colquhoun v. Public Trustee*, 31 N.Z.L.R. 1139, and *Hart v. Hart*, 17 G.L.R. 393. In *Murphy v. Public Trustee*, (1921) G.L.R. 152, the Court reserved to the applicant (who was the life tenant) leave to apply for a share of the capital at a later date.

The Court will if necessary make an order terminating on the happening of a certain event (e.g. the death of a life tenant) where the provision will no longer be required. See *Re Bleasel*, 25 N.Z.L.R. 974; *Rowe v. Lewis*, 26 N.Z.L.R. 769; *Marshall v. Public Trustee*, (1921) N.Z.L.R. 714.

Special provision has been ordered in certain cases where the circumstances required a special order:—

(a) Applicant to have a share in the estate: *Public Trustee v. Brown*, 34 N.Z.L.R. 951.

(b) Part of the estate to be conveyed to applicant: *Davidson v. Sundstrum*, 33 N.Z.L.R. 212.

(c) Applicant to have right to occupy house and use furniture during lifetime: *Plank v. Plank*, 32 N.Z.L.R. 898.

(d) Life interest in whole estate given to applicant: *Brown v. McCarthy*, 26 N.Z.L.R. 762.

(e) Furniture and personal effects given to widow: *Murphy v. Public Trustee*, (1921) G.L.R. 152.

It is usual to settle or charge some part of the estate to provide for periodic payments: see for example *Allardice v. Allardice*, 29 N.Z.L.R. 959 C.A.

PRACTICE.

1. Mode of Application.

The application is made by Originating Summons supported by Affidavit.

When an application is filed on behalf of any person it may be treated by the Court as an application on behalf of any other person who might apply: Section 33 (7); *Higgins v. Public Trustee*, (1916) G.L.R. 706; *Lean v. Tipping* (No. 1), (1917) G.L.R. 354.

Such other person should not apply to be joined as a party to the Originating Summons. He can take advantage of Section 33 (7) and file affidavits on his own account, or commence independent proceedings, or, if an infant or of unsound mind, he can be represented by the executor under Section 33 (10). *Bell v. Hunter* (No. 1), 34 N.Z.L.R. 1067.

Persons other than the applicant who are interested in the proceedings may reply by affidavit to the applicant's affidavits.

Oral evidence may also be given: see *E. v. E.*, 34 N.Z.L.R. 785, 794.

2. Parties.

It is not necessary to join or serve persons who will not be affected by the order: see *Rowe v. Lewis*, 26 N.Z. L.R. 769, 771.

The applicant is not bound to join in his Originating Summons all persons who are entitled to apply: *Bell v. Hunter* (No. 1) ,(supra).

The executor and any persons who may be prejudiced by the order should be joined as defendants and served with the Originating Summons.

3. Affidavit in Support of Summons.

The affidavit filed in support of the application should show all the persons who are competent to make an application under the Act: *Higgins v. Public Trustee*, (1916) G.L.R. 706; *Lean v. Tipping* (No. 1), (1917) G.L.R. 354.

4. Motion for Directions as to Service.

The motion should apply for directions as to service or dispensation of service with regard to all persons entitled to apply under the Act: *Higgins v. Public Trustee* (supra). This is additional, of course, to the directions as to service upon such persons as are made parties to the Summons.

(*To be continued*)

The New Chief Justice.

A Brilliant Career.

There can be not the slightest doubt that the appointment to the Chief Justiceship of Mr. M. Myers, K.C., has met with the wholehearted and unanimous approval of the Profession, and the Dominion is to be congratulated on having obtained to fill the position of the head of its system of justice the properly and deservedly acknowledged leader of the Bar. At a time when recent tragic losses, such for instance as those of Sir Charles Skerrett and Sir William Sim, have badly depleted the strength of our Supreme Court Bench, the appointment is doubly satisfactory. It is a further matter for gratification that the Government has recognised all the traditions pertaining to the office and has not disregarded the frequently voiced opinion of the Profession that all judicial appointments should be made from the ranks of the actively practising Bar.

His Honour Mr. Justice Myers is a son of the late Mr. Judah Myers, and was born at Motueka on 7th September, 1873. In 1879 his family came to Wellington and he was sent to the Thorndon School. In 1885, at the early age of twelve, he showed something of the pre-eminence that was to come in carrying off one of the six primary Education Board scholarships then awarded in Wellington, heading the list of all competitors. From 1886 till 1891 Mr. Myers was at Wellington College; while there he won, in 1887, a further primary Education Board Scholarship and was also awarded other College scholarships and exhibitions, including the Turnbull Scholarship. On leaving Wellington College, he was affiliated to Canterbury University College where he took the degree of LL.B. in 1896.

In 1892 the first step on the ladder of forensic fame was taken—Mr. Myers joined the staff of the well known legal firm of Bell, Gully and Izard. In March, 1897, he was admitted by the then Chief Justice, Sir James Prendergast, as a barrister and solicitor. In the same year Mr. Izard retired from the practice and two years later, on 2nd August, 1899, Mr. Myers was admitted into partnership, the firm being styled Bell, Gully, Bell and Myers until 1919 when, on the admission to partnership of Mr. H. F. O'Leary, the name was changed to Bell, Gully, Myers & O'Leary. It was only in 1922 that this association of thirty years' standing was broken. In September of that year, Mr. Myers was granted the patent of King's Counsel, the first such appointment made since the passing of the Law Practitioners Amendment Act, 1915, requiring that any barrister taking silk after the passing of the Act should not practise as a solicitor, either alone or in partnership with any solicitor. This step was naturally a great one, for it involved practice under conditions quite different from those generally prevailing where fusion of both branches of the Profession exists, and the success which marked his practice under these conditions must be ranked as one of the greatest triumphs of his career.

Aided doubtless by association with such leading lawyers as Sir Francis Bell, K.C., and the late Mr. Hugh Gully, Mr. Myers became a prominent figure in the Courts almost immediately after his admission to the Bar. For many years, until 1910, he took a large proportion of Crown cases both criminal and civil. Among the most important criminal prosecutions in which he appeared may be mentioned those of Philpott, in 1898, in which he was junior to Sir Francis Bell, and of Ellis which he conducted alone. In 1910 the Crown Law office was reconstituted and the Crown work was thereafter done by officers of that department. On the civil side Mr. Myers, possessing in a marked degree the confidence of the business community, found himself retained in most of the commercial cases of importance. Among these may be perhaps singled out *Merchants' Association of N.Z. v. The King*, 32 N.Z.L.R. 1233 (the "sugar case"), the *Dominion Portland Cement Company's case*, (1921) N.Z.L.R. 667, *The King v. Crown Milling Co., Ltd.*, (1925) N.Z.L.R. (the "flour case"). In sheer law his most notable triumphs were before the Judicial Committee of the Privy Council. In 1911 he successfully appeared for the respondent in *Allardyce v. Allardyce*, (1911) A.C. 730. In 1926 and 1927 he succeeded before the Board in *Crown Milling Co., Ltd. v. The King*, (1927) A.C. 394; *Bisset v. Wilkinson*, (1926) A.C. 177; *Hirawanu v. Gardner*, (1927) A.C. 388; *Doughty v. Commissioner of Taxes*, (1927) A.C. 327; and *Wright v. Morgan*, (1926) A.C. 788. The experience

gained in these cases through association with leaders of the English Bar, and in appearing before Judges of such eminence should prove an invaluable qualification in the performance of his judicial duties. In every side of a barrister's practice Mr. Myers has had a vast experience. Before the Election Court, he appeared successfully as counsel for Mr. Hine, in 1920, in the Stratford election petition and succeeded again in the Western Maori petition in 1923 when he was retained by Sir Maui Pomare. He has for many years possessed an extensive practice before Parliamentary Committees. In 1910 he appeared, though unsuccessfully, for Mr. Hine in connection with the charges made by him in the House of Representatives, the hearing occupying some thirty-five sittings. And he was frequently retained before Royal Commissions, such, to mention only a few, as those set up to deal with the Waihou and Ohinemuri Rivers Silting, Auckland Tramway Brakes, Foxton Wharf and North Island Main Trunk Line Deviation, and the sale of the Poverty Bay Meat Company's Works. In arbitrations he acted frequently as counsel and as arbitrator; one of the most important of the recent arbitrations in which he was engaged was that to settle the value of the undertaking of the Hawera Electric Light Company for the purposes of a proposed purchase by the South Taranaki Electric Power Board, the hearing of which occupied eighteen days. But one of the outstanding facts in Mr. Myers' career at the Bar is that, notwithstanding his eminence, his services were always, when the occasion demanded, available to whomsoever wanted them. Right up to his appointment to the Bench he would in cases warranting his retainer appear in the Magistrates' Court and would when there was a special call for his services appear in the Criminal Court, taking this class of work not from inclination, but simply because he observed staunchly the tradition of the Bar that the services of counsel should be available to all who need them. It is a somewhat curious coincidence that his first important appearance in the Supreme Court should be as junior to Sir Francis Bell, and that when he appeared in that Court for the last time his former leader was his client.

But the Bench's gain is the Bar's loss, for Mr. Myers has always been an indefatigable advocate of the rights, duties and privileges of the Profession which he adorned. For many years he was a member of the Council of the Wellington District Law Society, and twice vice-president and twice president of that body. He was a member of the Council of the New Zealand Law Society, representing Wellington for one year and Gisborne for four years, and he was also a member of the Council of Law Reporting.

Mr. Myers was sworn in as Chief Justice by His Honour Mr. Justice Herdman on the 10th inst., and took his seat on the Bench for the first time on the following Tuesday at the opening of the Wellington Criminal Sessions. Appointed at the height of his powers and fame, full of the energy of youth, and with the prospect of sixteen years on the Bench, it seems that the name of Myers, C.J., cannot fail to be handed down to posterity as one of the greatest of New Zealand's Judges.

The constitution of the English Bar Council ensures its being thoroughly representative of all sections of the Bar. Twenty-four members are elected each year; of these at least two must be of the Inner Bar, ten at least must be of the Outer Bar, and three at least must be of less than ten years' standing at the Bar. For a valid nomination the signatures of at least ten barristers are necessary.

Lord Halsbury.

His Life and Times.

Permission has been granted to the "New Zealand Law Journal" to publish a series of extracts from the Biography of the first Earl of Halsbury, which is shortly to be published.

(*Continued from page 27*)

Evidence by Accused Persons.

There was one feature of the criminal procedure of those days upon which young Giffard was gradually forming a strong conviction. When he was prosecuting in the early days of the Old Bailey, when prisoners were not allowed to testify, a prisoner swore on oath that he did not commit the crime.

Giffard protested that he was giving evidence.

The judge said, "I am not going to stop him." The prisoner said his oath was as good as that of the other witnesses, and got off.

The reason for what seemed a cruel and unnatural limitation, which may have led to many unjust decisions, was that the Law, probably with the intention of protecting the prisoner against himself, and to prevent evidence of his (possibly bad) character being called to shake his credibility as a witness, forbade him to give any evidence in his own defence, nor was the evidence of the husband or wife of the prisoner admitted.

Giffard was gradually making up his mind on the question, and coming to the conclusion that this was really a very serious defect in the Law. To change it was to make a very great change indeed, affecting every person, innocent or guilty, who had to face a criminal charge. The time had not yet come when he could hope to advocate, let alone procure, so drastic a reform. One day, however, "That young man will be Lord Chancellor. Remember my words." And in 1896 Lord Halsbury's Criminal Evidence Act, after many years of effort and disappointment, was placed on the Statute Book.

The South Wales Circuit.

On the South Wales Circuit, Giffard was soon *facile princeps*. Grove was in ill-health. Macintyre was weak, and there was no one else.

He had many interesting cases of which some can be quoted here. His minute knowledge of legal procedure is well illustrated by the following story. A client of his was indicted at Quarter Sessions in South Wales for wounding a man with intent to do him grievous bodily harm. Giffard took the point successfully that Quarter Sessions had no jurisdiction to try the offence. They then tried to convict him of common assault, but Giffard again argued successfully that the indictment would not sustain the charge. Whereupon the prisoner was sent to the Assizes. In order to be quite sure this time, they put in the indictment both offences. Giffard again demurred on the ground of misjoinder, that they had joined in the same indictment a felony and a misdemeanour. He said afterwards that the bewilderment of the prisoner when he was released without any punishment for a singularly brutal assault, was most ludicrous!

Another time Giffard had to defend a man for stealing the handle of the Swansea Town Pump. The indictment

was for larceny at Common Law, and things fixed to the soil are not the subject-matter of larceny at Common Law. Giffard successfully took the point, and the man was acquitted. The judge, however, was angry, and ordered that a fresh indictment should be prepared, charging the man with larceny under the statute which was applicable to that form of larceny. Giffard then successfully took the point, that though the pump was fixed to the soil, the handle was not.

Many years later, when he was nearly 98, he was asked by a gathering of Benchers at dinner at the Inner Temple, among whom was Lord Birkenhead, what he considered his greatest legal triumph. They expected him to mention the *Eyre Case*, or some equally spectacular occasion. But he said he had always considered the Swansea Town Pump case his greatest success.

There was one case in which he always maintained that real injustice had been done. An interfering and tactless curate of meek and correct demeanour had made sundry charges against a landlady of a public-house of having harboured prostitutes. He spoke before a large number of people, and she issued a writ for slander. Her evidence was as follows : " 'E come into my bar-parlour, and put his elber on my counter, and ses, ' 'S'welp me Gawd, ma'am. This place is no better than a b——y bawdy 'ouse.' "

The jury took one look at the curate, whom Giffard was defending, and without leaving the box, found that the words had not been spoken. Giffard always said it was very hard. It was exactly what the curate had meant, but the landlady had quite honestly translated his words into her own language.

Another case gave rise to an alteration in the Criminal Law. By Common Law an indictment for wounding with intent to do grievous bodily harm cannot be sustained if the natural weapons of mankind alone are used, and therefore cannot be sustained if a man bites another. Giffard, however, successfully maintained that in this case conviction could stand, because the biter happened to be wearing false teeth !

One more Circuit story. Giffard had just been appointed Revising Barrister at Brecon. In holding his Court a man began to interrupt. He was told to be quiet. The interruption continued, and he was warned that if he offended again he would be put out.

On a further interruption Giffard ordered the constable to remove the man. Peace reigned in the Court, and business went on till about 8 p.m., when it finished. Giffard was just leaving when the constable came up and said, " What shall I do with the prisoner, Sir ? "

" What prisoner ? " asked Giffard.

" The man you told me to arrest."

As a Revising Barrister has no power to commit, Giffard thought with horror of actions for false imprisonment, and so forth.

It turned out that the too zealous constable had not only arrested the man, but had shut him up all day in the lavatory, as the only room which had a lock and key ! However, Giffard, very quietly ordered the man to be brought before him.

" If I let you go, will you promise to behave properly in future ? "-he said sternly.

The man, quite cowed, promised, and no more was heard of him.

An important step in Giffard's career took place at Chester. Members of both North and South Wales Circuits are also members of the Chester Circuit, which at that time was the seat of a considerable amount of litigation. There was an important case there, and one side had retained all the " silks " on the Chester Circuit. Giffard was at that time a junior. Application was made to Baron Bramwell to move the case by *certiorari* to a different venue in London, on the ground that a fair trial could not be had, as all the Queen's Counsel on the Circuit had been retained on the one side.

Bramwell asked, " Have they retained Mr. Giffard ? " and being told no, he refused to change the venue. This made Giffard's name in Chester, and Bramwell used to say he ought to have had a large commission on all the Chester briefs he got in consequence.

Hardinge Giffard's greatest friends on Circuit were Tom Allen, to whose son he taught Greek, and whose little daughter was his favourite child friend, Jack Bishop, afterwards County Court Judge in South Wales, and Jem Bowen. Francis Williams was a good deal younger, but he thought him an admirable advocate.

One of the important trials in which he appeared on Circuit was the once notorious case of Esther Lyons, a Jewess, who, it was alleged, had been enticed away from her home for purposes of proselytism. Her father brought an action against a Baptist Minister named Thomas and other defendants who were alleged to be parties to the abduction. The trial took place at the Summer Assizes at Cardiff in 1869. Giffard appearing for the father, and Grove for Thomas. Giffard was successful in obtaining a verdict for 50*l*. for the plaintiff. The girl, however, who had become a Christian, and had been baptised, would not return to her father.

When on the South Wales Circuit, Giffard defended a local authority with as much warmth and eagerness as if he were himself a Welshman. When the Judge laughingly protested, Giffard said, " That may be, but if I am not a Welshman myself, I've made a good deal of money out of Welshmen in my time."

" Well, then," said the Judge, " Suppose we call you a Welshman by extraction."

When on the Circuit, he and some friends were attending a dance, and returned home in the wee sma' hours. Mr. Justice Grove, who was a poor sleeper, resented the loud and cheerful voices, and forbade them entrance to the Judge's lodgings. It is not related how the young men procured shelter, but it was not under the same roof as their leader that night.

It was on this occasion that he said he had always remembered in connection with Brecon that when he had rung the bell several times in vain at his hotel, the waiter arrived with the sufficient apology that he " was sorry to haf kept the shentleman waiting, but the house was on fire."

Meanwhile Dr. Lees Giffard was following his son's rise to fame with affectionate pride, as the following letter of May, 1855, testifies :—

" John, my eldest son, is a prosperous Chancery barrister, married to a lovely and excellent young woman. Francis, my second son, is the most respected clergyman in the diocese of Winchester. But it is however of my third son—an Englishman by birth (the two elder sons were born in Ireland)—of whom I have most reason to be proud, as he, if God Almighty spares him, is destined to exalt, and even to ennoble our family.

Though but four years called to the Bar, Hardinge Stanley Giffard's name is as well known as that of any young man in England. He is not merely the most rising young man at the Bar but confessedly at the head of his profession. His income last year amounted to between 2,000*l.* and 3,000*l.* and the present year promises to double it. Add to this that he is the most affectionate of sons and brothers. He is married, but has had as yet no children. His wife is a truly amiable person, and I believe him to be, as he deserves to be, the happiest of men."

(To be continued)

Bench and Bar.

Mr. J. H. Luxford, S.M., has been appointed Chief Justice of Samoa. Mr. Luxford was born in 1890, at Palmerston North, and was educated in Palmerston North and Dannevirke, and at the Wanganui Collegiate School. His legal training was received in the office of Mr. C. L. MacDiarmid, of Hamilton, and in 1913 he was admitted as a barrister. Following his admission Mr. Luxford practised at Te Awamutu, in partnership with Mr. A. E. Cox. On the outbreak of the War he enlisted in the New Zealand Main Body but was injured, and in consequence appointed to the machine gun instruction school. Late in 1915 he joined the New Zealand Division in Egypt, and early in the following year went to France. For gallantry at the first battle of the Somme he was mentioned in despatches by Earl Haig. In October, 1917, having then attained the rank of Major, he was seriously wounded and was subsequently invalided out of the army. In 1919 Mr. Luxford commenced practice in Hamilton, but later joined Mr. W. J. Napier, in Auckland. At the time of his appointment to the Magistracy, in April of last year, he was a partner in the firm of Fitchett, Rees & Luxford. Mr. Luxford is the author of "Machine Gunners in France and Palestine," the official history of the New Zealand Machine Gun Corps.

Mr. H. J. V. James has commenced practice at Wellington as a Barrister. For the past five years Mr. James has been "devil" to Mr. M. Myers, K.C., and he was previously managing clerk to Messrs. Salek, Turner, and Brown, Wellington.

The following admissions have been made recently at Wellington: as Barrister and Solicitor, G. L. Caldwell, W. J. Heyting, E. L. Howe, and A. M. S. Mackenzie; Solicitors on the Roll admitted as Barristers: S. J. Castle, L. B. Dinniss, W. D. Goodwin, A. E. Hurley, C. W. Nash; Solicitors: S. C. Childs, Stewart Hardy, T. P. McCarthy.

"An abandoned and audacious man is always thought better of than he deserves. If, therefore, you conceal that your witness is a rascal, let him reveal it recklessly."—Lord Darling.

If a man were possessed of all the virtues he might avoid contact with a lawyer; but as he is immoral and litigious he certainly can not.—Sir Ernest Wild.

London Letter.

Temple, London,
14th February, 1929.

My dear N.Z.,

Of the many "tips" I gave you as to the new Lord of Appeal, it is comforting to know that one at least came off. Lord Tomlin of Ash sounds very remote from our former Tomlin, J., but we shall see him at much nearer hand hereafter whenever, at any rate, we address him or lean over the barrier while our Leader addresses him, in the Judicial Committee of the Privy Council. I wonder what you will think of him, when you come, or rather when you come over, to deal with him? Of his intellect and of his personality there can be no two opinions; yours is bound to agree with ours, and be of the highest. I am wondering, rather, how his temperament will develop in appellate functions and how you will find him, as part of a Board to address and, if occasion arise, to meet in argument. The general forecast is, I think, that he will prove charming and you will be charmed. He has achieved his eminence by combining intellectual and personal qualities of the best class.

Fairfax Luxmore, K.C., was an almost certain successor from the very start. As to personal qualities, in his case, he is exactly what you would expect of a man of his athletic past: a very genial and a very friendly man, of physical calibre and happy disposition. He has never been credited with the brilliance of a star, but from his earliest days as a junior he has always advanced from big business to bigger by his soundness as a man of the world. This is not saying that he is no lawyer; he has all the legal acumen which must be presupposed from the size of his Chancery practice. As, one by one, the brilliants have been promoted from the Chancery Bar to the Bench, he has become more and more firmly set in that happy position of being the man to turn to, when the best had been retained by the other side and the next-best-thing was necessary to be retained to cope. He was, you may remember, to have appeared in the series of appeals from New Zealand of a year or two ago; but the coincidence of their hearing with the hearing of the Lord Northcliffe Will Case caused him to return his briefs at the last. There is not any appreciable doubt as to his making a very welcome Judge of the Chancery Division.

The Salvation Army matter is transferred from the arena of the Courts, for the moment, to another and less formal forum. All sorts of possibilities are being canvassed, as I write, as to the final arbitration of the unhappy dispute by some independent layman of authority. The news of this wide-world affair will have reached you long before this letter; and I have the less need to comment upon it herein, because so far as I know, it is not engaging the lawyers' attention to anything like the extent to which it intrigues the popular curiosity.

The Court proceedings which most occupies the professional interest is the appeal in the case of **Hobbs v. Tinling and Co. Limited and Hobbs v. The Nottingham Journal Limited.** This, you will remember, was a matter of legal libel, in which the defendants admitted publication and that the words published were defamatory,

but denied the particular meaning put upon them by the plaintiff and directed themselves to mitigation of damages. The plaintiff, by Serjeant Sullivan, K.C., and Mr. Martin O'Connor, now complains of an unsatisfactory trial before the Lord Chief Justice, the unsatisfactoriness being, as he asserts such as to warrant counsels' action of walking out of Court when the second action came on to be tried and leaving it to its fate. The position now is that Norman Birkett, K.C., is engaged upon defending the Lord Chief Justice against a somewhat severe criticism of his conduct of the trial in the Court below; and Lords Justices Scrutton, Greer and Sankey are principally occupied in adjudicating upon that controversy. Naturally, therefore, the Bar is much concerned as to the position and the progress of the appeal; and legally, I suppose, I am precluded from expressing any view upon a subject which is *sub judice*, as yet. I am not, however, I think precluded from expressing, with regard to the Lord Chief Justice, the appreciation which is universally felt as to the gifts of learning and rhetoric, as instanced in his recent pronouncements to the Dickens Society upon the merit and works and life of the author whom he, the Lord Chief Justice, had little hesitation in describing as our greatest of all. It was a wonderful address and it demonstrated once more the unique qualities of Lord Hewart's literary genius.

The Law Society's report upon the progress made in the work for poor litigants, under the Poor Persons Procedure provisions makes agreeable reading. We all share the ambition to rival, in our profession, the medical profession's gratuitous work for those unable to pay their fees; and our enthusiasm becomes none the less, indeed markedly the greater, when we observe that the medical profession tends more and more to be paid for its hospital work and less and less to provide hospitals' requirements by honorary surgeons and physicians as distinct from paid staff, whether resident or in charge of specialist departments on part-time terms. The centres, at which the poor are advised, and the cases, in which the poor are represented, gratuitously, seem to increase always in numbers. Most of the young men in Chambers (and all our own, I am glad to say) not only hold un-fee-d briefs habitually, with the undeniable advantage to themselves incidentally of practice in and getting accustomed to court-work; but they also heve regular hours at various centres where, in the evening they attend invariably and are at the service of poor persons who seek advice. There can be little or no personal advantage to be got out of that highly altruistic, and at times very exacting work; it is greatly to their credit that they do it; that the profession is proud of them is certain and that the work achieves a real success is proved by the assistance it now obtains in free services, both from the doctors when medical aid is required and from the press when the expedient of advertising has to be employed. The great motorists' organisation, the A.A. (which, having started as a scout for police traps, has now become very much of a public servant, and a useful public servant at that) renders aid to the good work; and even when photographs are required, a firm of legal photographers sees to their being provided gratis.

Yours ever,

INNER TEMPLAR.

"A Chairman of Quarter Sessions will hardly ever reserve a question of law, he will generally leave it to the jury."—Lord Darling.

Australian Notes.

By Wilfred Blacket, K.C.

Notes relating to the Law and the Profession in Australia will become a regular feature of this Journal. Our contributor, Mr. Wilfred Blacket, K.C., is the duthor of the recently published volume of legal reminiscences, "May It Please Your Honour."

The most gladsome of recent events is the accession of Mr. Justice Ferguson to the position of Acting Chief Justice, during the absence on leave of the Chief Justice, for he has worthily and strenuously won this high honour. The public generally join with all members of the legal profession in acclaiming his elevation. In his earlier life "Fergy" battled his way from journalism to the Bar in the persistent way that men of the name of "Ferguson" or "McPherson" are wont to do, and aided by ability and midnight oil soon won a reputation as a lawyer. Under the Statute Consolidation Commission he did splendid work, all Acts relating to Supreme Court Practice and Procedure, and Evidence being in his care, and his appointment to the Supreme Court Bench in 1912 followed almost as a matter of course. When His Honour publishes his reminiscences they will be a great public entertainment for his splendid budget of witty and altogether delightful stories, includes political and forensic men and happenings since the days when Parkes was Premier and Sir James Martin Chief Justice

The New South Wales Council of the Bar includes the Attorney-General, ex officio a member, five Kings Counsel, and fourteen "stuffs" elected annually by practising barristers. It does very useful work on behalf of the Bar and in particular pronounces upon matters of etiquette. In the Annual Statement, 1927-8, passed at the General Meeting held on the 11th March, 1929, one very important pronouncement appears. It deals with "spec" cases, and cases of misfortune in the words following: "Any pre-arrangement that fees or portions of fees paid to counsel are to be returned if disallowed on taxation is improper. Any practice of returning such fees is also improper. The fact that portion of a fee has been disallowed on taxation affords of itself no reason why the portion disallowed should be returned. Subject to these considerations the matter is one for counsel's discretion." It is obvious that the Council includes some good draftsmen for no arrangement of words could more definitely denounce the barrister who offers to do "spec" work nor more effectively protect the barrister who "waits at the gate of mercy."

Another determination of the Council may also be stated. It is as follows: "A, a barrister, appeared before the Federal Court of Marine Enquiry instructed by the Commonwealth Crown Solicitor to assist the Court. The Court found that one vessel was to blame for the collision which was the subject of the enquiry. A was later offered a brief on behalf of one of the vessels in proceedings in Admiralty for damages. The Council was of opinion that A was justified in accepting the brief."

And while on the subject of etiquette it may be mentioned that the question which has recently arisen in England as to whether counsel is within his right

in reminding a jury, in a capital case, that a conviction may be followed by the execution of the prisoner, has never, to my knowledge, been raised in New South Wales. In fact in earlier days jurors rather expected something "fine and fancy" from counsel regarding the unpleasantness of being hanged. "You wouldn't like to be throttled yourself, would you?" was Jack Want's way of putting it. George Reid was more elaborate. "Twirling in the air at the end of a greased rope," was merely an insignificant portion of his vivid description. These appeals to timidity are never made here now, partly because jurors resent this kind of thing, and partly because hanging has gone out of fashion. The last man who was seriously ordered to be hanged had his sentence commuted to eighteen months' imprisonment. Quite probably he is now once again a free citizen, for, as it has been very truly said, "it takes a lot of influence to keep a man in gaol in New South Wales."

In Equity this week in the case of *Lapin v. Heavener' Abigail, and others*, Long Innes, J., had to decide some very complicated questions of fact and law, but the only one worthy of mention was the question whether Mr. E. R. Abigail, who claimed £6,500 under a mortgage was a "money-lender" within the meaning of the relevant Act. It was proved that he had lent his own money in 71 transactions within a few years, the total of these loans being £89,000. Upon this issue His Honour said: "Although at first sight this series of transactions would appear to satisfy the most exacting requirements as to proof of the fact that such a business was being carried on, I am unable to do more than hold that while I am not satisfied that the defendant was not at the material times carrying on two businesses, that of a solicitor and that of a money-lender, I am not satisfied that he was and, therefore, I must hold that the onus of proof has not been discharged that he was an unregistered money-lender." The decision, therefore, is upon the facts of that case only, and asserts no rule of law applicable to other cases. It may, however, be of interest to observe that Mr. Ernest E. Abigail (whose evidence that many of these advances were made in order to give the borrower "a start in life" was fully accepted by His Honour) is one of our ablest advocates in criminal cases and has a very large general practice. Out of the profits of his earliest years of practice he built a Sunday School at Bondi, and on every Sunday afternoon plays the harmonium at the Children's Service.

Let a specimen of the habitual wit of Dr. Brissenden, K.C., conclude this instalment of these notes. He was appearing before the Full Bench of six Judges of the High Court on an appeal from a decision of Higgins, J. As he began his argument Mr. Justice Powers said, "I think I ought to tell you, Dr. Brissenden, that I conferred with Mr. Justice Higgins before he gave his decision, and formed a very strong opinion on the matter. I don't know whether you would like to say anything about that." "Oh no, your Honour," said "Briss," "except to inform the Court that I am one down and five to play."

Corrigendum.

For "Number of Members of Council of the New Zealand Law Society," ante p. 99, read "Number of Members of Councils of District Law Societies."

Taranaki District Law Society.

Annual Meeting.

The annual meeting of the Taranaki District Law Society, the membership of which is now seventy-eight, was held at the Law Library, New Plymouth, on the 23rd April. The Annual Report refers to the First Legal Conference, and states that pursuant to a decision that the Conference should be held annually in different centres, the New Zealand Law Society afforded the Taranaki Society the opportunity of extending an invitation for the 1929 Conference; but owing, however, to the fact that an increased number of delegates was expected and to the limited accommodation available in New Plymouth the Council felt that the time had not arrived when it could, in justice to the delegates, invite them to meet in Taranaki. The Conference was accordingly held in Wellington. Reference is made also to the Solicitors' Guarantee Bill, and to Government interference with private enterprise. Paragraphs 11, 12, and 13 of the Report contain much of general interest and read as follows:—

"11. Service of Summonses by Post.—The Council has repeatedly brought before the New Zealand Society the hardships imposed on the public and the profession as a result of the circular purporting to make the permissive provisions of the Magistrates' Court Act mandatory, but despite repeated protests by the New Zealand Council, the instructions have not so far been withdrawn, the ex-Attorney-General having apparently failed to appreciate the position. In the great majority of cases practitioners are glad to avail themselves of the method of service by post, but the instructions issued by the Justice Department have rendered it exceedingly difficult to obtain personal service in those cases where it is necessary or expedient to adopt that method. Your Council, in common with other District Councils, has urged that the plaintiff should have the right to elect which form of service should be employed in particular cases, without Departal interference. A Committee consisting of Mr. H. F. O'Leary and your delegate has now been set up by the New Zealand Council to interview the Under-Secretary with a view to having the position under the Act restored.

"12. Other representations.—Your Council has made representations on the following matters, amongst others, during the year:—

"(a) The lack of accommodation for the public in the Land Transfer Office at New Plymouth.

"(b) The anomalous position with regard to stamp duty on Transfers of Mortgages.

"(c) The methods employed by police officers in obtaining statements by accused persons and in conducting police cases.

"(d) The revision of the scale of Sheriff's charges for conducting sales.

"(e) The protection of mortgagees under policies of insurance over mortgaged premises which become unoccupied without the knowledge of the mortgagee.

"(f) The appointment of judges from the actively practising bar.

"(g) The unreasonable charges for copies of Magistrates' notes of evidence.

"(h) The inadequacy of the present Audit regulations.

" (i) The inadequacy of the charges allowed under the new scale for preparation of certain classes of leases.

" 13. Scale of Charges for Probate and Administration.—As instructed by the last Annual Meeting, the Council took into consideration the question of adopting a scale of charges for Probate and Administration. The matter was referred to a special committee which, after obtaining information from other districts, reported that, in its opinion, the adoption of a set scale was impracticable, and the Council resolved accordingly."

The following officers were elected for the ensuing year: President, Mr. G. M. Spence; Vice-President, Mr. R. V. Kay; Honorary Treasurer, Mr. T. P. Anderson; Council, Messrs. Alfred Coleman, R. H. Quilliam, J. H. Sheat, and L. A. Taylor; Honorary Auditor, Mr. W. H. Freeman; Delegate to the New Zealand Society, Mr. G. M. Spence.

Legal Literature.

The Magistrates' Court Practice and the Imprisonment for Debt Limitation Act, 1908 (and its Amendments), with Rules, Regulations, and Forms.

By H. Jenner Wily.
(Pp. xxi, 416, lvi: Butterworth & Co. (Aus.) Ltd., and Whitcombe & Tombs, Ltd.)

A perusal of the book justifies the hope, expressed in the author's preface, that it will assist the legal profession by supplying a ready and accurate reference to the practice of our Magistrates' Courts. We have " tried it out " on many and various points that we have had occasion to devote special attention to in the past and find it to be full and accurate in the appropriate references. Mr. Wily has divided his subject-matter into twelve divisions and a table of contents sets these out with details of the contents of each division. There follows a table of the cases referred to in the text and this table embraces just on 900 decisions.

The body of the book is, in form, an annotated statute, that statute being the (Consolidated) Magistrates' Court Act of 1928. Regulations and forms follow their appropriate sections and to each is appended the author's notes and references to the relevant New Zealand and English cases. In some cases, parts of other Statutes are incorporated, e.g., Sections 3 & 4 of the Inferior Courts Procedure Act, 1909, appear in Division II " Jurisdiction " under the sub-heading " Waiver of Irregularities." By use of various distinctive forms of type these component parts stand out clearly and it is remarkably easy to follow the author's scheme, and to find and trace any part of the whole subject matter.

The indexing is excellent and deserves special mention. There is an Index to Regulations (distinguishing between Regulations under the Magistrates' Courts Act and those under the Imprisonment for Debt Limitation Act), an Index to Forms and a General Index. The latter is very complete and has been intelligently compiled; for instance, the heading " Execution," with its sub-headings occupies one and a-third pages of the index; " Service " occupies over a page. The main part of the book closes with 54 precedents for Statements of Claim and these have annexed, where such guidance exists, references to statutes and decided cases. The Imprisonment for Debt Limitation Act, 1908, is incorporated in the book, its treatment being similar to that accorded to the Magistrates' Court Act.

New Books and Publications.

The Rent and Mortgage Interest Restrictions Acts, 1920-25. Sixth Edition. By A. Safford. (Sweet & Maxwell Ltd.). Price 9/-.

Law and Practice in Relation to Infants. By D. A. Bicknell, LL.B. (Solicitors' Law Stationery Society). Price 18/-.

Clerk and Lindsell's Law of Torts. Eighth Edition. By W. A. Macfarlane and G. W. Wrangham. (Sweet & Maxwell, Ltd.). Price £2/10/-.

N. Z. Magistrates' Courts Practice and the Imprisonment for Debt Limitation Act, 1908, and its Amendments with Rules, Regulations and Forms. By H. Jenner Wily. (Butterworth & Co. (Aus.) Ltd. and Whitcombe & Tombs Ltd.). Price 60/-.

Stone's Justices Manual. Sixty-first Edition, 1929. (Butterworth & Co. (Aus.) Ltd.). Price 43/-.

Correspondence.

The Editor,
" N.Z. Law Journal."

Sir,

re Native Trustee and Solicitors' Fees.

A matter having indirect bearing upon this matter and a more direct bearing upon Rural Credits business, has lately occurred in England—*vide* " Law Times " of February 2nd, and 9th last.

At a Special General Meeting of the Law Society, England, held on January 25th last, a practitioner asked whether the Society had considered that, under the Agricultural Credits Act, 1928, it was proposed to have all the legal business done in London by a staff. The President answered that it was thought impossible to do anything, but that perhaps something might be done. The " Law Times " of the 9th February, contains a letter from the practitioner who had raised the matter, intimating that the legal work in relation to securities was to be spread out among the solicitors. The writer also remarks that the practice of corporations and others carrying on a solicitor's practice and taking fees therefor should be stopped.

I understand, Sir, that the business of the various Intermediate Credits Associations is being done by a certain few Solicitors. All the other State Institutions allow their securities to be prepared by the Solicitor offering the security. It is suggested that the same rule should govern the Credits Associations.—I am, etc.,

G. Chuck.

Hawera.

[The above letter has been referred to the Commissioner of Rural Intermediate Credit, Mr. J. W. Macdonald, who points out that rural intermediate credit associations are not State institutions but are limited liability companies registered under the Companies Act and governed by their own directors, and that, therefore, the appointment of Solicitors to the associations is in the hands of the directors in each case.—Ed. N.Z.L.J.]

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"The personal liberty of every citizen in England ultimately depends on two things: (1) the wisdom of Parliament in making laws; and (2) the vigilance of the Courts of Law in securing obedience to those laws.
—Sir John Marriott.

Vol. V. Tuesday, May 28, 1929. No. 7

Police Powers and Procedure.

Under the above heading we publish elsewhere the first portion of a summary of the Report of the Royal Commission on Police Powers and Procedure which was presented in the last days of March. The Commission was presided over by Lord Lee of Fareham. The Report is unanimous and that fact, considering the different viewpoints one might have expected its various members to take, adds to its importance. The conclusions of the Commission are sure to receive careful attention in all countries where the British system of legal procedure and police administration prevail and its recommendations will probably in all such countries be at least in part adopted.

At the Legal Conference held in Wellington at Easter, the procedure adopted by the Police in obtaining statements from accused persons was the subject of a remit and, despite some small opposition on the ground that remedy for the evils complained of could not be effectively obtained by regulation, a resolution was passed to the effect that the Minister of Justice should set up a Committee to enquire into the alleged abuses and the steps to be taken to prevent their continuance if the charges were found to be true. The report of the Royal Commission had not at this time reached New Zealand, but it was recognised that the Minister of Justice would avail himself of its findings before deciding whether a Committee was necessary and that such a Committee, if set up, would find the conclusions reached and recommendations made so general in principle and application where a similar administration existed that but little evidence beyond that of Commissioners of Police and leading practitioners in New Zealand would be required.

It is very gratifying to this Journal to find the Report stressing how necessary it is that the difficulties the Police have to contend with in the investigation of criminal offences should not be lost sight of in the perhaps more attractive task of exposing methods said to savour of third degree procedure. At the time of the Savidge case, when Police methods were being severely criticised, we expressed a hope that our traditional respect and even affection for the Police would be maintained and urged that efforts should be made not to destroy but to foster such ties. It is pleasing, therefore, to find the Commission recommending "not a multiplication of regulations to hamper a constable," but "a sound grounding in the spirit and tradition of his office and in the general knowledge essential for the performance of his normal duties." If this course is adopted and members of the public adopt the advice of the Commission and, rather than voice their dissatisfaction whenever the smallest mistake or error of judgment is committed by any individual member of a large force, give more weight than they do to the trials and perplexities which beset the ordinary constable, the former happy relations existing between public and police will be restored. With the general conclusion of the Commission that it has formed a very favourable opinion of its conduct, tone, and efficiency there will be general public agreement at Home and also, we believe, with the comment of the English Law Journal, that "the marvel is that the average constable is able to perform all the duties which are cast upon him and remain as he does, unperturbed and cheerful." In our opinion if a similar inquiry is made in New Zealand the same favourable conclusions will be reached.

Though, however, the general conclusion of the Commission is in favour of the Police Force it makes many specific recommendations designed to safeguard the subject accused of a crime or from whom information is sought in regard to a crime committed. Those recommendations, relating as they do to the warnings to be given before questions are put, the taking of statements, and the presence of a solicitor or friend to assist the accused or person interrogated, deserve the most careful consideration by those responsible for the conduct of any police force. The advisability of adopting all or any of such recommendations is to be determined only after due regard is paid to the rights and liberties of the subject and the interests of Justice: but, while the rights and liberties of the subject can be easily defined, the extent to which a subject can be harried in the investigation of a crime is a practical question which will not be best answered by too many formal rules framed to meet the circumstances of a police and public mutually distrustful. The public are not generally aware that at Common Law a policeman is only a person paid to perform, as a matter of duty, acts which, if he were so minded, he might have done voluntarily. Recognition of that fact might, however, convince the public that the police are, as the Commission observes, exceptionally dependent upon the sympathy of the general public if they are to carry out their functions properly, and induce them to believe that it is wiser to trust the police with liberal powers than to hamper the investigation of crime by too many restrictions on the activities of its detectors.

Not the least valuable feature of the report is the finding of the Commission as to the effect on police and public of the enforcement of obsolete laws, or laws manifestly out of harmony with public opinion. They find that the enforcement of such laws exposes the police to temptations and reacts upon their morale and efficiency. Police corruption where it exists, is mainly associated with the enforcement of such laws. If we in New Zealand know of such laws we should do well to ponder the view of the Commission that: "In our view a grave responsibility rests on those who create criminal offences which are not precisely or clearly defined or in respect of which the requisite evidence to support a conviction cannot be obtained by straightforward and unequivocal methods. It is also unfortunate that by reason of defects in the law the police should be put in a position in which they must exercise a discretion as to whether the law is to be observed or not, or as to the degree of strictness to be observed in its enforcement. Any contempt for, or laxity in relation to, the law tends to spread, and the respect for and observance of the law is correspondingly weakened."

Court of Appeal.

Herdman, A.C.J.
MacGregor, J.
Ostler, J.

March 22; May 6, 1929.
Wellington.

JAMES v. MABIN.

Practice—Striking out Pleadings—Misrepresentation—Banker—Branch Manager—Alleged Misrepresentations and Advice by Manager of Bank as to Financial Position of Company Inducing Plaintiff to Sign Guarantees—Money Paid to Bank to Obtain Release from Liability Under Guarantee Claimed as Damages from Manager—Fraud and Negligent Advice Alternatively Alleged—Question of Law as to Whether Statement of Claim Disclosed any Cause of Action—Question Raised Before Statement of Defence Filed—Facts Necessary to Support Allegations in Pleadings Deemed Proved Unless Admission to Contrary—Claim Struck Out Only Where Obvious That No Reasonable Cause of Action—Not Struck Out Merely Because No Express Allegation that Representations Were in Writing—Quaere Whether all Representations Made Were as to Credit or Ability of Company with a View to Enabling Company to Obtain Credit—Possibility that Negligent Advice Might be Proved—Lord Tenterden's Act, 19 Geo. IV., c. 14, Sec. 6.

Appeal from the decision of Adams, J., reported 4 N.Z.L.J. 248, upon a question of law ordered to be argued before the trial of the action. The facts sufficiently appear in the report of the judgment. The question of law was whether the statement of claim disclosed any legal cause of action against the defendant company, and was answered by Adams, J., in the negative. The learned Judge decided that the case relied upon by appellant consisted of a series of representations or assurances which came within Section 6 of the Statute of Frauds—Lord Tenterden's Act—and that, as in his opinion those representations or assurances were made orally, no action based upon them could succeed.

Murdoch and Doolan, for appellant.

Myers, K.C., and W. F. Ward, for respondent.

HERDMAN, J., delivering the judgment of the Court, said that upon the argument before the Court of Appeal counsel for respondent did not seek to entrench himself behind that statute or, if he did do so, abstained from placing any serious dependence upon it. He preferred to submit that it was definitely established by the statement of claim as it stood, that when appellant launched his action he had no case in that the sum of £2,500 claimed for damages, being the amount paid by the appellant to the bank in December, 1927, to secure his release from liability under his guarantees, was paid with full knowledge of the alleged fraud of the respondent and that if the allegations in the statement of claim were proved at the trial they would show that appellant paid this money with full knowledge of the fact that the guarantees under which it was claimed had been obtained by fraud and that, therefore, the payment of £2,500 was no more than a gratuitous contribution to an institution which, assuming the allegations in the statement of claim to be true, was barred by fraud from recovering the money at law. In other words, he argued that if appellant suffered any loss he alone was responsible for it. As a specimen of legal draftsmanship the statement of claim was an embarrassing and confused production, but reading it through with great care their Honours had been unable to discover any admission that when the sum mentioned was paid over appellant was aware of respondent's fraud. For the purposes of the present appeal their Honours had to consider the case as if appellant were able to give complete proof of the facts necessary to support his claim including, in the absence of any admission to the contrary, the fact that he discovered, after he had parted with his money, that he had been defrauded. Their Honours could find nothing in the statement of claim which was the equivalent of an admission that he was aware of respondent's fraud when he paid the bank £2,500, nor could an inference that he possessed such knowledge be drawn from the allegations contained in the claim. It followed, therefore, that the point taken by counsel for respondent failed.

Their Honours then proceeded to consider the principles upon which a matter such as the present should be considered. No statement of defence had been filed. No point of law had, therefore, been raised by respondent, the defendant in the Court below, in his pleadings. If the action had been brought in England, respondent might have raised the point of law by his pleadings as provided by Rule 2 of Order XXV, or he might have applied to strike out the statement of claim under Rule 4 of Order XXV. In **Hubbuck and Sons v. Wilkinson, Heywood and Clark, Ltd.,** (1899) 1 Q.B. 86, 91, Lindley, M.R., referring to those two courses said "The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression 'reasonable cause of action' in rule 4, shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases." Their Honours referred also to the **Annual Practice,** 1929, p. 418. The power created by Rule 4 would only be exercised where the case was beyond doubt. The Court must be satisfied that there was no reasonable cause of action. In **Fraser v. Pape,** 91 L.T. 340, 341, where an application was made to strike out a statement of claim upon the ground that there was nothing in the claim or in the particulars to indicate the existance of any memorandum in writing to satisfy the requirements of Section 4 of the Statute of Frauds, Collins, M.R., refused to interfere and stop the action. In **Annual Practice,** 1929, p. 419, it was said that "where the statement of claim in its present form discloses no cause of action because some material averment had been omitted, the Court, while striking out the pleading, will not dismiss the action, but give the plaintiff leave to amend." As no defence had been filed and as, therefore, no point of law had been raised by any pleading, the question their Honours had to decide was whether it was plain and obvious that no cause of action had been disclosed? Their Honours referred to **Worthington and Co. Ltd. v. Belton,** 18 T.L.R. 438, where, upon an application to strike out a claim under Order XXV, Rule 4, the question for consideration was whether the statement of claim alleged a representation as to the credit, ability, trade or dealings of another person within Lord Tenterden's Act, the representation being alleged to have been made verbally, it was said that Lord Tenterden's Act was an answer to the action as the representations were alleged to have been made verbally. Romer, L.J., said that he had to ask whether Lord Tenterden's Act was obviously an answer to the statement of claim, and said that even on the strictest view, it was open to doubt whether Lord Tenterden's Act applied. Following the principles laid down by Chitty, J., in **Republic of Peru v. Peruvian Guano Co.,** 36 Ch. 489, 496, that under the rule the pleading would not be struck out unless it were demurrable and something worse than demurrable, he declined to strike out the statement of claim. Their Honours were unable to say that all the representations in the statement of claim which might come within Lord Tenterden's Act were not in writing. If any of the representations relied upon were in writing, no doubt the statement of claim should have said so, but their Honours knew of no authority which required them to strike out a statement of claim because, in a case within Lord Tenterden's Act, it was not specifically and expressly pleaded that the representation was in writing. In paragraph 7 of the statement of claim there was a statement that information was supplied to the appellant but as to whether or not the information was supplied in writing the paragraph was silent. In such circumstances their Honours did not think that they had any right to conclude that no writing existed The same observation might be made about paragraph 11, which referred to a series of representations being made over a period of eleven months, and about paragraph 15. From the language used in those paragraphs their Honours could draw no certain inference that representations or assurances were not made in writing and they knew of no reason which obliged them to draw such an inference from the clause in its present form. Their Honours had to presume at that stage of the litigation, in the absence of any admission in the claim to the contrary, that appellant was armed with all the proof necessary and proper to support his allegations. If that proof were not forthcoming at the trial then the course followed in **Haslock v. Fergusson,** 7 A. and E., 86, could be taken. The Court might refuse to admit parol evidence and dismiss the action.

Their Honours were by no means sure that all the representations relied upon by appellant were within Lord Tenter-

den's Act. In paragraph 10, for instance, there was a representation about the solvency and financial position of certain timber merchants who were doing business with Rundle and Co. Incidentally, that might be a representation about the credit and ability of Rundle and Co., but it was also a representation about persons other than Rundle and Co. Their Honours doubted whether it was to be inferred with certainty from the language used in clause 10 that any representation or assurance was made with the intent that Rundle and Co. might obtain more money or extended credit or that they were made with the object of persuading appellant to continue to stand behind Rundle and Co. The clause showed that the financial position of the company was discussed and that, in the course of an interview, an optimistic account was given by respondent of Rundle's financial position. He might have intended to bolster up the company's financial position so that it could get more credit, or that might not have been his intention at the time. Such a question a jury would have to decide on proof of all relevant facts. Then again, the appellant rested his action upon two grounds. Not only did he allege fraud, but he also based a claim upon negligent advice. It was possible to extract from the confused provisions of the statement of claim an intention to rely upon two causes of action so, if one failed, and an intelligible cause of action remained, the appellant might rely upon the one that survived. It was true that to succeed upon the ground of negligent advice appellant must prove that certain relations and circumstances existed which imposed upon respondent a special duty to take care when tendering advice. Between the two the relation of banker and customer did not subsist. Appellant was a surety. The statement of claim stated that he assumed that role upon the advice and at the request of respondent, and for accepting that responsibility he was to be remunerated. But, as it was put in **Royal Bank of Scotland v. Greenshields,** (1914) S.C. 259, 266, 267, "a bank-agent is entitled to assume that an intending guarantor has made himself fully acquainted with the financial position of the customer whose debt he is about to guarantee. And the bank-agent is not bound to make any disclosure whatever regarding the customer's indebtedness to the bank. But if he does, either voluntarily or in answer to a question put, make any representation which turns out to be erroneous or untrue, then the guarantor who has relied upon that statement is entitled to liberation from his obligation." In the present case appellant was not claiming to evade his responsibilities as a surety but asked for damages. It was alleged that respondent knowing all the circumstances negligently allowed appellant to assume substantial liabilities. Not only that, but he was charged with negligently tendering advice and giving reckless answers to inquiries made of him. Their Honours wished it to be clearly understood that they refrained from deciding, in the present proceeding, that the statement of claim contained enough material to constitute a claim based upon an allegation that respondent in breach of duty tendered negligent advice. **Banbury v. Bank of Montreal,** (1918), A.C. 626, was an authority for the proposition that if a banker specially took it upon himself to advise a customer as to investments, although gratuitously, he would be liable in damages if he acted negligently. But, as already mentioned, in the present case appellant was not a customer of the bank. It would seem that no special relation between himself and respondent which imposed a duty to exercise care existed and, as their Honours understood the authorities, they went no further than to declare that if questions were asked of him by the guarantor, respondent was bound to tell the truth and that if, in such circumstances, he did not tell the truth the surety, upon discovering the duplicity, was free to repudiate the obligation created by his guarantees. However, appellant might be able to submit evidence and contend at the trial that facts had been proved which showed that respondent committed some breach of duty which entitled him to relief. Without expressing any opinion one way or another on the claim for relief on that ground, their Honours stated in conclusion that an examination of the statement of claim had failed to satisfy them that any plain, obvious reason existed for interfering with the litigation between the parties at that stage.

Appeal allowed.

Solicitor for appellant: **Hannan and Seddon,** Greymouth.

Solicitors for respondent: **Brandon, Ward and Hislop,** Wellington.

Supreme Court.

Blair, J. April 22, 23, 1929.
Auckland.

AH DONG v. SKINNER.
MOI YOU FONG v. ARTHUR SKINNER.

Summary Conviction—Appeal—Appeal from Conviction by Magistrate after Pleading Guilty—Quaere Whether any Appeal Lies from Plea of Guilty—Counsel Entitled to Plead Guilty on Behalf of Accused Person Charged with Offence which may be Tried Summarily—Appeal Dismissed.

Appeal by two Chinese, Ah Dong and Moi You Fong, both of whom pleaded guilty in the Magistrates' Court at Tauranga, one to being in possession of prepared opium, and the other to smoking opium.

Schramm for appellants.
Meredith for respondent.

BLAIR, J., in an oral judgment, said that the case was unusual in that it was an appeal from a plea of guilty. By reason of the attitude taken by the Crown Solicitor, the question did not arise, but His Honour very much doubted whether there was any right of appeal when the parties had pleaded guilty. In **R. v. Worth,** 1 N.Z.L.R.S.C. 399, a judgment of Richmond, J., an appeal was permitted after a plea of guilty, but the case had peculiar features in it, and the judgment was based on the fact that the plea of guilty was really not a plea of guilty at all. If that fact could in the present case be established, a general appeal might lie. If it were established that no plea were entered, or that there was mistake, then the appeal would lie, because it would really be an appeal from a plea of not guilty. But His Honour was quite certain that the Chinamen knew what they were doing, and for their own particular reasons desired that a plea of guilty be entered. That being the case His Honour did not think that the Court could treat the plea as virtually one of not guilty.

There remained the question whether it was essential that a plea in a Court of summary jurisdiction must be given by the accused himself. It was contended that it was not open to the Court to accept a plea from counsel representing a person charged with an offence triable summarily. It was a very common practice in Summary Courts and there was to His Honour's mind no doubt that a plea could be validly given by counsel on behalf of an accused person charged with an offence triable summarily. There was authority for that proposition. See **Ex parte Long,** 74 J.P. 40, and **R. v. Thompson,** (1909) 2 K.B. 614. In the present case it appeared that counsel was undoubtedly authorised to plead on behalf of the appellants. Moreover on the facts Ah Dong was clearly guilty, and although the case against the other accused, without his admission of guilt, was not a strong one, there was evidence on which he could have been convicted, even if he had not pleaded guilty.

Appeal dismissed.

Solicitor for appellants: **F. C. Schramm,** Auckland.
Solicitors for respondent: **Meredith, Hubble and Ward,** Auckland.

Smith, J. October 17, 1928; March 12, 1929.
Auckland.

IN RE McMILLIN.

Will—Construction—Forfeiture—Bequest of Residue Upon Trust for Son and Daughter Equally—Son's Share to be Held Upon Trust to Pay Income to Son for Life or Until He Attempts to Deprive Himself or is Deprived by Bankruptcy from Personally Receiving or Being Entitled to Receive Same, and Then In Trust for the Children of Such Son—Provision that if Son Deprived of Income from any Cause Whatever, or on Death of such Son, Wife Entitled to Receive Such Income Provided She Maintains Educates and Brings Up Children—Share of Child of Son Being Male to Vest on Attaining Twenty-one or Being Female Attaining Such Age or Marrying with the

Consent of Her Parent or Guardian—Provision that Decision of Trustee as to Whether Son Deprived of Personal Benefits to be Final—Authority Given by Son Authorising Solicitor to Pay Income to Wife—Notice of Wife's Authority to Receive Income Subsequently Given to Trustees—Authorities to Wife to Receive Income Not Assignments and therefore Not Sufficient to Cause Forfeiture of Son's Interest—Son Subsequently Adjudicated Bankrupt—Interest of Son Held Forfeited Upon Bankruptcy—Class of Children Entitled to Take Fixed at Date of Forfeiture and Not Postponed Until Death of Son—Children Born After Forfeiture Not Entitled to Share in Capital or Income—No Provision in Will Extending Class—Rule of Convenience that Class Not Capable of Increase Once Any Child of Such Class Entitled to Payment Applied—Upon Forfeiture Son's Wife Entitled to Income of Shares of Children Subject to Maintenance and Education of Children Until Vesting of Share of Each Child.

Originating Summons to determine certain questions arising out of the will of Noble McMillin, deceased, who died on 26th March, 1917. After making a bequest of his personal effects to his son, R. N. McMillin, the testator by his will gave the remainder of his real and personal estate upon trust after conversion for division equally between his son, R. N. McMillin, and his daughter, R. E. Grayson. The testator declared, however, that the trustee under the will should hold the share and interest of his son, R. N. McMillin, "upon trust to invest the same and to pay the income resulting therefrom to my said son during his life or for such period as he shall not attempt to deprive himself or as he shall not be deprived by bankruptcy or otherwise from personally receiving or being personally entitled to receive the same for his own absolute use and benefit and so also that he shall not have any right or power to anticipate same and from and after the death of my said son or his being deprived of the actual personal benefit of the said income (whichever event shall first happen) then upon trust for the child or children of my said son and if more than one in equal shares absolutely declaring, however, that should my said son be deprived from any cause whatever of the said income then that his wife shall be entitled to receive same provided she shall maintain, educate and bring up my son's children to the satisfaction of my trustee and declaring further that on the death of my said son the said income shall be paid to his widow subject to the aforesaid conditions as to the upbringing of my said son's children and declaring further the receipt of my said son or of my said son's wife or widow shall be an absolute discharge to my said trustee for any moneys thereby purported to have been paid and received and declaring further that the share or shares to which any minor shall be entitled shall vest and become payable on such minor (being male) attaining the age of twenty-one years or (being female) attaining that age or marrying with the consent of her parent or guardian and declaring further that the provisions of the will in favour of my said son are made in his own interests and that if he shall do or permit anything whereby he may be or become deprived of the actual personal enjoyment of the benefits I desire to confer upon him then that the trusts resulting shall immediately become operative and take effect and that the decision of my trustee as to whether my said son has been deprived of the actual personal benefits of the trusts in his favour herein contained shall be absolutely final and conclusive and declaring lastly that nothing herein contained shall deprive any child of my said son from becoming beneficially entitled to his or her share under this my will beyond the death of my said son or such child attaining the age of twenty-one years subsequent thereto." Probate was granted to the executor named in the will on 17th April, 1917, and he continued in office until 25th February, 1927, since which date the Public Trustee had administered the estate. The testator left him surviving his son, R. N. McMillin, his son's wife, E. M. McMillin, and their four infant children. A fifth child was born to the son and his wife on 26th May, 1917. These were all defendants. The son's eldest child, Mabel, attained her majority on 10th February, 1918, and his second child, Robert, reached 21 on 5th January, 1927. The remaining children were minors. The share of income to which R. N. McMillin was entitled under the will was at first paid to him. On 29th June, 1921, however, the son gave an authority to Mr. T. B. Crump, a solicitor, to pay to E. M. McMillin, his wife, the nett balances of revenue received or to be from time to time received from the trustee under his father's will. The authority was stated to be the irrevocable, the intention being "that my wife shall hereafter draw the above revenue subject to any proper charges thereon or deductions therefrom in the interests of herself, myself, and our children." That authority was not notified to the executor of the will until June, 1922, when the son signed a second letter to the trustee, Quin, authorising such trustee to pay all income to his wife for the future as he recognised that this course was in the interests of the family. This document was sent to the trustee, Quin, who thereafter, during his trusteeship, paid over the son's share of the income to Mr. Crump, on behalf of E. M. McMillin. On 21st July, 1922, the defendant M. M. E. Cleaver (then McMillin), being over 21 years of age, assigned to her mother E. M. McMillin, all her share and interest in the residuary estate under the will, to secure payment of the sum of £200, further advances and interest, subject to a prior charge of £200 to the trustee, Quin. The testator's son R. N. McMillin was adjudicated bankrupt on 9th January, 1923, and was still an undischarged bankrupt at the date of these proceedings. By submortgage dated 22nd December, 1923, E. M. McMillin assigned to Mr. Crump her estate and interest under the mortgage of 21st July, 1922, from her daughter to herself, to secure payment on demand of the principal sum, further advances and interest. On 29th July, 1927, following the appointment of the Public Trustee as administrator, Mr. Crump called up the moneys owing under the securities and later requested the Public Trustee to pay to him the principal of the share or interest of the daughter M. M. E. Cleaver in the estate, and all income payable in respect thereof. The Public Trustee took out an originating summons; the questions raised in the summons appear sufficiently in the report of the judgment

Northcroft for Public Trustee and unborn children of R. N. McMillin and his wife.

Leary for R. N. McMillin.

Burt for E. M. McMillin.

Richmond for T. B. Crump, M. M. E. Cleaver, and R. N. McMillin, Junior.

SMITH, J., said that the trustee had submitted the question to the Court as to whether deprivation had taken effect upon bankruptcy, but the will gave the trustee power to make a final decision. His Honour proposed to indicate only the time at which he thought the trustee should decide when the deprivation of the son's interest took place. The words "attempt to deprive" related only to the income of the son's share and not to the gift over of the corpus, but even so, they involved an intention "to deprive." In His Honour's opinion, the testator intended that the gift over of the corpus might take place either by reason of an act of the son or of an act *in invitum* of the son. The essential event was to be the doing or permitting of some act by which the son was deprived, or by which he might, at the will of another, be or become deprived of the actual personal enjoyment of the income. The words "may be or become deprived" were intended to add something to what had gone before: compare **In re Loftus-Otway, Otway v. Otway,** (1895) 2 Ch. 235. There were three events which might be alleged as constituting a forfeiture. The first letter of 29th June, 1922, was expressed to be irrevocable. If it were an assignment, its mere non-communication to the trustee until June, 1922, would not prevent it from being an assignment under which the title of the assignee was complete against the assignor: **Gorringe v. Irwell India Rubber Works,** 34 Ch. D. 128. Mr. Crump's affidavit showed, however, that the first letter was not intended to be a final deprivation of the son's control of the income. His Honour held that it did not operate as such. Mr. Richmond relied mainly on the second letter of 13th June, 1922, as constituting an assignment sufficient to work a forfeiture of the son's interest at that date. The burden of proof lay on those who asserted that a forfeiture had taken place: **Cox v. Rockett,** 35 Beav. 48. An authority to receive income which was given *bona fide* was not of itself sufficient to cause a forfeiture dependent on an act of alienation: **Avison v. Holmes,** 1 J. & H. 530. On the other hand, the effective assignment of the right to the income would involve loss of the personal benefit of the income. The question in every case was one of intention: **Smith v. Perpetual Trustee Co. Ltd.,** 11 C.L.R. 148. His Honour adopted the view expressed by Higgins, J., in that case at p. 167, and said that he did not think that the letters of authority from the son to his wife were intended by him to do more than appoint her his agent to receive the income and disburse it, on his behalf, for the benefit of his family, including both himself and his wife. The authority commenced with the words, "recognising that it is in the interests of my family." The alleged assignment did not purport to transfer all the son's right, title and interest in the fund and in the income arising therefrom; and in His Honour's opinion the absolute control of the income referred to did not amount to such. An irrevocable request and authority to pay was unnecessary if the document operated as an assignment, for by such a contract the property would have vested in the wife. In His Honour's opinion the document did not oper-

ate as an assignment. Nor was it to be regarded as an irrevocable power of attorney, for the authority was not supported by consideration nor made by deed. His Honour thought, therefore, that it was not shown that the authority to the wife operated or was capable of operating at the will of another as a forfeiture of the son's interest under the will.

There was no doubt, however, that the bankruptcy would so operate, as it was a specified event. Moreover, His Honour thought that an act of bankruptcy by reason of which the son might become deprived of the benefit conferred upon him might be capable of working a forfeiture: **In re Loftus-Otway, Otway v. Otway** (*cit. sup.*). The papers filed did not show whether the son was adjudicated upon his own petition, or upon a creditor's petition. The next question was whether the bankruptcy or act of bankruptcy did operate as a forfeiture. Where income was payable to a bankrupt at the time of the bankruptcy or act of bankruptcy, the forfeiture clause would take effect: **In re Forder,** (1927) 2 Ch. 291. As that was the position in the present case His Honour expressed the opinion that the forfeiture clause took effect upon the occasion of the act of bankruptcy or of the date of adjudication itself as the case might be.

His Honour was of opinion that upon the occurrence of the forfeiture, the corpus of the son's share was to be held upon trust for his child or children, and if more than one in equal shares. That was admitted by counsel for the respective parties. The next matter was as to the class of children entitled to take. The gift over of the corpus was expressed by the testator to take effect either (a) upon the son's death, or (b) upon his deprivation, whichever should first happen. The will contained the following declarations as to the destination of the income after the gift over had taken effect: (1) "Declaring however that should my said son be deprived from any cause whatever of the said income then that his wife shall be entitled to receive same provided she shall maintain educate and bring up my son's children to the satisfaction of my trustee." (2) "Declaring further that on the death of my said son the said income shall be paid to his widow subject to the aforesaid conditions as to the upbringing of my said son's children." There followed the third declaration as to the receipt of the income. (3) "Declaring further that the receipt of my said son or of my said son's wife or widow shall be an absolute discharge to my said trustee for any moneys thereby purported to have been paid and received."

Viewing the will as a whole, His Honour was of opinion that the proper construction of the first two declarations was that each applied only upon the occurrence of the event to which it referred. The first applied only upon the gift over taking effect upon the deprivation of the son; the second only if it took effect upon the death of the son. The third declaration as to receipts applied respectively to the son, during his enjoyment of the income; to the wife, if she received income for the maintenance, education and up-bringing of the children upon the occurrence of a gift over caused by a forfeiture during the life of the son; and to the widow if she received income for the purposes stated upon a gift over occurring by reason of the son's death. It followed, His Honour thought, from that construction of the declarations that the use of the word "widow" in the second declaration could not be called in aid to determine whether children, e.g., of a second wife, were to be included in the class taking upon a gift over occurring by reason of a forfeiture during the life of the son. The gift over was not in the usual form. Frequently the trust was to pay the income to the son during his life and to direct protection of the share of the son in the event of his bankruptcy or insolvency, and to direct that the corpus of the son's share should be held in trust for all of his children living at his death. In **Jarman on Wills,** 6th Edn., 1678, it was said that the usual way is to give a determinable life interest to A with a gift to the children on his death and a declaration that in the event of his life interest being determined during his life the income shall be applied in the same manner as if he were dead. A clause in that form was construed in **In re Bedson's Trusts,** 28 Ch. D. 523, where it was held by the Court of Appeal that the period of distribution was not the bankruptcy but the death of the son, although in arriving at that result the Court was obliged to pass by the testator's express declaration that on the bankruptcy of the son the capital fund was to go as if he were dead. Where the will provided that income was to be paid to the son until he should become bankrupt and then effected a gift over to children who attained 21 years of age, the rule of construction appeared to be laid down in **In re Smith,** 2 J. & H. 594. The rule was that if the deprivation of the life interest occurred on bankruptcy and there was no extension of the class of children let in, the class was fixed at the time of the bankruptcy if there was then in existence a child who had attained 21; if, however, the first child to attain 21 did so after the forfeiture, children born in the meantime were included, subject to their attaining 21. See also **Re Aylwin's Trusts,** L.R 16 Eq. 585, but the gift over there was to children without restriction as to age, **28 Halsbury's Laws of England,** Par. 1340. The question as to whether the class had been extended depended upon the true construction of the will. His Honour had indicated that the word "widow" in the second declaration set out above was not of assistance in this matter. The testator had declared, however, "that the share or shares which any minor shall be entitled to shall vest and become payable on such minor (being male) attaining the age of twenty-one years or (being female) attaining that age or marrying with the consent of her parent or guardian." That clause meant on the face of it that any minor who attained 21 should be entitled to payment of his or her share. It was, therefore, entirely consistent with the closing of the class in accordance with the rule established by **In re Smith** (*cit. sup.*). The only indication to the contrary was the last declaration, namely, "and declaring lastly that nothing herein contained shall deprive any child of my said son from becoming beneficially entitled to his or her share under this my will beyond the death of my said son or such child attaining the age of twenty-one years subsequent thereto." In His Honour's opinion, that last declaration applied only to the case of the gift over taking effect upon the death of the son. It was a cautionary clause directed against a perpetuity. It did not apply to the case which had occurred. In His Honour's opinion, therefore, the will did not extend the class to take on bankruptcy, but confirmed the view that the class was fixed at the time of the bankruptcy. Dealing with the matter from the point of view of authority, His Honour thought that the case of **Public Trustee v. Gibson,** 32 N.Z.L.R. 777, did not apply to the wording of the present will. Furthermore if the direction as to the vesting and payment of the child's share at 21 were inconsistent with the last declaration of the will, His Honour thought that the rule of convenience explained by Jessel, M.R., in **In re Emmett's Estate,** 13 Ch. D. 484, 490, should be applied, namely that "so soon as any child would if the class were not susceptible of increase be entitled to call for payment, the class shall be incapable of being increased." See also **In re Knapp's Settlement,** (1895) 1 Ch. 91. The case of **Blackman v. Fysh,** (1892) 3 Ch. 209 is to be limited to the particular facts of that case; see Eve, J.'s criticism in **In re Canney's Trusts,** 101 L.T. 905, 907. In the present case the eldest daughter M. M. E. Cleaver was clearly over 21 at the time of the forfeiture. It followed that the class was then closed. All of the son's children were then born and were included, but no child or children thereafter born to the testator's son were entitled to be admitted to the class.

The next question related to the destination of the income after the forfeiture. On the one hand the wife was entitled to receive the income provided she maintained educated and brought up the children of the testator's son to the satisfaction of the trustee. On the other hand, each minor was entitled to payment of his or her share on attaining 21 years, if male, or on attaining that age or marrying, if female. It was clear that a child's right to maintenance did not cease *ipso facto* upon attaining 21, but in every case the question must be resolved upon the construction of the particular document conferring the right to maintenance. If the construction which His Honour had adopted was correct, it was clear that the wife, while she maintained, educated and brought-up the children to the satisfaction of the trustee, was entitled to the income of the shares of the children, until being male they attained 21 or being female they attained that age or married with the consent of the parent or guardian under that age. When the children were entitled to the payment of their own shares the wife's right to receive the income of their share for the purposes of their maintenance, education and upbringing ceased.

His Honour therefore answered the questions as follows: (1) The trustee should decide that the interest of the defendant R. N. McMillin absolutely ceased and determined as from the date of his adjudication, or from an act of bankruptcy as the case might be. (2) Upon the occurrence of the forfeiture, the defendant E. M. McMillin became entitled to receive the income of the shares of all the children, other than that of M. M. E. Cleaver, subject to the obligations imposed upon her. Thereafter she continued entitled to the income of the share of each child subject to the same conditions, until that child if male attained 21, or if female attained that age or married with the consent of her parent or guardian. (3) The defendant M. M. E. Cleaver was entitled to payment of the corpus of her share of the estate upon the occurrence of the forfeiture. (4) The defendant R. N. McMillin, Junior, became entitled on 5th January, 1927, when he attained 21, to payment of the corpus of his share of the estate of the deceased. (5) The children of the defendant R. N. McMillin who might be born after the forfeiture were not

entitled to participate in the income or capital of the estate of the deceased, by reason of the forfeiture of their father's life interest.

Solicitor for plaintiff: **Solicitor to the Public Trust Office,** Wellington.

Solicitors for R. N. McMillin: **Bamford, Brown and Leary,** Auckland.

Solicitor for E. W. McMillin, **A. Hanna,** Auckland.

Solicitors for T. B. Crump, as assignee of M. M. E. Cleaver, for M. M. E. Cleaver, and R. N. McMillin, Junior: **Buddle, Richmond and Buddle,** Auckland.

Kennedy, J. February 21; March 27, 1929. Auckland.

SHEPHERD v. SUNDERLAND.

Vendor and Purchaser—Specific Performance—Whether Time of Essence of Contract—Agreement by Vendors to Sell Land to Purchaser—Provision that Possession to be Taken by Purchaser on Certain Date—Balance of Purchase Moneys to be Paid on Date Fixed for Completion—Express Provision that Time for Performance of Covenants by Purchaser of Essence of Contract—Agreement by Vendors to Purchase Land from Purchaser also Providing for Payment of Balance of Purchase Moneys on Day Fixed for Completion and that Vacant Possession be Given on that Date—Transaction an Exchange—Failure of Vendors to Give Possession on Date Fixed Although Purchaser Ready to Complete and to Give Title to Property in Exchange—Time for Taking Possession Expressly Made of Essence of Contract—Implication That Time for Giving Possession also of Essence of Contract—Provision that Interest to be Paid on Purchase Money Not Paid on Date Fixed for Completion Not Sufficient to Negative Express Provision that Time for Completion of Essence of Contract—Provision Conferring Additional Remedies on Vendors if Default Made by Purchaser for Fourteen Days in Payment of Instalments or Interest or in Observance of Covenants Held Not to Restrict Rights of Purchaser or to Give Vendors Time for Performance of Covenants.

Action claiming specific performance of two agreements for sale and purchase. Under one agreement, dated 10th March, 1928, and signed by both parties, the defendants agreed to sell and the plaintiff to purchase a property for convenience referred to as the "Huapai property." The purchase price was £931 5s. 6d. The plaintiff was to pay a deposit of £10, to take over an existing first mortgage to the State Advances Superintendent, and a second mortgage, and to pay the balance in cash on the date fixed for completion of the contract. The agreement provided that, if from any cause whatever (save the default of the vendors) the purchase should not be completed by the 19th March, 1928, the purchaser should pay to the vendors interest at seven per cent. on the remainder of the purchase money from that period until completion of the purchase. This stipulation was expressed to be without prejudice to any of the vendors' rights under this agreement. Possession was to be given and taken on 19th March, 1928. Clause (6) provided: "If the purchaser shall make default in payment of any instalment of the purchase moneys hereby agreed to be paid or of interest thereon or in the performance or observance of any other stipulation or agreement on the part of the purchaser herein contained (the times for such payment or performance fixed by these presents being both at law and in equity strictly of the essence of the contract) and such default shall be continued for the space of fourteen days," then the vendors might without prejudice to their other remedies at their option either rescind the contract of sale and forfeit all moneys paid to the purchaser, or without demand re-enter and take possession of the property or re-sell the said property. Under the other agreement, also dated 10th March, 1928, which was signed by the plaintiff only, the plaintiff agreed to sell and the defendants to purchase a house property, for convenience referred to as the "Edendale property." The purchase price, the sum of £1,000, was to be paid as follows: £10 by way of deposit, £700, by the purchasers taking over a first mortgage of £700, and the balance in cash on the day fixed for completion. The agreement contained a printed clause to the effect that the property was bought and sold subject to existing tenancies (if any); while at the end of the agreement there was added the clause: "The vendor agrees to give vacant possession of the property mentioned in the schedule hereto on the date fixed for completion."

It was admitted by the parties that the two agreements for sale and purchase were in substance a transaction by way of exchange. The defendants owned and occupied the Huapai property, while a tenant occupied the Edendale property. The defendants intended to take possession of the Edendale property on 19th March, 1928. Their solicitors had tendered a transfer of the Edendale property and on 19th March, 1928, the defendants had done all that they were bound to do to require possession and completion. No money was then tendered by the defendants to the plaintiff, but this was not necessary as a balance in cash was payable on the exchange by the plaintiff to the defendants. The defendants, on 19th March, 1928, packed up their personal belongings at Huapai and were ready to give possession of that property to the plaintiff and were ready to take and required vacant possession of the Edendale property. The plaintiff did not give, and was not in a position to give vacant possession until 22nd March, 1928. The defendants, therefore, declined further to be bound by the contract and the plaintiff brought the present action.

Coates for plaintiff.

Adams for defendants.

KENNEDY, J., after stating that the defence that there was no sufficient note or memorandum in writing of the contract to satisfy the Statute of Frauds had been abandoned, said that there remained the substantial defence that, on 19th March, 1928, the plaintiff failed to give vacant possession of the Edendale property although the defendants were ready and willing to complete. The question arose whether the plaintiff had failed to perform any part of the contract at the time or times specified and, if so, whether those times were of the essence of the contract. If they were, then the plaintiff, failing to perform his part of the contract at the time specified, would not be able to enforce specific performance. The intention to make time of the essence of the contract, as to any one or more of its terms, might be expressly stated in the contract or it might be implied either from the nature of the contract itself or from the surrounding circumstances. Where the parties had stipulated that time should be of the essence of the contract as regards one or more of its terms, the Court would treat such stipulation as valid and binding: **Steedman v. Drinkle,** (1916) A.C. 275, 279. Under both agreements the time fixed for the performance of the stipulations of the agreements on the part of the purchaser were expressly stated to be, both at law and in equity, strictly of the essence of the contract. Under the first agreement it was of the essence of the contract that the purchasers, i.e., the defendants, should take possession of the Edendale property on 19th March, 1928; and under the second agreement it was of the essence of the contract that the purchaser, i.e., the plaintiff, should take possession of the Huapai property on the same day. These two agreements were not independent agreements by way of sale, but were agreements by way of exchange. If then it was of the essence of the contract that the defendants should take possession of the Edendale property on 19th March, 1928, His Honour thought it must follow that it was of the essence of the contract that the plaintiff should himself give possession of that property on that date; and likewise if it was of the essence of the contract that the plaintiff should take possession of the Huapai property on 19th March, 1928, it must follow that it was of the essence of the contract that the defendants should on that date give possession of that property. The general rule was that where one party had made stipulations in his favour of the essence of the contract, the Court would *prima facie* hold time to be essential in respect of all other stipulations which were against him: **Seaton v. Mapp,** 2 Coll. 556, 564. It had, however, been submitted in answer that provision was made for the purchasers paying interest in the event of the purchase not being completed by 19th March, 1928, and that stipulation showed that the time for completion was not of the essence of the contract, and **Webb v. Hughes,** L.R. 10, Eq. 281, was quoted in support. All that case decided, however, was that the express terms of the contract, namely the provision as to payment of interest in the event of the completion being delayed, excluded the implication otherwise arising from the surrounding circumstances. In the agreement under consideration, however, there was an express provision that the time fixed for the performance or observance of any stipulation on the part of the purchaser was to be strictly of the essence of the contract. The provision for payment of interest in the event of the purchase not being completed on the due date was, no doubt, intended for the adjustment of the rights of the parties under the agreement when it was actually completed, but it would not operate to negative an express stipulation of the agreement making time of the essence.

It was further argued that clause 6 of the second agreement gave the plaintiff (the vendor of the Edendale property) a period

of 14 days after 19th March, 1928, in which to give vacant possession. Both agreements were for the most part silent as to the purchaser's rights in the event of failure of the vendor to perform his obligations and the purchaser's rights must, in that event, be left to be determined by the general law. Clause 6 purported to confer upon the vendor, when the purchaser was in default for 14 days, certain rights which were evidently regarded by the draftsman as additional to his rights under the general law, for the rights were conferred "without prejudice to his other rights." At most clause 6 provided that the special remedies, given by that clause to the vendor, did not arise until 14 days after default. That clause enlarged a vendor's remedies where default had been made by a purchaser. It did not purport to restrict a purchaser's rights where default has been made by a vendor. A vendor in default could not claim that clause 6 gave him a further 14 days' grace beyond the time stipulated for the performance of his acts.

It was clear that the defendants endeavoured to take possession of the Edendale property on the 19th March, 1928, and, at the same time, to give the plaintiff possession of the Haupai property. The plaintiff and his solicitors from 10th March, 1928, had the fullest information that the defendants required possession and completion on 19th March, 1928. The plaintiff had not, on 19th March, 1928, over the Edendale property the £700 mortgage stipulated for in the agreement, and had not tendered to the defendants any transfer of the Huapai property nor the money required on his part to make equality of exchange. The plaintiff was not ready to complete on the date for completion. His Honour concluded that the plaintiff on 19th March, 1928, had failed to perform those obligations which lay on him and in respect of which time was of the essence while, on the contrary, the defendants were ready and willing on the date fixed for completion to perform their part and required the plaintiff to perform his part. The defendants were therefore discharged. His Honour said that the evidence did not establish any waiver by the defendants of the objection. No doubt the plaintiff anticipated having vacant possession on 22nd March, 1928, but the evidence did not establish that the defendants definitely agreed to extend the time to that date.

Judgment for defendant.

Solicitors for plaintiffs: **Hanna and Tole,** Auckland.

Solicitors for defendants: **Addison and Adams,** Auckland.

Kennedy, J. February 25; April 22, 1929. Auckland.

IN RE SINGER.

Barrister and Solicitor—Costs—Taxation—Fee Charged for Services as Barrister by Barrister and Solicitor not Acting as Solicitor in Particular Transaction not Taxable—Law Practitioners Act, 1908, Sections 26, 28, 29, 30.

Summons taken out by one Martin for an order referring to the Registrar for taxation a bill of costs rendered by Mr. R. A. Singer, a barrister and solicitor. Martin had appeared in the Police Court at Auckland to answer a criminal charge, and was remanded to appear later. Mr. Singer was then engaged by Martin to defend him, and appeared in the Police Court when Martin was further remanded and later at the preliminary hearing, at the conclusion of which Martin was committed to the Supreme Court for trial. Mr. Singer said that he had reason to believe that fees due by Martin to other solicitors for work done in previous litigation had not been paid and named his fee at three hundred guineas, and insisted upon two-thirds of the fee being paid before he acted on Martin's behalf. £200 was paid by Martin, but immediately prior to the trial in the Supreme Court, Martin notified Mr. Singer that he had decided to employ other counsel and required his bill. Eventually Mr. Singer, who denied Martin's right to a solicitor's bill of costs, supplied a note of his fee, in which Martin was debited with £315, being "my counsel's fee as arranged herein," and credit was allowed for £200 paid.

Stanton in support of summons.

McVeagh to show cause.

KENNEDY, J., said that it had been submitted on behalf of Mr. Singer that the fee paid or payable by Martin was not taxable by the Registrar under the provisions of the Law Practitioners Act, 1908. His Honour was of opinion that that objection was sound. The fee charged was not for services to be rendered by Mr. Singer as solicitor, though it was true that a solicitor might appear as an advocate in the Police Court, but rather for services to be rendered by "counsel" which must, in the circumstances of the present case, have meant services by Mr. Singer as barrister and not as a solicitor. The fee was named as "counsel's fee" and the difference between counsel's fee and ordinary solicitor's charges was explained to Martin when the fee was named. The question accordingly arose whether the fee charged by a barrister, who was not also acting as solicitor for the client, for his services as barrister, might be referred to the Registrar for taxation under the Law Practitioners Act, 1908. In New Zealand the same person frequently practised both as a barrister and as a solicitor. There was in New Zealand only one class of barrister, namely one holding the rank of King's Counsel, to whom the patent had been granted since 12th October, 1915, who, if enrolled as a solicitor, might not take out his practising certificate as a solicitor under Section 45 of the Law Practitioners Act, 1908, and practise as a solicitor. Barristers of the Court in New Zealand had all the powers, privileges, duties and responsibilities that barristers had in England: Law Practitioners Act, 1908, Section 11. In England there was no rule of law, but only one in etiquette, that a barrister should be instructed by a solicitor: **Bennett v. Hale,** 15 Q.B. 171. His Honour thought, therefore, that there was nothing to prevent Mr. Singer, although both a barrister and solicitor, agreeing with Martin, in a matter which fell within the scope of work of a barrister as such, to act in that matter as barrister, and to render or agree to render service as a barrister as distinct from service as a solicitor. He might act as counsel, although he was at no time solicitor for Martin, the person employing him.

The Law Practitioners Act, 1908, did not in terms make provision for the taxation of the fees of a barrister, but rather for the taxation of the fees or charges of a solicitor. Section 28 provided that no solicitor should commence or maintain any action for the recovery of any fees, charges, or disbursements for any business done by him until the expiration of one month after the delivery of the signed bill. Section 29 provided for a reference of the bill of costs to taxation upon the application, within such month, of the party chargeable by the bill whether the business contained in such bill, or any part thereof, had been transacted in any Court or not. Section 30 provided for a reference after one month or, under special circumstances, more than twelve months, after the delivery of the bill. The fees and charges so taxable were the fees and charges of a solicitor acting as such. The "business" referred to in Section 28 must, to use the language of Lord Langdale, in **Allen v. Aldridge,** 5 Beav. 401, be "business in which the solicitor was employed because he was a solicitor, or in which he would not be employed if he had not been a solicitor." The Act did not provide machinery for the taxation of the fees and charges payable to a solicitor for services rendered not as solicitor but in some other capacity. Thus in England it had been held that the statutes relating to the remuneration of solicitors did not apply to a solicitor employed as clerk to a local authority at a fixed salary—**Bush v. Martin,** 2 H. & C. 311; nor to a solicitor acting as scrivener in procuring a loan on commission—**Gradwell v. Aitchison,** 10 T.L.R. 20; while in New Zealand it had been held that the provisions as to taxation of a solicitor's bill of costs, did not apply to a procuration fee charged by a solicitor for procuring a loan: **In re Browning,** 5 N.Z.L.R. 485, and **In re Bennett and Jacobsen,** (1924) G.L.R. 44, for such a charge was not the professional charge of a solicitor, but rather a charge for services rendered as a commission agent, or money broker. Neither in His Honour's opinion was service rendered by a barrister as such, although that service were rendered by a person who happened to be also a solicitor, service which could be said to be rendered by a solicitor as such when in fact the relationship of solicitor and client had never existed. It was also not without significance that the provisions appearing in Sections 26 to 39 of the Law Practitioners Act, 1908, were copied from provisions of the English Acts relating to the remuneration of solicitors. It was not easy to see how a registrar, unless he fixed the same fee for a counsel of the greatest eminence and of the greatest skill as for the most junior and inexperienced counsel, could tax the fees actually charged by particular barristers for their services as such, although it was easy to see that a registrar might without difficulty fix an amount which, having regard to the complexity of the work and its importance, it was reasonable to pay in fees to counsel. His Honour did not apprehend that the door was opened by this decision, as suggested by counsel for the applicant, to evasion by solicitors of the provisions of Section 26 of the Law Practitioners Act, 1908. That section operated for the relief of solicitors rather than for the benefit of their clients, and the Court would look as well to the substance as to the form of a transaction.

Summons dismissed.

Solicitors for Martin: **Stanton, Johnstone and Spence,** Auckland.

Solicitors for Mr. R. A. Singer: **Russell, McVeagh, Bagnall, and Macky,** Auckland.

Family Protection Act, 1908—Part II.

A Review of the Decisions Thereunder.

By A. C. Stephens, LL.M.

(Concluded from page 121)

PRACTICE (Continued)

5. Service.

For mode of service upon persons who are not made parties but who are entitled to apply under the Act, see *Higgins v. Public Trustee* (supra); *Lean v. Tipping* (supra).

6. Representation.

Where the executor is a disinterested party he is not invariably represented at the hearing: see *Allardice v. Allardice*, 29 N.Z.L.R. 959 C.A.; *E. v. E.*, 34 N.Z. L.R. 785 C.A. He usually appears, however, and submits to the order of the Court: *Cook v. Webb*, (1918) N.Z.L.R. 664 C.A.; *Re McCarthy*, (1919) N.Z.L.R. 807. He may also submit argument or make suggestions. See *Rowe v. Lewis*, 26 N.Z.L.R. 769; *Cook v. Webb* (supra); *Newman v. Newman*, (1927) N.Z.L.R. 418.

Where the executor is also an applicant or a defendant he is not represented in his capacity as executor: see *E. v. E.* (supra); *Spelman v. Spelman*, (1920) N.Z. L.R. 202.

The executor may be appointed to represent beneficiaries. See *Smith v. Public Trustee*, (1927) N.Z.L.R. 342.

As to representation of beneficiaries who are absent from the Dominion, see *Heagerty v. Considine*, 34 N.Z. L.R. 905.

Infants and persons of unsound mind may be represented by the executor under Section 33 (10): *Bell v. Hunter* (No. 1), 34 N.Z.L.R. 1067; *Public Trustee v. Brown*, 34 N.Z.L.R. 951. It has been suggested however that this power should not be exercised by the executor beyond applying to the Court for advice or directions: *Re McCarthy*, (1919) N.Z.L.R. 807.

It is to be noted that there is no duty on an executor to take action under subsection 10 on behalf of an infant: *Spelman v. Spelman* (supra).

The executor may be appointed by the Court to represent infant defendants on the motion for directions as to service of the Originating Summons. The alternative course is to have a guardian ad litem appointed for the infants. See *Brown v. McCarthy*, 26 N.Z.L.R. 762; *Paxton v. Nicholson*, (1918) G.L.R. 393; *Re McCarthy*, (1919) N.Z.L.R. 807; *Hutchison v. Hutchison*, (1921) N.Z.L.R. 743.

7. Absent Beneficiaries.

Where there were beneficiaries who were absent from the Dominion and who were affected by the order, the Court directed that the order should remain in the Court office for such time as would allow them to come in if they so desired: *Heagerty v. Considine*, 34 N.Z. L.R. 905.

8. The Order.

Leave to apply should be reserved whenever the terms of the order are likely to require reconsideration or where the order is in the nature of a settlement: *Fox v. McDowell*, (1921) G.L.R. 157.

Where the order is involved it should be submitted to the Court for approval before it is sealed: see *Re Higgins*, (1918) G.L.R. 387.

Where costs are directed to be taxed a special form of order has been laid down: *Higgins v. Public Trustee*, (1919) G.L.R. 131.

Examples of detailed orders are to be found in *Colquhoun v. Public Trustee*, 31 N.Z.L.R. 1139; and *Hart v. Hart*, 17 G.L.R. 393.

9. Appeal.

There was no provision as to appeal in the Testators' Family Maintenance Act, 1900, but the Testators' Family Maintenance Act, 1906, which was passed subsequently to *Plimmer v. Plimmer*, 9 G.L.R. 10 C.A., gave a specific right of appeal and the section is repeated in the consolidating Act (Section 35).

There has been considerable difference of judicial opinion as to the jurisdiction of the Court of Appeal to review an order of the Supreme Court made in exercise of the discretion conferred on it by the Act and as to the purpose and effect of Section 5 of the Testators' Family Maintenance Act, 1906, (Section 35 of the Consolidating Act). The matter was raised in argument but not dealt with in *Allardice v. Allardice*, 29 N.Z.L.R. 959 C.A., and left open by *E. v. E.*, 34 N.Z.L.R. 785 C.A. It was again raised in *Cook v. Webb*, (1918) N.Z.L.R. 664 C.A., and finally settled in *Rose v. Rose*, (1922) N.Z. L.R. 809 C.A., where it was held that on an appeal from an order made under the Act the discretion of the Court of Appeal is substituted for that of the Supreme Court so that the former Court is free to deal with the whole matter as the interests of justice demand.

10. Limitation of Time for Application.

See subsection (9) Section 33 (as amended by the Family Protection Amendment Act, 1921-22) and subsection (11) Section 33.

Each case will be dealt with on its own circumstances. *Newman v. Newman*, (1927) N.Z.L.R. 418 F.C. An extension of time should be granted where the failure to make earlier application arises through honest ignorance by the applicant of his rights under the Act and the other interested parties will not be prejudiced by the extension: *Hoffman v. Hoffman*, 29 N.Z.L.R. 425, 428. See also *Copeland v. Wakelin*, (1927) N.Z. L.R. 846; *Re Pulleng*, (1922) G.L.R. 339. An extension should not be granted where the applicant has been guilty of long and inexcusable delay after becoming aware of his rights: *Milne v. Cunningham*, (1917) N.Z. L.R. 687. In *Smith v. Public Trustee*, (1927) N.Z.L.R. 342, an extension was granted after a delay of seven years apparently on the ground that the circumstances at the date of the testator's death would have justified an application and remained without alteration at the date of the application. But compare *Newman v. Newman* (supra).

In *Re Roper*, (1927) N.Z.L.R. 731, the time for making application was extended from time to time for seven years. See also *Corbey v. Boonstra*, (1923) G.L.R. 433.

It was held by Hosking, J. on the terms of subsection (9) before it was amended that the application must be made within two years of the grant in New Zealand of probate of the will of the testator upon the ground that the prohibition upon the Court against hearing

an application becomes absolute on the expiration of this period: *Spelman v. Spelman*, (1920) N.Z.L.R. 202, 204. It is suggested, however, with great respect, that the subsection did not contain any such absolute prohibition. No doubt the Court would have granted an extension only on special circumstances in case of a delay of two years, but it is submitted that, even in such a case, the matter was, under the subsection in its original form, still within the discretion of the Court. However, any ground for the decision has been removed by the amendment which empowers the Court to grant an extension for an indefinite period.

It seems questionable whether Hosking, J., in deciding that an executor applying on behalf of a person who was an infant at the date of the testator's death, is limited to two years from the grant of probate, gave proper weight to the concluding words of subsection (11): see *Spelman v. Spelman* (supra).

In one case where an extension of time was granted the Court ordered the provision for the applicant to commence on the expiration of one year from the death of the testator: *Hoffman v. Hoffman* (supra).

There is some doubt as to whether there is jurisdiction to make an order imposing a charge on the estate of the testator in order to defeat the time-limit for making application under the Act. Compare *Welsh v. Mulcock*, (1924) N.Z.L.R. 673, 687 C.A., and *Toner v. Lister*, (1925) G.L.R. 323).

The application for an extension of time should be joined with the application for provision under the Act in one originating summons: *Milne v. Cunningham*, (1917) N.Z.L.R. 687.

The issue of an originating summons without service does not amount to an application under the Act: *McCarthy v. Mitchell*, (1924) N.Z.L.R. 847.

Where the applicant has intimated to the executor that he does not intend to make a claim under the Act the executor is justified in distributing the estate without waiting for a year from the death of the testator: *Sollitt v. Fairhead*, (1924) G.L.R. 533.

COSTS.

The applicant is usually allowed his costs out of the estate when he is successful. The above rule is, however, not invariable. See *Kerr v. Bridge*, 25 N.Z.L.R. 907; *Nosworthy v. Nosworthy*, 26 N.Z.L.R. 285; *Hart v. Hart*, 17 G.L.R. 393; *Rose v. Rose*, (1922) N.Z.L.R. 809 C.A.; *Smith v. Public Trustee*, (1927) N.Z.L.R. 342; *Copeland v. Wakelin*, (1927) N.Z.L.R. 846.

When the applicant is successful all parties are generally allowed costs out of the estate: *Rush v. Rush*, 20 N.Z.L.R. 249; *Re Bleasel*, 25 N.Z.L.R. 974; *Brown v. McCarthy*, 26 N.Z.L.R. 762; *Rowe v. Lewis*, 26 N.Z.L.R. 769; *Colquhoun v. Public Trustee*, 31 N.Z.L.R. 1139; *Hutchison v. Hutchison*, (1921) N.Z.L.R. 743; *Allen v. Manchester*, (1922) N.Z.L.R. 218; *Pulleng v. Public Trustee*, (1922) N.Z.L.R. 1022; *Parish v. Parish*, (1924) N.Z.L.R. 307 F.C. Contrast *Nosworthy v. Nosworthy* (supra); *Rose v. Rose* (supra); *Re Herd*, (1923) G.L.R. 118; *Corbey v. Boonstra*, (1923) G.L.R. 433; *Re Roper*, (1927) N.Z.L.R. 731. The executor receives his costs out of the estate.

The costs are sometimes fixed by the Court: *Wilkinson v. Wilkinson*, 24 N.Z.L.R. 156; *Munt v. Findlay* (supra); *Re Bleasel* (supra); *Re Green*, 13 G.L.R. 477; *Severn v. Public Trustee*, (1916) N.Z.L.R. 710; *Parish v. Valentine*, (1916) N.Z.L.R. 455. They are sometimes directed to be taxed by the Registrar. *Rush v. Rush*, 20 N.Z.L.R. 249; *Cook v. Webb*, (1918) N.Z.L.R. 664, 667; *Hutchison v. Hutchison*, (1921) N.Z.L.R. 743; *Allen v. Manchester* (supra); *Pulleng v. Public Trustee* (supra); *Parish v. Parish* (supra). As to taxation of costs in such cases, see *Higgins v. Public Trustee*, (1919) G.L.R. 131.

An unsuccessful applicant is not as a rule allowed costs: *Munt v. Findlay* (supra); *Sinclair v. Sinclair*, (1917) N.Z.L.R. 144; *Newman v. Newman*, (1927) N.Z.L.R. 418 F.C. He may be ordered to pay costs: *Worthington v. Ongley*, 29 N.Z.L.R. 1167; *Re Green*, 13 G.L.R. 477; *Spelman*, (1920) N.Z.L.R. 202; *Sollitt v. Fairhead*, (1924) G.L.R. 533. Costs have been allowed to an unsuccessful applicant: *E. v. E.*, 34 N.Z.L.R. 785, 803 C.A.

Successful defendants are generally allowed costs: *Newman v. Newman* (supra).

GENERAL.

The Act gives the Court no power to deal with property which is dealt with by the testator under a special power of appointment: *Nosworthy v. Nosworthy*, 26 N.Z.L.R. 285.

The Act applies only to the part of his estate which the testator has disposed of by his will. Where there is a total or partial intestacy the Statutes of Distribution settle the division of the property which is not covered by the will: *Yuill v. Tripe*, (1925) N.Z.L.R. 196 C.A. This case overrules *Public Trustee v. Willis*, (1924) G.L.R. 238, and also *Brown v. McCarthy*, 26 N.Z.L.R. 762, and *Public Trustee v. Denton*, (1917) N.Z.L.R. 263, so far as they suggest that an order may be made affecting property as to which there is an intestacy. See also *Constable v. Public Trustee*, 13 G.L.R. 259.

A person entitled to the benefit of the Act cannot by contract (whether made before or after the death of the testator) deprive himself of his rights or limit them in any way: *Gardiner v. Boag*, (1923) N.Z.L.R. 739; *Parish v. Parish*, (1924) N.Z.L.R. 307 F.C.; *Hooker v. Guardian Trust and Executors Co.*, (1927) G.L.R. 536.

Where certain of the persons who would benefit under an order were absent from the Dominion and it was not known whether they were alive their shares were reserved until enquiries could be made: *Hunt v. Public Trustee*, 29 N.Z.L.R. 307.

As to the jurisdiction of the Court to reveiew its own order, see *Carson v. Fox*, (1920) N.Z.L.R. 3, and *Fox v. McDowell*, (1921) G.L.R. 157.

As to the position of the Public Trustee while acting as committee or administrator of the estate of a mental defective, see *Re McCarthy*, (1919) N.Z.L.R. 807; *Re Koehler* (1920), N.Z.L.R. 257.

The Act applies whenever the N.Z. Courts have jurisdiction over the wills of testators, i.e., always in the case of immoveables situated within the jurisdiction, but in the case of moveables, only when the testator dies domiciled in New Zealand: *Re Roper*, (1927) N.Z.L.R. 731. See also *Munt v. Findlay*, 25 N.Z.L.R. 488.

Police Powers and Procedure.

Summary of the Royal Commission's Report.

The Report of the Royal Commission on Police Powers and Procedure, which was appointed last August, with Lord Lee of Fareham as Chairman, has presented a completely unanimous Report, which covers in great detail the matters submitted to its consideration, and makes valuable recommendations. In view of the importance of the matter, and particularly in view of the resolution passed at the last Legal Conference on the subject of the taking of statements by the police, it is proposed briefly to indicate the way in which the Report deals with certain of the aspects of the problem before it. Whilst such a summary cannot, of course, be in any way exhaustive or deal with every point of importance raised by the Report—which covers 125 pages apart from appendices—it will, it is hoped, be useful as giving in broad outline its main features.

The Terms of Reference.

The terms of reference of the Commission were :—

> "To consider the general powers and duties of police in England and Wales in the investigation of crimes and offences including the functions of the Director of Public Prosecutions and the police respectively; to inquire into the practice followed in interrogating or taking statements from persons interviewed in the course of the investigation of crime; and to report whether in their opinion, such powers and duties are properly exercised and discharged, with due regard to the rights and liberties of the subject, the interests of justice, and the observance of the Judges' Rules both in the letter and the spirit; and to make any recommendations necessary in respect of such powers and duties and their proper exercise and discharge."

The Report commences with a chapter of general observations, in which the functions of the police are considered, and certain considerations necessary to be borne in mind in embarking upon such an inquiry are pointed out. The fact that at common law a policeman is only a person paid to perform, as a matter of duty, acts which if he were so minded he might have done voluntarily, makes the police in exercising their functions

> "to a peculiar degree dependent upon the goodwill of the general public and the utmost discretion must be exercised by them to avoid overstepping the limited powers which they possess. A proper and mutual understanding between the police and public is essential for the maintenance of law and order . . . many complaints have proved, on investigation, to be in effect directed not against the Police themselves, but against the laws which the Police are called upon to enforce . . . the attempt to enforce obsolete laws, or laws manifestly out of harmony with public opinion, will always be liable to expose the Police to temptations and to react upon their morale and efficiency."

The fact that the responsibility for police work depends primarily on the individual constable, and not on his superiors is, as the Report points out, not always sufficiently recognised. Whereas the private soldier or the artisan is supervised and controlled at his work to such an extent as to call for the exercise on his part of little or no discretion, the individual policeman has, as a matter of course, constantly to take decisions of importance both to the public and the individual citizen, and to rely on his own judgment as to what his course of action should be as circumstances arise. For this reason the multiplication of instructions or regulations is to be deprecated as tending not only to hamper the constable, but to cause him to act by the letter of his instructions rather than by their spirit.

> 'What the constable really requires, above everything, is a sound grounding in the spirit and traditions of his office and in the general knowledge essential for the performance of his normal duties."

Powers and Duties in Investigating Offences.

The Report proceeds to deal with the powers of the police as to arrest and search, and with the manner in which the individual constable is made acquainted with his duties. A standard instruction book which "should aim primarily at indicating the general principles which should guide a constable in his work, rather than at laying down precise instructions with regard to every detail of his duties," is recommended, and it is stated that such a work is in course of preparation.

The difficult questions which arise, in the course of investigations into crime, with regard to the taking of statements by persons who may or may not later be accused of the offence, and with regard to whether or not a "caution" should be administered, and, if it is to be administered, when, are considered in detail. It is recommended that the caution should be retained and that it should be administered not only to persons suspected of having committed the offence under investigation, but to any person from whom it is proposed to take a formal statement.

> "Our precise recommendation is that, at the outset of any formal questioning, whether of a potential witness or of a suspected person, with regard to any crime or any circumstance connected therewith, a constable should first caution that person in the following words :—
>
> 'I am a Police officer. I am making inquiries *(into so-and-so)*, and I want to know anything you can tell me about it. It is a serious matter, and I must warn you to be careful what you say.'"

This recommendation, if adopted, will put an end to the difficulty which now sometimes arises where a person not at the time suspected is invited to make a statement without any warning at all, and incriminates himself by his statement or comes afterwards under suspicion. In such cases, difficulties may at present arise, not, perhaps, as to the legal admissibility of the statement, but as to the propriety of its being read as evidence.

With regard to the cases in which a potential witness, whilst not likely to be charged with any offence, will, if called to give evidence, either have to admit disreputable conduct on his own part, or to lay himself open to a damaging cross-examination as to character, the Commission recommend that no special warning should be given. The problem of how a witness whose personal character may be involved should be dealt with came into prominence as a result of the Savidge case last year, and a provisional direction was given to the Metropolitan Police that a special warning should be given to a witness whose own character or reputation was the matter chiefly involved in the case, and whose youth, inexperience, or ignorance made some warning desirable, before any effort was made to obtain a statement from that witness. The Commission consider that no such special warning is necessary or desirable, and recommend the withdrawal of the direction in question

As to the actual taking of statements, it is recommended that, as far as possible, employees should not be visited at work, or children at school; that where a statement is likely to be used in evidence against its maker all important questions should be recorded, as well as the answers; and that so far as practicable a statement of an accused person should be given to the Court in his own words.

> "We attach importance to this on account of the danger that a statement may imperceptibly change its meaning in the

process of passing through the mind of another person, who expresses in different, though possibly better, language, what he considers to be the true meaning of the deponent, but who has a preconception of the facts in his own mind to which he is perhaps unconsciously aiming to make the narrative conform."

On the question of the length of time occupied in taking statements, the Report, whilst not recommending the imposition of a time limit, suggests—

"The person making them should retain the right either to amend or withdraw them before being called upon to append his signature. If therefore the Police wish the deponent to sign a statement they should, except when it is of a very brief or simple character, offer him ample time (extending if necessary to the next day) to consider, and if he so desires to amend it, before signing; a copy being meanwhile retained by the Police."

Without laying down a rule that friends or legal advisers should be present when statements are taken from persons not in custody, it is suggested that in normal cases the witness should be offered the option of having them present; and that some person other than the police should always be present when a child under sixteen is formally interrogated.

On the important question as to whether powers should be given by legislation to compel the making of statements by unwilling witnesses before proceedings have been commenced, the Commission, after careful consideration, recommend no change in the present position.

"Whilst we agree that such powers would on occasion prove to be of great value, we have come to the conclusion that, on balance, we should not feel justified in recommending special legislation to deal with witnesses who are unwilling to give information to the Police."

(*To be continued*).

Audit of Trust Accounts.

A New South Wales Bill.

It seems curious to the New Zealand practitioner, who has for many years regarded audit of his trust account as a matter of course, that solicitors in New South Wales should be under no such obligation. At a time when the Profession here is taking steps to establish a Guarantee Fund, our audit provisions having been found not an absolute safeguard, our colleagues in New South Wales are viewing with somewhat mixed feelings a Bill now before their Legislature making provision for the first time for the audit of solicitors' trust accounts. Every solicitor and conveyancer is by the Bill required to pay trust monies into a separate bank account and to keep such books of account as will enable the account to be conveniently and properly audited. A solicitor or conveyancer must produce all books and vouchers and give all information reasonably required for the purposes of the audit, and his bankers may be called upon to disclose the position of his private or trust account with them. In case of neglect to have the account audited, the Attorney-General may have it audited at the expense of the defaulter. Trust moneys held by a solicitor or conveyancer jointly with a co-trustee who is not a solicitor or conveyancer are, provided proper accounts are kept by the trustees and a regular and proper audit is made, excluded from the operation of the Bill except so far as such moneys come into the hands of the solicitor or conveyancer in the course of his business. Non-compliance with the provisions of the Bill is deemed to be professional misconduct and, in addition, the offender is liable to a fine not exceeding £100.

Lord Halsbury.

His Life and Times.

Permission has been granted to the "New Zealand Law Journal" to publish a series of extracts from the Biography of the first Earl of Halsbury, which is shortly to be published.

(*Continued from page 125*)

The following characteristic letter from Hardinge Giffard to his father was written in 1856 when he was acting as Revising Barrister in South Wales.

"St. David's, October 11, 1856.

"My Dear Father,

As you will see by the date, we have "given to St. David's two true Britons more," though I certainly never thought, when I read that line, ever to be there, still less to approach it in the way of official duty. I recommenced revision circuit on Thursday at Kilgerran, slept at Cardigan that night, took Newport (Pemb.) and Fishguard yesterday, at which latter place I had more trouble than usual, seeing that party spirit runs high there, and they fought bitterly over all the borough votes that were capable of controversy.

To-day I have finished the revision of Pembrokeshire, having taken a place in my way where there is a fair but once a year, and that once happened to be to-day. Such a hubbub and confusion as there was, it would be difficult to overstate. The pigs and young women squealing in every key, the former at being dragged along by ropes fastened round them like the cross bands of our soldiers' knapsacks, the latter at being tickled by their too-attentive lovers, though whether their resistance was due to the publicity of the attentions, or the attentions themselves, I will not undertake to say.

The favourite costume of the gentlemen was a very flat hat, and a bright blue tailcoat with brass buttons, the tail reaching down nearly to the ground, breeches proper, not trousers, and buff gaiters with brass buttons. Most of the gentlemen had two ladies with him, one on each arm, and certainly he might be less pleasantly situated, for I doubt much if St. Kevin of blessed memory would have kept all his resolutions if he had lived in this part of the world, or at all events if he had ever gone to the Mathey fair. I do not think I ever saw so many beautiful women together as I did to-day. We got here in time to go over the Cathedral, and heard a great deal about St. Patrick from the parish clerk, who, primed I expect by a tribe of Oxford divines, who it appears have been here archaeologising, always speaks of the Virgin Mary as "the Blessed Virgin." There is a very curious piece of carving under one of the seats of the choir, and only visible on the seat being turned up. It is of a priest with the face of a fox giving with one hand the wafer to a goose with a human countenance, while behind his back he holds a bottle of wine with the other. A somewhat dangerous libel I should think, at the time the artist designed it, and scarcely rendered safe by the place of exhibition, or concealment, whichever it is to be called. We hope to attend service in the Cathedral to-morrow, and on Monday I am due at Glamorganshire sessions, which begin at Swansea. We have not yet been to St. David's Head, but mean to get there to-morrow after church if we can.

Sunday, October 12.

We went to the Cathedral this morning at 11, and after that started, in spite of mud and weather, for St. David's Head. We got wet as we expected, but were rewarded for our adventurousness by seeing the wildest and most desolate looking scene we have either of us ever seen. Ramsey Island and Whitesand Bay a little relieve the grim blackness of the rocks on St. David's Head. Beyond seeing a pig the colour of red ochre, and having my umbrella blown inside out, we met with no adventure, and with nothing and nobody, all seemed as if the foot of man had never trodden the place before; everything was one solemn solitary grim frown of black rocks. On one side of the hill there are the traces of what the book calls a submerged forest, but it looks like masses of half petrified trees, just emerging from the earth below, and between the rocks.

We shall not be sorry to get away from this, for the Hotel, as it is pleased to call itself, is miserably furnished with everything. I was rash enough to order—a pint of sherry yesterday and the bottle stares me in the face at this moment, not likely to lose its contents, except that I think that I ought in Christian charity to future guests, to throw it out of the window. We have tumbled across a Chester client here, who with his wife and son is working his way back to Chester from Tenby and has taken this town on his way. He, moreover, brave man, is going to look at the Head, with a guide! and a post-chaise, to-morrow in the orthodox way "*miror imagis.*" There is some virtue in a stout pair of legs, and we can boast two between us. The possessor of the inferior pair received, and is much obliged for, a letter from Mary. The owner of the first-rate pair returns thanks to Harry for his notes, one containing a telegraphic message, and the other the lamentable history of Lord Lawrence. Give my love to Todgers. Your affecte. son,

HARDINGE GIFFARD.

Caroline sends love, but protests that my legs are not better than her own."

It was not only at Parliamentary elections that Giffard had to fight, for six months after he had returned to London he received this letter, which was followed by the most extraordinary scene ever witnessed in a Court of Law, in which he figured prominently.

From HENRY FRESHFIELD, Esq. 5 Bank Buildings, E.C.
June 23, 1869.

MY DEAR MR. GIFFARD,

The case my nephew wrote to you about affects Lord Carrington, the son of an old friend—and with whose family we have been intimately connected for very many years.

Lord Carrington is 25, and yesterday horsewhipped Mr. Murray, the proprietor and editor of *The Queen's Messenger*, for a gross attack on his father.

If he should be summoned, we should esteem it a personal favour if you would defend him. My nephew doubted if you would go to a police office, but I think we could arrange to meet your convenience, the question being one of great importance to the family, and they would be fortified by your advocacy. Do not reply to this.

Yours faithfully,
HENRY N. FRESHFIELD.

Giffard undertook the case, and accordingly appeared at Marlborough Street Police Court on July 7, 1869, when Lord Carrington was charged with assaulting Mr. Grenville Murray, editor and proprietor of *The Queen's Messenger*, a journal which had gained an evil notoriety by its scandalously libellous articles on public men.

Grenville Murray, known as "the roving Englishman," was a natural son of the Duke of Buckingham, and was one of the most brilliant and racy writers of his time. He had published in *The Queen's Messenger* an abominable libel on the second Lord Carrington, and his son, the third Earl, had publicly horsewhipped him in St. James' Street, when he was coming out of his club.

For this assault, Grenville Murray was ill-advised enough to issue a summons against Lord Carrington. The object of the defence was to prove that Grenville Murray himself had written the article, and, therefore, richly deserved his castigation.

After a lot of conflicting evidence had been heard including a counter-charge of perjury against the prosecutor, the magistrate adjourned the case.

Scarcely had he announced his intention to do so when a rush was made by some of Murray's friends for a box, which it was alleged contained MSS. stolen from *The Queen's Messenger* office, and intended to be used in the perjury charge. Around that box raged for nearly a quarter of an hour a fight as fierce and fell as that for the body of Patroclus, or that described by Macaulay in the "Lays" over the corpse of Valerius. Noble lords, eminent Queen's Counsel, solicitors, clerks, witnesses, to the number of thirty or forty, were engaged in that desperate mêlée.

Hats were smashed, eyes blackened, noses set bleeding, glasses broken, inkstands hurled to and fro, till at last a strong body of police quelled the riot, and ejected the furious combatants.

Hardinge Giffard, who had been in the thick of the fighting, using his fists vigorously, emerged from the Court with flushed, bruised, perspiring face and shirt-front drenched with ink, *but with the box.*

The magistrate, Mr. Knox, looked on aghast and horror-stricken at such a scene, which one would imagine had never been witnessed before or since in any English Court of Justice.

Grenville Murray funked facing the perjury charge. A warrant was issued for his arrest, but he bolted, and was outlawed. But he had the audacity to return to England more than once, and was on one occasion recognised in disguise at the printing office of *The Queen's Messenger*, which paper died the week after its editor's disappearance.

Subsequently Grenville Murray was associated with Edmund Yates in the production of *The World*, and died at Passy on December 20, 1881.

When Lord Halsbury saw this account, he approved it as correct, except that it did not mention the two black eyes which he had received and several more that he had bestowed.

(*To be continued*)

Judicial Ignorance.

Nowadays Judges do not, as much at all events as was the case some years ago, feign ignorance when on the Bench of the happenings in the world. For instance, Shearman, J., had recently before him a case dealing with films, cinemas, and film artists, and he successfully resisted any temptation to ask, "What is a film?" and "Who is Charlie Chaplin"; and the same learned Judge only a few days later in *Sideli v. Duophone Syndicate Ltd.*, informed counsel that a jazz band always and intentionally has a burr.

Correspondence.

The Editor,
"N.Z. Law Journal."

Sir,

In the special Wellington Conference number of your Journal, dated 30th April, 1929, I notice that Mr. M. J. Gresson, in speaking to a remit, is reported to have stated that Batchelor, a defaulting solicitor who was recently prosecuted in Christchurch, had been a clerk in the Public Trust Office. This is inaccurate, for Batchelor has never been employed in the Public Trust Office or in any other Government Department.

I trust that you will see your way to publish this letter in order to remove any misapprehension which the misstatement may have caused. I am, etc.,

J. W. MACDONALD,
Public Trustee.

Wellington,
16th May, 1929.

The Editor,
"N.Z. Law Journal."

Sir,

Divorce or Dissolution?

Section 10 of the 1928 Act gives to a petitioner in divorce the right to present to the Court a petition praying for a divorce from the other party to the marriage. Prior to the passing of this Act the prayer was always that the marriage of the petitioner with the respondent should be dissolved.

In the latest edition of *Sim on the Divorce and Matrimonial Causes Act* the old form of petition praying for a dissolution has been retained, and consequently there seems to be some doubt as to whether it is now correct for a petitioner to pray for a divorce from the other party or for a dissolution of marriage as before.

As the new Act has been in force for several months now, this point of practice may have been considered by the Court, and if so, it will be useful if any of your readers can advise through your columns what is the correct practice. I am, etc.,

"SOLICITOR."

Wanganui.

Rules and Regulations.

Auctioneers Act, 1928. Declaring Special Districts under the Auctioneers Act, 1928. Gazette No. 25, 11th April, 1929.

Fisheries Act, 1908. Regulations re use of nets for taking fish in certain waters.—Gazette No. 25, 11th April, 1929.

Government Railways Act, 1926. Alterations to scale of charges upon the New Zealand Government Railways.—Gazette No. 25, 11th April, 1929.

Orchard Tax Act, 1927. Certain Commercial Fruitgrowing Districts made subject to the provisions of the Act.—Gazette No. 25, 11th April, 1929.

Samoa Act, 1921. Samoa Prisons and Constabulary Order, 1929, re constitution and payment of Samoan Constabulary and management of Prisons.—Gazette No. 25, 11th April, 1929; Samoan Health Amendment Order.—Gazette No. 31, 2nd May, 1929.

London Letter.

Temple, London,
26th February, 1929.

My dear N.Z.,

The weather is really abominable, and, for all the kind feelings I have towards you, I refused to budge from my room, when this morning one of your brethren looked in upon me to be taken down to the Privy Council to see the legal sights there, and I sent a young and hardy pupil in my place, pleading to urgent paper business before my fire. Nine of the High Court Judges are ill, with various kinds and degrees of influenza; and I do not blame them. If I was on salary, I should stay at home and be ill myself.

At a table in Hall, at lunch to-day, I observed in progress a brave effort to make the best of a bad day. It is a table next door to our own, also occupied by Old Hands. Before each of them was a glass of Brown Sherry; and a fellow-luncher, who came in with me, suggested that we might well find our own table too full to receive us and sit ourselves amongst the sherry drinkers. We could hardly be excluded from the treat could we? We did not, however, adopt this unscrupulous suggestion: which shows you that the morality of the English Bar is still on a high plane. And the occasion of this orgy, next door? Lionel Cohen's silk gown. I believe it is the rule, if anyone knows of it, that upon the arrival of a new silk to lunch in Hall, his table may call upon him for free drinks to celebrate. Cohen is a Chancery man who has made enough as a Junior in the past, and must make enough as a leader in the future, to be able to face this tax upon his progress. Other silks are Somervell and Eales, as I told you, but not Dickinson, as I am afraid I did also tell you. Hildersley is a great rating and all-that-sort-of-thing expert, and a man of standing and esteem. Sir Frederick Liddell you have head much about; he will never lead in Court, having won the position of Counsel to the Speaker and having lost very many years ago his powers of public speech in the very different business of drafting Bills of Parliament. Few though the new Silks comparatively be (and it is rumoured that the present Lord Chancellor has deliberately renewed a formerly-practised and somewhat severe discrimination among the applicants), there should be much Junior work let loose as a result of their elimination from the back benches; Somervell, on the Common Law side, and Cohen, on the Chancery side, should be Juniors the sight of whose departing backs should be particularly welcome in this behalf.

The *Hobbs v. Tinling and Co., Ltd.*, case, in which there was that much ado, of which I have told you, about the Lord Chief Justice's conduct of a *nisi prius* trial, is over and done with, and most people have forgotten all about it and retain only the memory of the Irish eloquence therein of Serjeant Sullivan. That Serjeant, as you know, is not of the old English rank of Serjeants, whose last survivor went some while ago. He is a Serjeant on the Irish side of him. The origin of this curious term "Serjeant" was one of the many thrillingly interesting origins discussed the other night by that learned academic of the law, Herman Cohen who has nothing to do with the Lionel Cohen aforementioned. He lectured upon these matters in the Inner Temple Hall, early in our current fortnight; and, in

a thesis intituled "The Origins of the Legal Profession in England," went back far behind the conquest and carried us to the early beginnings of the ecclesiastical jurisdiction which apparently comes first of all. I pause, at this point, for you to rise and remove your hats, in a tribute of respect for the Chancellor of the Ancient Jurisdiction, who addresses you! I am glad to think I got busy some centuries before the rest of you.

"Serjeant" is, as I did not know but you did, the corruption of "serviens," and the Junior Bar apparently began existence as "apprenticii." The idea of old Bremner, our senior junior, as an apprentice still, after a good half century of practice or more, is a pleasing one. However, there it is; the junior bar began as apprentices and the Inns began as the lodgings they nstalled themselves in, when King Henry, in 1234, closed down the City Law Schools in sweet sympathy for the welfare of the Oxford School of Law, likely to flourish to its better satisfaction if relieved of competition. In 1379 all the barristers, servants or apprentices, were taxed; and about the same time the machinery of the State was employed to enact, and enforce, greater simplicity of dress among at least the stuff gownsmen. All very interesting, and mostly to be read, I gather from Lord Justice Sankey's remarks (as president at the meeting where the lecture was delivered), in Mr. Cohen's recently published book: "History of the English Bar." The origin of the wig and gown, speaking generally and without particular reference to the various distinctions and finesse, is that which most intrigues the public but is really the least peculiar; it is not that we sometime or other initiated that marvellously effective gear, it is (as again you know; but you must let me spread myself a little, as I happen to know it too) that everyone else sometime or other stopped wearing it. The Bibs are apparently the relic of the ecclesiastical collar, which again brings into the prominence that it deserves this agreeable subject of Chancellors and Ecclesiastical Jurisdictions . . . . Horridge, J., by the way, is a keen and profound student of these matters, and is to be consulted by those who would dig deeper into the subject at least of wigs, and, I also suppose, gowns.

The decision of Romer, J., as to the charitable nature of bequests to found and maintain homes for animals, even animals naturally tending to be a nuisance to society, has been reversed by the majority of the Court of Appeal, Lord Justice P. O. Lawrence being the dissenting Lord Justice and agreeing with Romer, J., *Re Grove Grady: Plowden v. Lawrence.*

The next most interesting case of the period is, if you are interested in motor omnibus propulsion and especially in that ingenious type of engine in which the power is passed from the petrol engine to the driving wheel through the medium of an electric dynamo, *Tilling Stevens Motors Ltd. v. Kent County Council.* The House of Lords (and it is a pleasant thought to think of their Lordships involved in a Tilling-Stevens motor omnibus, in their select numbers) decided that for licence purposes such a vehicle is still electrically propelled, notwithstanding that the propelling power is really an internal combustion engine, propelling the dynamo and through it the vehicle. Lastly as to recent cases, and on a matter which may concern you as laymen no less than it concerns you as lawyers, the not-so-very-long-ago decisions in *Levene v. The Commissioners of Inland Revenue, Lysaght v. Commissioners of Inland Revenue* have given rise to the publication of a leaflet by the Inland Revenue, upon the subject of residence in this country and the effect and extent of the incidence of income tax which it causes: the leaflet is addressed to "Visitors from the Dominions and Foreign Countries," and it is subscribed by the signature of "Gordon Spry" who is not only the most entertaining teller of funny stories I have ever met, but is as able a Secretary as the Board of Inland Revenue can ever have had. I strongly advise you to become possessed of this most illuminating and informative sheet, whether you are contemplating a visit to this country, on leave, or whether you wish to be prepared for the sudden questions which are shot at us lawyers, on such matters, and by which the very depths of our ignorance are plumbed by the test of us upon a fundamental point of everyday life.

In Parliament the Local Government Bill has fared with comparative ease and comfort past the House of Commons and into the House of Lords, there being less of a battle royal over the abolition of Guardians than there was over the threat, since modified, to extend the powers of the Executive to legislate on its own. Clause 111, which dealt with this subject and gave power to the Minister to reform the law on his own when this might be necessary, "for the purpose of removing difficulties," (O admirable object!), caused much dissension, the Houses being very sensitive and fidgetty, as also is the Press, upon the subject of departmental legislation, a growing obsession and a matter very much and cleverly canvassed by our Lord Chief Justice of recent years. The House of Lords, without waiting for the Local Government Bill to come along, has also got busy on the same subject, in connection with the Factory and Workshop (Cotton Cloth Factories Bill, and Lord Carson has made a great declamation upon the growing evil. The feeling of the public is not very discriminating in the matter: It prays heartily and with reason that everybody may stop legislating for a while, the Houses of Parliament and the Departments alike: the laws enacted by both are equally tiresome, equally unintelligible, equally excessive; and it makes no difference to the poor man in the street, bravely attempting to obey even if he cannot understand them, whether they are on the Statute Book or not, whether they have or not the odious character of being Rules and Regulations only. . . .

Yours ever,
INNER TEMPLAR.

Court of Arbitration Sittings.

The following fixtures have been arranged by the Court of Arbitration:—

Nelson: 31st May, at 10 a.m.
Westport: 5th June, at 10 a.m.
Reefton: 6th June, at 10 a.m.
Greymouth: 7th June, at 10 a.m.
Hokitika: 10th June, at 10 a.m.
Christchurch: 18th June, at 10 a.m.
Wellington: 8th July, at 10 a.m.

Obituary.

Mr. E. Y. Redward.

In the late Mr. Ernest Yevily Redward, who died suddenly on 15th May, the State loses a valued servant, and the Profession a member the extent and responsibility of whose work hardly received in his lifetime the recognition due to it.

Born at Wellington, in 1869, he was educated at Wellington College, topping the Junior Civil Service Examination list in 1884. In the following year he became a junior clerk in the Public Works Department, and in 1888 was transferred to the Crown Law Office, where he remained for thirty-seven years. He was admitted as a barrister and solicitor in 1895, and in 1907 received the title of Assistant Law Officer, the title being changed in 1917 to that of Crown Solicitor. He also for many years held the office of Revising Barrister for the Dominion under the Friendly Societies Acts. In 1925 he left the Crown Law Office, nominally to retire upon superannuation, but actually to assume the position of Compiler of Statutes for the Dominion, and he remained in harness till the day of his death. Before its reorganisation by Sir John Findlay in 1910, the work of the Crown Law Office was chiefly of an advisory character, and Mr. Redward never went into Court. This was probably why he declined the position of Solicitor-General on the elevation to the Bench of Sir John Salmond in 1920.

His detailed knowledge of the contents of the statute book and of the *minutiae* of administrative law was unparalleled in the Dominion, and he was relied on for legal guidance by the executive officers of every Government Department, many of which had developed and ramified from small beginnings during the years of his service. With the annexation of the Cook Island Group the scope of administrative responsibility was widened, and Mr. Redward's connection with it was marked by his compilation of Island Laws issued as an official publication in 1905. The European War threw on the Crown Law Office a sudden burden of settling emergency regulations and many other classes of documents not made public, and of advising in novel cases for which no New Zealand precedent existed. In this work Mr. Redward loyally assisted his chief, the late Sir John Salmond. One part of his work at this time is on record in his compilation of "The War Regulations Act and Regulations Thereunder," an official publication carefully edited and copiously indexed, the first edition of which appeared in 1915, and the fifth in 1919. In the preparation of the Consolidated Statutes of 1908, Mr. Redward occupied a responsible, though subordinate, position. Besides being responsible for the final proof-reading, he supplied to the Commissioners, with whom he was in daily touch, critical notes on every draft compilation as it passed through his hands. The Commissioner's estimate of his work is on record in the following passage of their report of 28th July, 1908 :—

> "We desire to express our appreciation of the services rendered by Mr. Redward, Assistant Crown Law Officer. He possesses an accurate knowledge of the statutes, together with a special gift of method, and has served us with conspicuous ability and zeal."

As Compiler of Statutes Mr. Redward had a freer hand, and the quantity and standard of his work are on record in the consolidating Acts which appear in the statute books for the years 1925 to 1928. It was, however, as Editor of "*The Index to the Laws of New Zealand*," still familiarly known as "*Curnin*," that Mr. Redward deserved best of his fellow-practitioners. When Mr. John Curnin, on his retirement from the Civil Service, made his copyright a gift to the State, Mr. Redward was, on Mr. Curnin's recommendation, appointed to carry on the publication, and the first edition issued under his editorship was the tenth, brought down to the end of the session of 1896. The 26th edition, brought down to the end of the year 1928, was issued only a few months ago. For more than thirty years the whole of the work of this publication was done by Mr. Redward personally, and it grew under his charge from a volume of 229 pages to one of 464 pages.

The late Mr. Redward's temperament was genial and even. In earlier days he was a prominent rugby half-back and subsequently took an active part in tennis and the control of tennis. "It was in keeping with his whole character," an intimate friend observes, "that as goal-kicker for his team he always took charge of the ball after a game, and produced it for the next match in a condition of perfect symmetry of seam and shape."

Bench and Bar.

Mr. Guy Norman Morris, solicitor, of Auckland, has been appointed a Stipendiary Magistrate, to fill the vacancy caused by the appointment of Mr. J. H. Luxford, S.M., as Chief Judge of Samoa. Mr. Morris was a Clerk of the Court for five or six years. He served in the War and returned as a lieutenant, wounded. He was appointed Clerk of the Court at Tauranga, and he was later, for five years, administrator at Niue Island. He also served as Collector of Customs at Fiji for two years being, during that time, on loan from the Justice Department. On his return, he was in the Official Assignee's office at Auckland, and shortly afterwards he was appointed Official Assignee there. Mr. Morris is the Public Service nominee on the Public Service Appeal Board.

Messrs. Torrens and Laurie, Auckland, have dissolved partnership. Mr. R. J. Torrens is retiring from practice and Mr. F. N. Laurie will continue to practise on his own account.

Messrs. M. O. Barnett and P. Keesing, of Wellington, are amalgamating their practices. The firm will be known as Barnett and Keesing.

Mr. J. de V. W. Blathwayt, LL.B., lately of the staff of the Public Trust Office, Gisborne, has commenced practice in Gisborne on his own account.

Our professional reverence for the law is so great that we recoil from the idea of laying it on the laboratory table as we should from that of plucking out our own entrails and re-arranging them in better shape.—
—Sir Maurice Amos.

Legal Literature.

Lord Reading.

A Biography; by C. J. C. Street (Geoffrey Bles).

When one sets out to write of the life of another, one should keep in ones mind the thought that the great lesson to be gained from a biography is to learn what man can be or do at his best. Such was the thought of Samuel Smiles who also added: "A noble life put fairly on record acts like an inspiration to others." It is not easy to write within a few short years of a man's death a true or fair record of that man's career; and to write the record of a living man presents many obvious difficulties. With all these disadvantages to contend with, however, Mr. Street has written a most interesting account of Lord Reading. The biographer is apparently well acquainted with the subject of his writing and is a fervent admirer. With his views it is safe to predict that the English Bar is in complete accord. The story reveals the falsity of the popular belief that a lawyer is not of much use in other spheres of life. Lord Reading and Lord Birkenhead are brilliant examples of men successful both in law and in business.

Longfellow justly said that a life that is worth writing at all is worth writing minutely. Mr. Street's book is not minutely written, but that is perhaps impossible while the subject is yet living. Lord Reading's life is, however, fairly traced from early youth. His scholastic career indicated no great future. He was of a restless disposition, striving to find his proper niche in this world. He learnt from a voyage to India as ship's boy that it was not to be found at sea. The Stock Exchange gave him much experience, but he was not restful there. His subsequent decision to abandon the City for the Law found the niche he was seeking. In character Rufus Isaacs seems to have possessed all the manly qualities. His popularity seems to have been established at once at the Bar and never to have waned. His success was founded in the police and county courts. His relatives were able to test his abilities early in his career with some heavy litigation in the High Court, and the load was carried without difficulty. His industry was great and his ability so marked that he became sought after very rapidly by litigants. Mr. Street reveals a brilliant career at the Bar, and gives some interesting details of cases fought.

Rufus Isaacs, recognising a duty to work for the public weal as well as his own interest, entered Parliament in 1904 as a Liberal. His behaviour during the bitter campaign conducted by Mr. Lloyd George is a happy contrast to the general behaviour of the Liberal party in 1909. He was regarded as a man of such wise judgment that it makes rather sad reading to hear of his share in what was known as the "Marconi Scandal." If it were not for his unquestionable probity, his explanation that he did not mention he had taken shares in the American Marconi Company as it did not occur to him that it was pertinent to the particular inquiry of his interest in English Marconi Shares, would have been hard to understand. His high character stood him in good stead in a most trying situation, and when that inquiry was concluded the world knew Rufus Isaacs as a man whose integrity was not in doubt.

Than Lord Reading few, if there are indeed any, did more for the British Empire during the War. As a special envoy from Great Britain to the United States he paid several visits and with great judgment, tact, and understanding arranged matters of finance and munitions to his own great credit and his Country's advantage. When he received his office of Lord Chief Justice after the War it was only for a short while until he was appointed Viceroy in India. Here again, although with a national racial disadvantage in India, he met and coped with the full fury of Bolshevik enterprise.

The life of an eminent Lord Chief Justice of England is always likely to be interesting reading. When that life is of a man endowed with the most noble characteristics, and comprehends an experience of commerce as well as law, of high diplomacy and vice-regal duties, that life must be, and, indeed, in this case most assuredly is, excellent reading.

—C. A. L. Treadwell.

Justice of the Peace and Local Government Review Annual 1928.

Edited by Albert Lieck.
(Pp. viii, 192, ii: Butterworth & Co. (Publishers) Ltd.: Shaw & Sons Ltd.)

One of the most interesting books concerning the law that this reviewer has for a long time had in his hands is the *Justice of the Peace and Local Government Review Annual* for 1928. It is a collection of some of the articles of more permanent interest that have from time to time appeared in that eminent legal newspaper, but its scope is not confined to articles published in the year mentioned in the title. The selection is wise, as one would, of course, expect under the editorship of Mr. Lieck. The opening section of the book treats of the administration of justice and some five or six articles are there collected, each of which should interest all concerned with or engaged in the actual administration of justice. The greater portion of the work is devoted to articles dealing with different points in criminal law frequently arising before inferior courts, such, for example, as public indecencies, soliciting, contempt of court, evidence of bad character of accused persons, evidence of conduct on other occasions, corroboration in bastardy. There are some valuable articles dealing with the police and prisons, and articles on many other subjects falling within the jurisdiction of justices. No solicitor whose practice takes him into the police court will fail to find this a useful volume.

New Books and Publications.

Butterworth's Twentieth Century Statutes. 1928 Volume. (Butterworth & Co. (Aus.) Ltd.). Price 26/-.

Butterworth's Yearly Digest, 1928. (Butterworth & Co. (Aus.) Ltd.). Price 24/-.

Sim's Divorce and Matrimonial Causes Act and the Rules Thereunder. Fourth Edition. By. W. J. Sim, LL.B. (Whitcombe & Tombs Ltd.) Price 21/- (Cloth); 25/- (Half-calf).

Jurisdiction in Marginal Seas. By W. E. Masterton. (Macmillan & Co. Ltd.) Price 24/-.

Everyday Statutes. Annotated by S. E. Williams (4 Volumes). (Sweet & Maxwell Ltd.) Price £9/5/-.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"I will forever at all hazards assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the British constitution, can have no existence."
—*Lord Erskine.*

Vol. V. Tuesday, June 11, 1929 No. 8.

Law and the Colonial Service.

A few years ago Lord Birkenhead addressing the undergraduates of Glasgow University made a plea for candidates for the Indian Civil Service. That service has not of late years proved as attractive to undergraduates of the English Universities as it did in the past. This has been due largely, if not entirely, to administrative changes in India, but despite those changes Lord Birkenhead, who was then Secretary-for-State for India, spoke highly of the advantages of a career in the service to young men of talent and ambition. The Colonial Service has, on the other hand, steadily advanced in importance and status with the rapid progress of those parts of the Empire which are under the direct control of the Colonial Office. The extent of the area administered by the Colonial Office and the size of the population within that area are not generally recognised. The Colonial Service is responsible for an area of some 2,000,000 square miles with a population of approximately 50,000,000, and with some small exceptions the whole of this area and its inhabitants lie within the tropical zone.

Reviewing in the House of Commons on the 1st May the last five years of Colonial administration, Mr. Amery, the then Secretary-of-State for the Colonies, pointed out that the total trade of the Colonial Empire had by 1927 come very close to the £500,000,000 mark, and expressed his conviction that for the present year the figures would well exceed that total. In the most important colonial group, the West African Colonies, the total trade had grown from £51,000,000 in 1924, to £66,000,000 in 1927, and during the same period the total trade of the East African group, rose from £25,000,000 to £32,500,000. The total trade of the Eastern Pacific group, Ceylon, Malaya, and the Pacific Colonies, rose from £153,500,000 to £247, 000,000. The total exports from Great Britain to all her Colonial Dependencies in 1905 was under £18,000,000. By 1924 the figure had risen to £47,000,000 and in 1927 it was just short of £55,000,000. Great Britain's imports from the colonies in 1905 were £19,500,000, in 1924 over £50,000,000, and in 1927 nearly £60,000,000. Mr. Amery went on to point out that as a purchaser of goods in Great Britain the Colonial Empire, taken as a unit, now ranked next to India and Australia as Great Britain's best market, and that in the last five years the Crown Agents for the Colonies had bought in Great Britain £33,000,000 worth of Government stores.

These facts and figures indicate the enormous importance of the Colonial Dependencies to the British Empire, and when it is remembered that the Native populations, who are the primary producers of this enormous trade, number some 50,000,000 and are regulated and governed by the Colonial Service, the importance of that Service will be equally recognised. To all young men studying law at our Universities, and to lawyers with sons to make their way in the world, the announcement that a Board has been set up in New Zealand under the Chairmanship of His Excellency the Governor-General to recommend candidates for this Service from amongst graduates of the New Zealand Universities is a fact of prime importance. It is not only the regulation of trade in the Colonial Dependencies that falls within the scope of the duties of the officials of the Colonial Office, but the government of a population as great as that of Great Britain herself.

In such government the man trained in legal principles and possessing a legal education must always find an important place. There are, of course, in such a service special branches such as the agricultural, the veterinary, the medical and the educational, but in the general administrative operations which are concerned with the establishment of justice and the preservation of law and order the general education of the University man, whose studies have included a course of law, is bound to be a qualification. The education for such service, considering the great diversity of peoples concerned, the different languages, the various stages of civilisation, and the forms of government, religions and cultures existing in the various Colonial possessions, should be general rather than special, and those whose duty it is to prescribe courses of legal education should always understand that a knowledge of legal principles and a degree in law are qualifications for administrative service as well as for actual practice in the Law. Inasmuch as service under the colonial administration is confined almost entirely to tropical countries, health, habit and outlook are essential requisites in an applicant, and generally speaking the qualifications required are probably those that go to the making of a successful lawyer who commands the confidence and respect of his clients.

It is impossible in an article such as this to do more than refer to the fact that a career in this Service should offer great attractions to the class of young man whose horizon has hitherto been confined to practising the profession of Law in the Dominion in which he happens to have been born. To such we suggest they should consider the opportunity now open for a career in an increasingly important Service. They should, if possible, obtain a copy of Mr. Amery's survey and seek information from the New Zealand Board. Mr. Amery says that in the Service salaries have been increased and that the Colonial Office has steadily raised the standard of the character and ability of the men who entered the Service as there is nothing more vital to the development of the whole of the Empire than the men who do the work on the spot. Members of the legal profession may well consider how the opening now presented for service of this nature affects the requirements of legal education and training.

Court of Appeal.

Herdman, A.C.J.
Adams, J.
MacGregor, J.

March 26; May 6, 1929.
Wellington.

NAPIER HARBOUR BOARD v. NEW ZEALAND TRAWLING AND FISH SUPPLY CO. LTD.

Harbours—Dues—Bunker Coal For Trawlers Brought On to Wharf and Loaded Direct Into Trawler by Employees of Trawling Company—Fish From Trawler Landed Direct Into Vehicles by Company's Employees and Taken Away—Gear Forming Part of Equipment of Trawlers Landed On to or Shipped From Wharves—Board Entitled to Levy Dues on Such Goods—Not Within Exemption of "Vessel Employed in Fishing . . . and Not Conveying Goods for Hire"—Harbours Act, 1923, Sections 5, 78 (1e), 226 (12).

Case stated under Rule 154 removed into the Court of Appeal for argument and for the determination of the questions of law arising. The facts as agreed were that the company was the owner of certain steam trawlers which were employed solely in fishing within, and in the immediate vicinity of, the Port of Napier. The trawlers berthed at the plaintiff Board's wharves to which they returned each day on the conclusion of their fishing operations. They carried no goods for hire nor did they trade with any other port. "Bunker coal" was required for the propulsion of the trawlers and was shipped on to such trawlers for that purpose. It was brought on to the plaintiff Board's wharves in vehicles belonging to the coal merchants and was put on to the trawlers fron the wharves by the defendant company's employees. The fish brought to the wharves in the trawlers was landed from there into defendant company's vehicles on the plaintiff Board's wharves, but all labour in connection with such loading was done by the defendant company's employees.

Wharfage amounting to £4 3s. 8d. was claimed in respect of certain gear. That gear included firstly the engine boiler tanks, timber, and other gear dismantled from S.T. "Weka" during June, 1925, when that vessel was taken out of commission and destroyed, which gear was landed on the plaintiff Board's wharf and upon which wharfage dues were claimed under By-law No. 116 (b); and secondly, 1 winch, 2 trawl-boards, 2 gallows, and 1 search-light consigned from Wellington to the defendant company at Napier, in November, 1926, per S.T. "Awarua," a fishing vessel not the property of the defendant company upon which wharfage dues were claimed under By-law No. 116 (b).

The questions of law arising were whether the plaintiff-Board had a right to levy wharfage dues in respect of (a) "bunker coal" loaded over the wharves into and for the use of the defendant company's trawlers, or (b) in respect of fish the result of the trawlers' fishing operations landed on the Board's wharves, or (c) in respect of the whole or any part of the gear forming part of the equipment of the trawlers landed on to or shipped from the Board's wharves.

T. S. Weston for plaintiff.
Gray, K.C. and Buxton for defendant.

ADAMS, J., delivering the judgment of the Court, said that in a case between the same parties, reported (1927) G.L.R. 194; 3 B.F.N. 33, it was held that under Section 226 (12) of the Harbours Act, 1923, the Board had power by appropriate by-law to levy wharfage dues in respect of "bunker coal" brought on to the Board's wharf and placed from there on to the trawlers, but that that could not be done under the existing by-law No. 112 (a). The Board then amended by-law No. 112 by adding clauses (b), (c), and (d). The present questions arose under those clauses. In their Honours' opinion the decision to which they had referred was right both in the result and in the reasoning by which it was supported. But if the Board had power by appropriate by-law to levy wharfage dues in respect of "bunker coal," there was no reason why the power should be limited to "bunker coal." The enabling section was Section 226 of the Harbours Act, 1923, which read as follows: "The Board may from time to time, by by-laws made under this Act . . . . (12) Fix scales of dues, tolls and charges, to be paid for the use of such wharves or docks, and charges for labour supplied or services rendered in connection therewith, or on goods passing over or through the same." The only exception to be found was in Section 78 (1) (e) exempting (*inter alia*) any vessel employed in fishing and not conveying goods for hire. That exemption applied only to the vessel. The defendant company had used the plaintiff's wharf for the purpose of conveying "bunker coal" to its vessel, and also for the purpose of landing its fish. These articles were "goods" within the definition in Section 5 of the Act. They were, therefore, within the ambit of Section 226 (12), and by the amendment to by-law 112 the Board had fixed dues to be paid in respect of them.

The gear from the S.T. "Weka" was severed from the ship in the process of her destruction before it was landed on the wharf, therefore it had ceased to be part of a fishing vessel or its equipment, part or all of it might indeed at some future time become part of a fishing vessel or of its equipment, but when landed it had no relation to any particular ship. Their Honours thought that such gear came clearly within the definition of "goods" in Section 5. The gear ex S.T. "Awarua" might have been intended for one of the defendant's trawlers, but there was no suggestion that it was part of a fishing vessel or of its equipment. That gear was, therefore, in the same category as the gear from the S.T. "Weka."

Solicitors for defendant: **Kennedy, Lusk and Morling,** Napier.
Solicitors for plaintiff: **Sainsbury, Logan and Williams,** Napier.

Herdman, A.C.J.
Adams, J.
MacGregor, J.
Kennedy, J.

March 25; May 6, 1929,
Wellington.

R. HARDING & CO. LTD. (IN LIQUIDATION) v. HAMILTON

Company—Liquidation—Set-off—Claim for Calls by Liquidator of Company—Monies Due to Shareholder in Respect of Bills Signed by Shareholder for Accommodation of Company While a Going Concern and For Services Rendered to Company as Accountant—Claim of Set-off by Shareholder—Informal Arrangement When Bills Signed That Any Moneys Paid by Shareholder on Bills Should be Credited to Shares—Similar Arrangement as to Moneys Becoming Due for Services Rendered to Company—No Debts Payable *in praesenti* to Shareholder—Agreements to Set-off *in futuro*—Not Sufficient to Constitute Set-off—No Evidence of Set-off or of Any Transaction Equivalent to Payment—No Inference of Set-off Drawn from Failure of Receiver Appointed by a Debentureholder to Require Payment of Calls by Shareholder—Moneys Paid Not Advances on Account of Shares—Companies Act, 1908, Sections 66, 68; Table A. Art. 16.

Appeal from a decision of Ostler, J., upon a summons to show cause why the respondent, Hamilton, should not be ordered to pay to the liquidator of the appellant company the sum of £400 being an amount due in respect of a call upon his shares in the company and upon a motion for the removal of the respondent's name from the list of the contributories of the company. The summons was dismissed and an order was made removing the respondent's name from the list of contributories. The facts were that the respondent held 500 shares of £1 each in the company in respect of which £100 had been paid; that amount being credited to him on 29th March, 1927. On 23rd August, 1927, the balance of uncalled capital was called up, the call being made payable on 12th September, 1927, and in September, 1927, a receiver was put in by debentureholders. The company went into liquidation on 29th December, 1927. While the Company was a going concern the respondent signed certain accommodation bills to assist the company, and when the company was unable to take up the bills at maturity, the respondent came to its assistance and found sums of money aggregating £515 15s. Between April, 1927, and August, 1927, he rendered the company certain services as an accountant in respect of which there was payable to him the sum of £149 18s. After crediting a sum of £245 owing by him on account of a car purchased, there was due to him for moneys paid to meet promissory notes and for services rendered the sum of £424 13s., and he was contingently liable for the sum of £101 5s. in respect of three promissory notes which were not then due. There existed between the respondent and the company an informal arrangement to the effect that the company was to meet the various bills signed by the respondent as they became due, and that, if the company failed to meet the bills and if

the respondent was obliged to redeem them, the amounts so paid by him were to be credited to him in part payment of the amount unpaid by him to the company on his 500 shares. A similar arrangement was made in respect of monies which might become due to him for services rendered. If the monies due by the company to the respondent were to be set-off against the £400 payable by him for calls, he would owe the company nothing when it went into liquidation; on the contrary the company would be indebted to the respondent. The question arising was whether in fact the monies had been set-off. In addition to the above informal arrangements as to crediting in the future the amounts paid on bills (if any) or amounts due for services (if any) towards payments of the amount unpaid on shares, there was evidence that the receiver had taken no steps to enforce payment of the call. There was, however, no evidence that any of the monies paid by the respondent had in fact been received as advances upon shares or credited against the shares or even that the respondent had before liquidation attempted to have any record made in the books of the company that his liability in respect of his shares had been discharged.

Cornish for appellant.
Stevenson for respondent.

HERDMAN, A.C.J., delivering the judgment of the Court, said that it had been submitted that the transactions between the company and the respondent came within Article 16 of Table A of the Companies Act, 1908, which enabled directors of a company to receive payments from a member of the company who was willing to advance the same on account of moneys due upon his shares. Their Honours had no hesitation in stating that that was not the case. The respondent used his money to pay a debt which the company should have paid. In a sense the respondent was a surety and under an obligation to meet a debt if the principal debtor failed to pay it. He did not deposit money with the company on account of his liability as a shareholder. He consented to act as the medium through which the company secured money for its own purposes from lending institutions, and when the time arrived for the payment of the bills upon the strength of which money had been raised, the respondent found the ways and means. If the arrangement was that the monies paid by him were to be treated as advances within the provisions of Article 16 one would expect to find some stipulation about the payment of interest; but none was to be discovered. Then again, Prouse, the managing director, evidently considered that the essence of the agreement arrived at was "set off," for in a letter dated 28th February, 1928, addressed to the respondent, he said so. If the respondent was to escape from paying the amount of the calls which the liquidator claimed, he could only do so by proving that the moneys paid by him for the benefit of the company and the moneys earned by him for services rendered were in fact set-off against the liability on his shares before the company went into liquidation.

The respondent claimed that his liability to the company had been discharged by a transaction or transactions which were the equivalent of payment. The onus was upon him to prove that a set-off was so effected. The learned Judge in the Court below came to the conclusion that a set-off must be presumed from the inactivity of the receiver who had been put in charge of the company's business by debenture holders. The receiver heard the respondent's story and took no step to enforce payment of the call, but as to whether or not he had abandoned his claim against respondent there was no evidence either way. No inference of any value could, however, be drawn from the failure of the receiver to proceed against the respondent. Was then the respondent's indebtedness for calls extinguished by set-off before the company went into liquidation? Firstly, as to the bills mentioned in the case, the respondent's evidence showed that money was supplied by him as each bill fell due. It followed that, as eighteen bills matured before liquidation and eighteen payments were made by the respondent, there must have been eighteen separate instances of set-off, but nowhere could any record be found of any gradual diminution of the respondent's liability. Next, when the arrangement about set-off was made there were no debts payable *in praesenti*. The respondent might never have been called upon to meet the bills. The company might have been able to take them up as they fell due. No call had been made when the arrangement was made. Months elapsed before the resolution was passed which provided for the calling up of the uncalled capital. Then, as to the respondent's claim for services rendered, he might never have done any work. When the arrangement was made it amounted to an undertaking to do something *in futuro*. The situation disclosed by the facts resembled the situation with which the Court had to deal in **Kent's Case,** 39 Ch. D., 259. When the arrangements about set-off were made in the present case, no one could predict with certainty that the respondent would ever have a claim against the company for money advanced or for services rendered.

Their Honours then proceeded to consider whether it had been proved that any set-off had been actually consummated. The question arising was whether there was proof in the present case, as in **Spargo's Case,** L. R., 8 Ch. 407, that there was on the one side a *bona fide* debt payable at once for the purchase of property, and on the other side a *bona fide* liability to pay at once for shares and that one obligation had in fact been set-off against the other. The respondent, no doubt, was under liability on account of his shares, but when the agreement was made there was no debt owing to him by the company. There was nothing before the Court to indicate either that moneys paid by the respondent were received as advances or that they were, when paid, credited against his share liability. There was no entry in the minute book which recorded the terms of any arrangement made by the respondent with the company about set-off, nor was there any such record in the share register. There was no evidence of any attempt being made by the respondent before liquidation to have a record made in any book of the company that his liability in respect of his 500 shares had been discharged. No cash book, no ledger, not even a receipt for moneys paid on account of the company had been produced. There existed, however, sufficient proof of a somewhat nebulous executory undertaking which provided that moneys paid by the respondent on account of the bills already referred to and moneys payable to him for services rendered were to be credited against his liability on his shares. But that was not enough. The company was in liquidation. A liquidator had been appointed. His duty was to see that the interests of the creditors and contributories were protected, and for that purpose he must act in accordance with the directions in Sections 66 and 68 of the Companies Act, 1908, and insist that members of the company contribute to the assets of the company an amount sufficient for the payment of the debts and liabilities of the company and for the adjustment of the rights of contributories amongst themselves, subject, of course, to the limit provided for in paragraph (b) of Section 66. Section 68 expressly forbad any set-off by a member of moneys due to him by the company in his character of a member in competition with creditors to a winding-up. Their Honours did not think that **Grissell's Case,** L.R. 1 Ch. 528 assisted in the present case. In **Black's Case,** L.R. 8 Ch. 254, it was held that the contractor could not set-off the amount due to him from the company under his agreement as damages or otherwise against the amount due by him on the calls. In that case there was an agreement about a set-off before liquidation. That was so in the present case. In **Black's Case** the shareholder attempted to escape from paying the amount of a call made by a liquidator. In the present case the respondent sought to evade payment of a call which the liquidator was attempting to collect. If at some date before the liquidation proceedings supervened, the respondent and the company had met and arranged that the set-off agreed upon should there and then be carried into effect, that would have ended the matter at any rate so far as moneys owing by the company to the respondent were concerned. But that was not done. The case of **In re Law Car and General Insurance Corporation,** (1912) 1 Ch. 405, was in some respects, not unlike the present. A director of a company who was a large shareholder offered to guarantee an overdraft of £5,000 at a bank stipulating that any payments which he should make should, at his option, be treated as payments in advance on calls. Neville, J., pointed out that the contract made did not discharge the director from liability in respect of the unpaid balance due on his shares. If nothing were paid to the bank under the guarantee, or if he did not exercise his option, the liability upon his shares remained intact. The director paid moneys to the bank and exercised his option after the company went into liquidation. But the learned Judge decided that **Black's case** (*cit. sup.*) applied and that at the time of winding-up an amount was unpaid on the directors' shares and that, therefore, he was liable. Their Honours referred also to the judgment of Fry, L.J., in **Kent's case,** 39 Ch. D. 259, and distinguished **In re Jones Lloyd and Co.,** 41 Ch. D. 159, where the transaction under review amounted in effect to a payment for shares in cash. In the present case, however, no actual set-off was ever carried into effect nor was there any proof of any transaction which was equivalent to payment.

Appeal allowed.

Solicitors for appellant: **Morison, Spratt and Morison,** Wellington.

Solicitors for respondent: **Izard, Weston, Stevenson and Castle,** Wellington.

Supreme Court.

MacGregor, J. April 19; May 8, 1928.
Wellington.

HERDMAN v. C. DICKINSON & CO. LTD.

Principal and Agent—Land Agent—Commission—Written Authority to Sell Hotel at Certain Price—Commission Payable "Should a Sale be Effected"—Agent Obtaining Offer to Purchase at Lower Price Providing for Payment to Agent of Deposit "on Acceptance of Offer"—Agent Agreeing to Accept Less Commission—Offer Accepted—Deposit Not Paid by Purchaser—Refusal of Purchaser to Complete—Vendor Declining to Enforce Contract—Duty of Agent to Obtain Payment of Deposit—Failure to Perform Duty—Agent Not Entitled to Commission.

Appeal on law and fact from the decision of Mr. Barton, S.M., in favour of the plaintiff company in an action and counterclaim heard by him in the Magistrates' Court at Wellington. The respondent conpany was a land agent and the appellant the proprietress of the Railway Hotel at Marton Junction. The respondent claimed to recover from the appellant a sum of £100 as the amount of commission agreed to be paid by the appellant to the respondent for effecting the sale of her hotel premises. The appellant defended the action and counterclaimed for £150 damages alleging negligence by the plaintiff in acting as her agent. On 28th May, 1928, the appellant by a written authority to sell authorised the respondent to sell her leasehold interest in the hotel, including furniture, for £2,850. The authority provided: "I hereby authorise you to sell my hotel as per particulars hereunder mentioned and agree to pay you commission as stated below should a sale be effected by you or through your instrumentality. No sale, no charges. Commission on all sales 5% or arranged." On 5th June, 1928, respondent's servants informed the appellant that they had an offer for £2,500 for the lease and furniture of the hotel, to which the appellant replied that she could not accept less than £2,500 nett and enquired, "How about your commission?" Subsequently the respondent received from one Mrs. Annie Doogan an offer agreeing to purchase at £2,600, and they communicated this offer over the telephone to the appellant, informing her that their commission would be £100. Following on this communication they sent her a copy of Mrs. Doogan's offer which was addressed to the respondent company and by which she offered to purchase the lease and furniture of the Railway Hotel, Marton Junction, for the sum of £2,600 on certain terms. These terms included (*inter alia*) a provision that on acceptance of the offer she would pay a deposit of £100 to the respondent company as agent for the vendor, the balance of the purchase money (£2,500) to be paid in cash on date of settlement. On 15th June, 1928, on receipt of this offer, the appellant telegraphed to the respondent company: "Accept offer. Herdman." The respondent company then telegraphed to Mrs. Doogan: "Your offer accepted by Mrs. Herdman." On 19th June the appellant received a letter from Mrs. Doogan's solicitors purporting to withdraw her offer to purchase. The appellant took no steps to compel Mrs. Doogan to complete the purchase. Mrs. Doogan had not paid the deposit of £100 provided for in her offer.

O'Leary for appellant.

Cornish and James for respondent.

MACGREGOR, J., said that there was no controversy regarding the facts, the only question being whether the respondent had made good its claim in law to recover its agreed commission of £100 on the sale of the appellant's hotel. The answer to that question must depend upon whether the respondent had duly carried out its duties as appellant's agent in the transaction. After referring to **Bowsted on Agency,** 7th Edn., 201, and to the observations of Hosking, J., in **Samson v. McKay,** (1923) N.Z.L.R. 43, as to the duties of an agent, His Honour said that the crucial question was accordingly whether it had been established by the evidence that the respondent had procured a person approved by the vendor to enter into a binding contract of purchase upon the terms warranted by its authority. The case of **Progressive Agency v. Bennett,** (1928) N.Z.L.R. 100, was in point. Skerrett, C.J., in that case decided that a land agent who had been authorised by an owner to sell his property on the terms (*inter alia*) of a "£200 cash deposit," who procured the written acceptance of a purchaser to the terms but failed to obtain payment of the deposit, upon cancellation of the contract was not entitled to recover his commission. In His Honour's opinion that decision was in principle decisive of the present case. It was cited to the learned Magistrate who was able to distinguish it to his satisfaction from the present case; but in the result His Honour found himself unable to do so. It was clear, His Honour thought, from the language of the written offer, procured (and prepared) by the respondent itself, that it became part of its duty as agent on acceptance of the offer to obtain payment of the deposit of £100 from the purchaser. The first material term of the offer provided that: "On acceptance of this offer I will pay a deposit of £100 to C. Dickinson & C. Ltd., as agents for the vendor." It was clear also from the evidence that the respondent company realised that to collect this deposit was part of its duty as agent for the appellant, for Mr. Cullingham (one of the respondent company's representatives) said in evidence: "I called on Mrs. Doogan to get the deposit but she was away. I looked on it as my duty to try to collect the deposit." It appeared that although the offer was withdrawn on 19th June, the appellant was not told until 5th July that the £100 deposit had not been paid. Had she been promptly advised by her agent that no deposit had been paid as stipulated, she might well have adopted a different attitude towards the whole transaction. The words "On acceptance of this offer I will pay a deposit of £100 to C. Dickinson & Co. Ltd., as agents for the vendor," as used in a business document, could have no other meaning than that a sum of £100 was contemporaneously with the acceptance of the offer to be paid to the respondent: see **Progressive Agency v. Bennett** (*cit. sup.*) at p. 103. It was clearly laid down in **1 Halsbury's Laws of England,** 183, that "the first duty of an agent is to carry out the business he has undertaken, or to inform his principal promptly if it be impossible to do so." In the present case it appeared to His Honour from the evidence that the respondent had failed in that primary duty in both respects. It had failed in its duty to collect the deposit of £100 on acceptance of the offer, and had also failed to notify the principal promptly of that material fact. In those circumstances His Honour found it impossible to hold that the respondent had proved that it had duly or completely carried out its duties as the appellant's agent in this transaction. The respondent, therefore, was not entitled to its agreed remuneration.

Appeal allowed.

(Leave to appeal to the Court of Appeal was subsequently refused by MacGregor, J.).

Solicitors for appellant: **Bell, Gully, Mackenzie and O'Leary,** Wellington.

Solicitors for respondent: **Webb, Richmond, Cornish and Swan,** Wellington.

MacGregor, J. April 26; May 8, 1928.
Wellington.

GARDINER v. FLUX.

Landlord and Tenant—Option to Purchase Freehold—Provision for Lessee Giving Prior to Expiration of Term One Month's Notice in Writing of Desire to Purchase—Lessor to Transfer Land on or Before Expiry of Notice on Payment of Sum Stipulated and Arrears of Rent Owing up to Date of Payment—Notice Must Expire Before End of Term—Notice Given Three Days Before Expiry of Term Not Effectual.

Claim by plaintiff for the specific performance of a contract for the sale and purchase of land created by an option of purchase contained in an agreement to lease. The defendant was the landlord and the plaintiff the tenant under the said agreement of lease, the term of which expired on 1st December, 1928. The clause in the agreement which created the option of purchase in question was as follows: "And it is hereby declared and agreed that if the lessee at any time prior to the expiration of the term hereby granted shall give to the lessor one month's notice in writing that he desires to purchase the freehold of the said land hereby demised the lessor on or before the expiration of such notice will on payment of the sum of two hundred and

seventy pounds (£270) and of all arrears of rent owing up to the date of payment of the said sum of Two hundred and seventy pounds (£270) transfer the said demised premises to the lessee or as he shall direct in fee simple free from all encumbrances." A notice of desire to exercise the option to purchase dated the 26th November, 1928, was given by the solicitors for the plaintiff to the defendant and was received by the defendant on 27th November. The defendant refused, however, to transfer the land comprised in the option, adopting the attitude that the option had not been exercised within the time allowed by the above clause and that there was, therefore, no binding contract of sale and purchase. A small amount of rent was owing at the time the option was exercised, and a breach of agreement in failing to keep the land clear of noxious weeds was alleged.

L. H. Herd for plaintiff.

Putnam for defendant.

MacGREGOR, J., said that the broad question which he had to determine was whether a binding contract of sale and purchase was created between the parties on the receipt by the defendant of the notice on 27th November, 1928. In other words, had the conditions imposed by the clause in the lease on the exercise of the plaintiff's option to purchase been duly complied with? In considering that question of interpretation, one must keep in mind that "such a clause is always for the interest of the tenant, as it binds him to nothing, and allows him the advantage of a trial of the demised premises": **Woodfall on Landlord and Tenant,** 22nd Edn, 400. The conditions imposed on the exercise of options were always strictly construed: see **Dart on Vendor and Purchaser,** 7th Edn., 272; **Fry on Specific Performance,** 6th Edn., 515. The English cases cited in support of the propositions stated in those text-books appeared to bear them out. His Honour referred to **Lord Ranelagh v. Melton,** 2 Dr. & Sm. 278; **Weston v. Collins,** 13 W.R. 510, and **Smith v. Dawson,** 2 N.Z.L.R. S.C. 411. In the last case it was held that where a lease provided that if the lessee should at any time during the term be desirous of purchasing the land leased, and of such desire should give three months' notice, &c., then the lessor should convey, the whole three months' notice must expire within the term, and a notice given two days before the expiration of the lease was not sufficient. In His Honour's opinion the same result followed in the present case. It was true that the wording of the respective leases in question was somewhat different, but His Honour thought the same principle must govern the construction of both documents. It appeared that the clause giving a right to purchase to the plaintiff contemplated that the purchase was to be completed before the expiration of the term, and that the words "prior to the expiration of the term hereby granted" in effect governed the whole of what followed. In other words His Honour did not think it could be said that the plaintiff in point of fact gave to the defendant "one month's notice in writing" of his desire to purchase "at any time prior to the expiration of the term hereby granted." The term expired on 1st December, 1928. The notice was given to the defendant on 27th November, 1928. The plaintiff, therefore, had given to the defendant, not one month's notice as provided by the lease, but only three days' notice. The clause further provided that a transfer was to be executed on payment of the purchase price (£270) and "of all arrears of rent owing up to the date of payment of the said sum of £270." The lease expired on 1st December, 1928, and the rent ceased as from that date. There could, therefore, be no "rent owing up to the date of payment," presumably the 27th December, 1928. The plaintiff accordingly would on his construction of the clause be entitled to the use and occupation of the land from 1st to 27th December, 1928, for nothing. His Honour was satisfied that that could not the the true effect and meaning of the clause under discussion. On the contrary, His Honour was of opinion that on the true construction of the clause the "one month's notice" must expire, and the purchase be completed, prior to the expiration of the term, i.e., while the relation of landlord and tenant still subsisted between the parties to the lease. Otherwise a landlord, in such a case as the present, could not with safety make any effective preparation for leasing or otherwise dealing with his land until after the existing lease had expired. For those reasons, His Honour held that the plaintiff had given his notice too late, and had not proved the existence of a contract of sale and purchase. He was, therefore, not entitled to a decree for specific performance.

Judgment for defendant.

Solicitors for plaintiff: **Tripe, Herd and Herd,** Wellington.

Solicitors for defendant: **Fell and Putnam,** Wellington.

Blair, J. April 24; May 1, 1929. Auckland.

COLONIAL SUGAR CO. LTD. v. VALUER-GENERAL.

Valuation of Land—"Unimproved Value"—Lessee's Interest—Special Use to which Land Being Put Not Taken into Account—Principles of Valuation Stated by Supreme Court for Guidance of Assessment Court—Further Valuation by Assessment Court—Valuation on Wrong Principle—Special Use to which Land Being Put Taken Into Consideration—Whether Point That No Evidence to Justify Assessment Open to Supreme Court on Appeal From Valuation—Contents of Case on Appeal—"Consist of"—Statement of Facts may be Included—Case Remitted to Assessment Court with Directions as to Maximum Figure for Valuation—Valuation of Land Act, 1925, Sections 29 (c), 30.

Appeal under Section 30 of the Valuation of Land Act, 1925. One phase of the matter had already been the subject matter of a decision by Reed, J., reported (1927) N.Z.L.R. 617; 3 B.F.N. 138. The learned Judge had there directed the Assessment Court that in ascertaining and determining the value of the appellant's interest in the unimproved value of the land: "The Assessment Court is not debarred from considering the appellant company as a possible purchaser, but it must be as an unfettered purchaser—that is to say, the company's special requirements, owing to its established business in the vicinity, must not be allowed to be a factor in determining the value of this eight-years' lease of an unimproved mud flat. The use to which the land is being put or the nature of the existing occupation is quite immaterial." The matter came before the Assessment Court again on 3rd October, 1927. By a majority, that Court, purporting to act upon the principles directed by the Supreme Court, fixed the valuation at £1,500. The president of the Court who dissented fixed the valuation at £100 approximately, pointing out that the question was what would anyone give for an eight-years' lease of a tidal mud-flat for eight years at an annual rental of £15. The Sugar Company's special use of the area could not be considered. The appellant, pursuant to leave of the president of the Court, duly gave notice of appeal, the grounds being that the Court did not ascertain the lessee's interest in the unimproved value of the land in accordance with law; that there was no evidence to justify the assessment made of £1,500 in respect of the company's leasehold interest; that the company's special requirements and the special use made by the company of the land were the basis or the principal factors in the assessment.

Richmond for appellant.

Meredith for respondent.

BLAIR, J., said that no new evidence had been taken before the Assessment Court. It had before it only the evidence previously given, the material portions of which were set out in Mr. Justice Reed's judgment already referred to. From that evidence it would seem that in support of the original valuation of £1,660, evidence was given by a Government valuer, Mr. Chilcott; but it was clear that his valuation was based upon the special use to which the company put the land. Nowhere in his evidence did he indicate any idea of his valuation on the basis directed by the Court. Upon the company's side there was the evidence of three well-known valuers of Auckland, all of whom deposed to the value disregarding entirely the special use to which the land was put by the company. Their evidence, therefore, was the only real evidence of value upon the basis directed by this Court. Mr. Justice Reed made it clear in his judgment that the assessors were not in the position of experts or skilled witnesses. He stated: "The Assessment Court is in truth a judicial tribunal which must act on the evidence before it." It being, therefore, clear that any evidence brought in support of the valuation was evidence founded on an entirely wrong basis and it being equally clear that the only evidence tendered to the Court upon the proper basis of valuation was the evidence tendered by the company, it followed that the assessors, in coming to the conclusion that they did in fixing the value at £1,500, must have disregarded the only evidence before them. Whether that was due to wilfulness, or to inability to appreciate their proper functions, was immaterial. The fact unquestionably was that the judgment of the Supreme Court has been entirely disregarded. The utmost value placed upon the leasehold interest of the appellant company by any of the valuers was the sum of £300; and it was obvious, therefore, that the assessors in fixing a value far in excess of such utmost value had taken

it upon themselves to arrive at their conclusion upon a basis not authorised by law. It was true that Section 27 of the Valuation of Land Act, 1925, provided that the onus of proof should rest upon the objector. That no doubt was the position, but when the Assessment Court had before it statements by the valuer who made the valuation, which showed that the valuer acted upon an erroneous basis, the statutory onus of proof was entirely displaced. The first ground of appeal had, therefore, in His Honour's opinion been established.

The second ground of appeal was that there was no evidence to justify the assessment of £1,500 in respect of the company's leasehold interest. A similar ground of appeal was argued before Mr. Justice Reed, and he stated that he did not think that in an appeal from an Assessment Court the point was open, because there was no provision for bringing evidence before the Supreme Court: Section 18, subsection (c) of the Valuation of Land Act, 1908. That Subsection had been re-enacted in the 1925 Act (Section 29 (c)) and provided that the case on appeal should consist of copies of the valuation, of the objection thereto, of the decision of the Assessment Court, and of the notice of appeal. Reed, J., expressed the opinion that the statute contemplated that the "decision" of the Assessment Court should contain sufficient material to raise the question of law involved, because if that were not so the right of appeal was valueless. The evidence taken before the Assessment Court had been made part of the case on appeal, and Reed, J., acted upon that evidence notwithstanding his view that no provision had been made in the Valuation of Land Act for bringing the evidence before the Supreme Court. Read literally, Section 18 (c) of the 1908 Act, re-enacted in Section 29 (c) of the 1925 Act, provided that the case on appeal should comprise copies of certain documents. In "Words and Phrases Judicially Defined," Volume 2, page 1450, the following appeared against the words "consist of": "The words 'consist of' are not synonymous with the word 'including,' but where something is described as consisting of certain other things, it always implies that there may be others which are not mentioned." His Honour confessed, however, to some difficulty in agreeing that the statute contemplated that the "decision" would contain the facts. To get that meaning out of the statute, it appeared to His Honour to follow that the decision having been given would have to be re-written, so as to embody sufficient facts to apprise the appellate Court of the point involved. If the word "consist" in Subsection (c) meant "exclusively consist" then the case on appeal must comprise documents which left the appellate Court entirely in the dark as to the point of law involved, because there was no provision for introducing facts except such facts as happened to be mentioned in the decision. If, no the other hand, the word "consist" were construed to comprise *inter alia* the specified documents, then the whole of the provisions of Section 30 immediately following Section 29 were given full operative effect. An examination of Section 30 showed that it had been copied from the predecessor of Section 167 of the Magistrates Court Act, 1928, which provided the machinery for settling the statement of facts on appeals on points of law, Reading the word "consist" as meaning "exclusively consist," it would follow that if the facts were to be embodied in the decision, then the Assessment Court's decision was to be drafted by appellant and settled by respondent. That would make it possible that the decision of that Court would be drafted and settled without the Court being consulted at all. Absurdity would result if the decision of the Assessment Court could be framed without its knowledge and assistance. Seeing that the copy of the notice of appeal must be made part of the case on appeal, then if no facts could be stated in the case on appeal it would be open to ingenious counsel so to frame his notice of appeal as to embody as facts matters which suited him. His Honour preferred to read Section 29 (c), when read with Section 30, as contemplating and authorising a statement of facts settled as provided by Section 30. If that were not so then it was surely unnecessary to provide machinery for settling disputes as to what was to be embodied in a case on appeal, i.e., if Subsection (c) meant that the case must consist exclusively of copies of certain designated documents as to the contents of which there could not be any dispute.

The construction suggested by His Honour was consonant with the course adopted in previous appeals. See **Nightcaps Colliery Co. v. Valuer-General of Land,** 25 N.Z.L.R. 977. Construing the statute as His Honour did, and the evidence having been embodied in the case on appeal, it appeared to His Honour that the appellant was entitled to succeed also on his second ground of appeal. The question as to whether there was any evidence to support a finding was a question of law and the proper way of bringing such a question before an appellate Court was to embody in the case a copy of the evidence: **Bethune v. Churches,** 17 N.Z.L.R. 129.

The third ground of appeal was really embodied in the first ground. By Section 31 of the Valuation of Land Act, 1925, it was provided that on the hearing of the appeal the Supreme Court might make such order as it thought fit. It was not usual, and, in fact, it was highly inconvenient, for the Supreme Court to attempt to fix a sum, that being peculiarly the province of the Assessment Court; but it was obvious that the Assessment Court had disregarded the evidence and that the assessors evidently required plain directions before they were able to appreciate their duty. It would simplify the matter if His Honour made an order remitting the case to the Assessment Court for re-assessment on the evidence already given, with a direction to re-assess at such sum as they thought fit not exceeding the maximum valuation given by any valuer called on behalf of the appellant company. This His Honour did.

Solicitors for appellant: **Buddle, Richmond and Buddle,** Auckland.

Solicitors for respondent: **Meredith, Hubble, and Ward,** Auckland.

Blair, J. March 13; May 3, 1929.
Hamilton.

JONES v. CUMMINGS AND OTHERS.

Family Protection Act—Application by Husband for Provision Under Will of Wife—Husband a Poor Working Man at Date of Marriage and Wife Comparatively Wealthy—Husband After Marriage Ceasing to Work and Living on His Wife's Means—Wife Not Encouraging Husband to Live in Idleness—Husband Able to Earn Own Livelihood—No Provision Made for Husband in Will—Beneficiaries With One Exception Not Financially Better Off Than Applicant—Applicant Not Entitled to Provision Under Will of Wife—Bounty Given in Lifetime by Wife Not Affording any Moral Claim to Provision After Death.

Application under the Family Protection Act, 1908, by a husband against the executors of his wife's estate based on the ground that adequate provision had not been made in her will for his proper maintenance and support. The facts are set out in the report of the judgment.

Northcroft for plaintiff.
Strang for trustees.
A. H. Johnstone for beneficiaries other than trustees.

BLAIR, J., said that the applicant married the testator in October, 1920, she then being a spinster aged 43. The applicant now aged 55, was a widower with seven children. His eldest son was now 27 years of age; his youngest daughter, aged 14, was still at school; one daughter, aged 21, was feeble-minded; the others were at work. At the time of his marriage applicant was a cobbler employed by Hannah & Co., on piecework, his wages being £5 10s. a week, later falling to £3 10s. His wife was a woman of considerable means. She had a draper's shop at Matamata and had worked all her life and saved money, with the result that she was worth approximately £11,000. She sold out shortly after her marriage. At the time of her death her estate was approximately £7,750. Shortly after she married plaintiff he left his employment with Hannah & Co., and he had not since 1922 done any work. The whole burden of supporting him and bringing up the younger members of his family, plaintiff left to his wife, and that was suggested as explaining the diminution in the value of her estate. He apparently spent the bulk of his time in following horse-racing or in playing bowls. The eldest son married and for some considerable time lived in a house belonging to the deceased, but, possibly emulating the example of his father, he paid no rent and had ultimately to be turned out of the house. The plaintiff also procured from his wife advances of very large sums of money which were put into property in his name. The position was becoming so unsatisfactory that testator's brothers or sisters, several of whom had materially helped her to amass her small fortune, deemed it proper to intervene, and pressure was brought to bear upon the plaintiff, which ultimately resulted in the placing of his wife's advances on a proper footing. At first he claimed all the advances as gifts, but subsequently he had to abandon that contention. The deed incorporating the arrangement made was dated 19th September, 1924. The will, under which there was no provision for the plaintiff was dated 6th August,

1924. She divided the whole of her estate amongst her brothers and sisters. The parties were never separated and continued to live together up to the time of her death, but plaintiff said they did not live happily. He apparently still continued to devote his time to sport, and left her to provide the expenses of the household. Plaintiff sustained an accident in 1923, whereby his right hand was injured. He could play bowls with the injured hand, and in fact was looked upon as a champion player, but he said he could not work with it at his trade as a boot repairer. This was true as there was some permanent interference with some of the movements of wrist or fingers. The plaintiff admitted, however, that he was an expert boot salesman, and the hand would not be any disability in following that occupation. He admitted that he had not made any attempt for the last two years to obtain any employment. He obtained £964 damages in respect of the injury to his hand, which he claimed to have used "for living purposes," but this statement was shown to be false as there was still £600 of the money secured to him on mortgage, and he said he thought he got 6 per cent. interest on it. He had also £300 invested in a property at Claudelands. With the assistance of his wife he acquired a property at Hamilton East and built thereon a building comprising shops and a billiard room above. The billiard room was not let but the shops were bringing in £300 a year. The outgoings by way of rates, insurance and interest on first mortgage absorbed £180 a year. Upon that property there was a second mortgage of £1,500 to his wife, and it was part of the arrangement set out in the deed before mentioned that that £1,500 should be free of interest while the parties were living together. As from the date of his wife's death interest at 6½ per cent. would be payable. When that was added to the present outgoings there remained only a surplus from the present gross income of of some £33. But as against that it was to be noted that the billiard room portion of the premises was not let and plaintiff himself had kept a billiard saloon and could no doubt himself make use of it if he could spare time from the amusements to which he had hitherto devoted himself.

The deceased divided her estate equally between her four brothers and three sisters so that each of them should benefit to the extent of approximately £1,000. One of the brothers, a draper, was very well-to-do; the rest of the sons worked for their living and were not possessed of much estate. One sister was a war widow dependent on her pension; another was a spinster dependent for her subsistence on the rents of two small house properties; and the remaining sister was a shop assistant in her brother's drapery shop and had no assets. Except in the case of one brother, it might be said that the rest of the family were financially no better off than the plaintiff. Some of them, were it not for the fact that they were entirely free from the objection to work which plaintiff had cultivated in himself, would be worse off than he. The impression left upon His Honour's mind from the evidence was that plaintiff apparently married the deceased for her money and that shortly afterwards he entirely ceased work, relegated to her the burden of providing for and looking after his large family, and selfishly devoted himself entirely to his own amusements, taking no interest in his wife except as a source of supply. He based his claim on a breach of her moral duty to him. When asked to indicate what he had done for his wife except marry her, he made no reply.

The question arising was whether in the above circumstances the plaintiff had established any right to an order under Part II of the Family Protection Act. The principle on which the Court acted in applications under the Act was stated by Edwards ,J., in **Allardice v. Allardice,** 29 N.Z.L.R., 959 at p. 972, and by Salmond, J., in **Welch v. Mulcock,** (1924) N.Z.L.R. 673, at p. 684. The application was made by a husband in respect of his wife's estate and it might well be that the moral claims of a husband upon his deceased wife were not comparable with the moral claims of a wife on her husband's estate. It was certainly not common for a man to marry a rich woman in New Zealand, and expect her to keep him in idleness. Such cases had occurred, but they were rare, and a man content to accept that unenviable position lost caste among his fellows. Although before the Married Women's Property Acts a husband became entitled to the whole of his wife's estate when he honoured her by taking her in marriage, that doctrine had received such severe handling both by legislation and trend of modern ideas that it was doubtful if marriage by a poor man to a rich woman now gave him any moral claims on her purse. A man with any pride in manhood would scorn to advance such a claim. It appeared to His Honour that plaintiff was driven to maintain that his wife was indulgent to him in his lifetime, and that having so indulged him it was her duty after her death to continue to indulge him: see **Golightly v. Jefcoate,** 33 N.Z.L.R. 91, per Williams, J., at p. 93. That case, however, differed from the present in that the husband was bedridden and destitute. He was in great necessity and the beneficiaries were not. In **Allardice v. Allardice** (*cit. sup.*) 959, at p. 969 Stout, C.J., said: "A child for example that has been living on a father's bounty could not be expected to begin the battle of life without means." The questions of indulgence and bounty were, no doubt, relevant to the question of the existence of moral duty, particularly where a child was led by words or conduct to believe that he or she was to be provided for. In the present case that element was absent. It was true that the wife financed the husband to enable him to get into business, but nowhere could His Honour find any evidence that the wife encouraged her husband in idleness. Indeed the deed which under pressure she got signed by him, provided that he was to pay household expenses. After her experience that financial assistance to him did not result in making him work, she insisted also on a strict business arrangement as to advances made to him. He could not, therefore, base his moral claims upon a promise implied by a course of conduct

His Honour proceeded to examine all the reported cases of applications by husbands in respect of their wives' estates. He referred to and discussed **Nosworthy v. Nosworthy,** 26 N.Z. L.R. 285; **Brown v. McCarthy,** 26 N.Z.L.R. 762; **Colquhoun v. Public Trustee,** 31 N.Z.L.R. 1139; **Geen v. Geen,** 33 N.Z.L.R. 81; **Golightly v. Jefcoate,** 33 N.Z.L.R. 91, and **Hooker v. Guardian Trust and Executors Company** (1927) G.L.R. 536. In all the cases above referred to where an order was made the husband was in want, unable to keep himself, and had moral claims on his wife. In the present case the husband was able-bodied, and if he liked could work, and had years of work before him. As the result of assistance from his wife he had some means and he should be able materially to increase his income if he would trouble to do so. His Honour did not see that he had any moral claim on his wife who had discharged family burdens that he himself should have discharged, and did not think that he had established any right to an order.

Application dismissed.

Solicitors for plaintiff: **Earl, Kent, Massey and Northcroft,** Auckland.

Solicitors for trustees: **Strang and Taylor,** Hamilton.

Solicitors for other beneficiaries: **Stanton, Johnstone and Spence,** Auckland.

Court of Arbitration.

Frazer, J. May 13, 1929.
Dunedin.

CHRISTIE v. WILL.

Workers' Compensation—Worker—Gardener Employed by Doctor in Private Garden Not a "Worker"—Not Engaged in any "Trade or Business" Within Meaning of Act—Workers Compensation Act, 1922, Sections 2, 3 (2).

Claim for compensation under the Workers' Compensation Act, 1922, in respect of an injury by accident. The one question arising in the case was whether the claimant, a gardener employed by the defendant, a retired medical man, and working in the defendant's own private garden, was a worker entitled to compensation under the Act for an injury by accident sustained by him while so working.

W. Ward for plaintiff.
A. N. Haggitt for defendant.

FRAZER, J. (orally) said that counsel for the plaintiff placed reliance on the definition of "trade or business" in Section 2 of the Act, which definition read as follows: "'trade or business' includes any trade, business, or work carried on temporarily or permanently by or on behalf of an employer." That definition had to be read with Section 3 (2), which read: "(2) This Act applies only to the employment of a worker—(a) In and for the purposes of any trade or bysiness carried on by the employer; or (b) In any occupation specified in the First Schedule hereto, whether carried on for the purposes of the employer's trade or business or not." It was admitted that work done in a man's private garden was not a trade carried on by the employer. It was admitted, of course, that it was not a business carried on by the employer. Was it, then, work carried on temporarily or permanently by or on behalf of the employer?

The *ejusdem generis* rule of construction applied in the present case: the word "work" must be given a meaning analogous to the words "trade or business," thus confining it to work that brought in some profit, or prospect of profit, to the employer, or had a commercial aspect, or, at all events, enabled the employer to discharge his functions in some way. Apart, altogether, from that view of the definition, the Court had to examine Section 3 (2), which made the Act apply to the employment of a worker (a) "in and for the purposes of any trade or business carried on by the employer" or (b) "in any occupation specified in the First Schedule hereto, whether carried on for the purposes of the employer's trade or business or not." The last sub-paragraph distinctly carried with it, by the use of the words "in any occupation whether carried on for the purposes of the employer's trade or business or not" an implication that "work" in Section 2 referred only to work in a sense analogous to that of "trade or business," and that Section 3 (2) (b) applied to exceptional cases, in which "work" was given a wider sense. The First Schedule specified a number of cases, including that of domestic servants whose employment was for not less than three days, as being within the Act if an injury was received at work. If the Court were to regard the word "work" all through the Act as having the wider meaning, as suggested by counsel for the plaintiff, then Section 3 contained a contradiction in itself. It was perfectly clear, under Section 3 (2) (b), that domestic servants were not entitled to compensation unless their employment was for three days; but if a worker could proceed under Section 3 (2) (b), the Court must arrive at the conclusion that a domestic servant was entitled to compensation, if injured, although her employment was for only half-an-hour. That was certainly a contradiction.

It was somewhat difficult to give a precise meaning to the word "work," but in the ordinary usage of the English language, one would never say that Dr. Will "was carrying on work as a gardener." The word must be used in its ordinary everyday sense. That was the proper rule of construction. Nobody would suggest that to say that Dr. Will was carrying on work as a gardener was an appropriate way of conveying the impression that the doctor had his own private garden in which he occasionally might dig or occasionally might employ a man to dig for him. Those words, in the ordinary every day usage of the language would imply that the doctor was engaged in commercial gardening of some kind. Some little light was given by Section 3 (4) which read as follows: "The exercise and performance of the powers, duties, or functions of any Corporation or of any local authority or other governing body of a Corporation shall, for the purposes of this Act, be deemed to be the trade or business of the Corporation." It might be that there were other meanings that could be given to the word "work." His Honour noticed that the definition of "trade or business" in Section 2 did not specifically include professional work. "Work" was a very general term, and a solicitor's clerk who broke his leg when going downstairs in his employer's office in the performance of his duties would probably be entitled to compensation, for the Act covered clerical work so long as the remuneration did not exceed £400 a year. But there again the word "work" carried with it a distinct analogy to "trade or business," inasmuch as a professional man usually made an income by practising his profession. Admittedly, a profession was something more than a trade or business, but there was nevertheless the element of deriving an income from its practice.

His Honour next referred to the amendment to the definition of "trade or business" made in the Workers Compensation Act, 1922. The wording of the Workers Compensation Act, 1908, was almost exactly the same as that of the 1922 Act, except for the following additional words "to which the Act would apply if such trade, business, or work were partly or wholly the regular trade, business, or work of an employer." Those words seemed unnecessary, and if it had been intended to bring a case such as the present within the Act, it could have been done more simply and clearly by amending Section 3 so as to include any work done for an employer in or about his house or grounds. Something like that would have met the case, or the schedule itself might have been amended. All that had been done had been to cut out some words apparently useless and confusing, which did not appear in the English Act. The present case was, in His Honour's opinion, covered by the judgment in **Allison v. Milsom,** (1923) N.Z.L.R. 776.

Judgment for defendant.

Solicitors for plaintiff: **Aslin and Brown,** Dunedin.

Solicitors for defendant: **Ramsay, Barrowclough and Haggitt,** Dunedin.

Police Powers and Procedure.

Summary of the Royal Commission's Report.

(*Continued from p. 139*).

The Obtaining of Evidence.

It is impossible even to summarise, in the course of an article such as this, all the topics connected with the investigation of crimes and offences and with the obtaining of evidence by the police. The use of plain clothes, the employment of police as *agents provocateurs*, the right of entry into registered clubs, the methods of holding identification parades and the practice of enquiring into the characters of accused persons are all subjects of great importance and are all fully dealt with by the Royal Commission's Report; but they must be discussed here with extreme brevity.

Certain offences cannot in practice be proved unless the police or persons employed by the police are, unknown to the offenders, present when the offences are being committed; and in some cases suspicion is aroused unless the watcher participates in the offence. At the same time there is a natural public dislike to anything which savours of the creation of an offence for the purpose of obtaining a conviction in respect of it; and the employment of the police in visiting, ostensibly as members of the public, clubs suspected of breaches of the law involves:

> "the risk, amounting almost to certainty, that habitual employment in visiting clubs where these offences are suspected is likely to have a demoralising effect on the Police concerned. These constables must often be chosen for their youth. They are dressed in clothes to which they are unaccustomed and given money to spend freely, in order that they may lull suspicion by conforming to the habits of those who frequent these places. In this way they are brought into contact with a mode of life very different from their own, even if it is not actively undesirable. This procedure seems to us wholly objectionable."

The Commission recommended that, as a general rule, in the case of offences of this class, the police should observe and not participate, but that:

> "as an exception to the general rule . . . participation in offences may be resorted to by the Police only on the written authority of the Chief Constable and in cases where there is good reason to believe that the offence is habitually committed in circumstances in which observation by a third party is *ex hypothesi* impossible."

With regard to clubs it is proposed that statutory power should be given to Chief Constables to authorise in writing selected Police Officers to enter and inspect any registered club, it being understood that this power is to be exercised only when there is reason to suspect that the law is being broken.

The Right of Search.

With regard to the right of search of premises, the Report recalls the storm of protest which was raised to a clause—ultimately withdrawn—in the Bill which became the Criminal Justice Act of 1925, giving wide powers as to the issue of search warrants by magistrates. The present practice of the Police in England is to search, without a warrant, premises, as well as an arrested person, where it appears that evidence is likely to be obtained thereby. No statutory sanction for this practice exists and the Commission, taking the view that the practice is necessary and enunciating the undeniable principle that;

"the Police should never exceed their legal powers, and consequently the powers necessary to enable them to investigate crimes and offences should be clearly defined and should rest upon unimpeachable authority,"

recommend :

"that the practice of the Police as regards the search of premises should be regularised by a statute authorising them to search without a warrant the premises of persons who have been arrested."

Identification Parades and Enquiries as to Character.

Various recommendations of detail are made as to the holding of identification parades with a view to making a process which, whilst obviously necessary is by no means easily conducted satisfactorily, as free from objection as possible.

On the subject of police enquiries into the antecedents and characters of accused persons the Commission makes some very important observations and recommendations. It has become the practice, apparently at the instance of certain judicial persons, for the Police to make enquiries as to the character of accused persons before they are convicted and therefore whilst they are presumed to be innocent. These enquiries are made so that if the accused is convicted Court may be the better able to assess his punishment ; but the fact that such enquiries are made may obviously seriously damage the reputation, amongst those who know him, of a person who may be perfectly innocent of the particular offence with which he is charged. Whilst there are advantages no doubt in a full history being before the Court which has to sentence a man, the Commission say that :

"after weighing the advantages and objections, we have reached the conclusion that the Courts should forgo this information unless the accused is willing that it should be obtained. The Police should therefore be instructed not to make special enquiries as to the character and antecedents of accused persons, other than previous convictions, for the purpose of giving the Court information after verdict and before sentence, unless the accused himself is willing for such information to be obtained."

There is another matter which arises in this connection with which the Report deals.

"It has been represented to us that the statements as to character given by the Police are not always confined to facts which they have ascertained, but sometimes include impressions or opinions which they have formed as to the accused's manner of life or the character of his associates. We think that the Police should only depose to facts within their knowledge, and should refrain from expressing opinions which may be incapable of proof or disproof."

These recommendations, if adopted, will put an end to a practice which should never have arisen.

Treatment in Custody.

The difficult topics which arise with regard to the arrest and charging of prisoners, detention on suspicion and the questioning of prisoners in custody are fully considered. With regard to the taking of voluntary statements from prisoners a series of recommendations designed to protect the maker and to ensure that no gloss—accidental or otherwise—appears in his statement, are made.

"If a prisoner expresses a wish to make a voluntary statement, he should be cautioned, offered writing materials, and left to write without being overlooked, questioned, or prompted. If the prisoner prefers to have his statement taken down, he should be required to make a request to that effect in writing. His statement should then be taken down as nearly as possible in the actual words used.

"All questions put by the Police (for the purpose of removing ambiguities), and the answers to them, should be recorded *verbatim*, at the point in the statement where they actually occurred. If the prisoner has written his own statement and the Police on reading it feel it necessary to clear up any obvious ambiguity . . . any questions put by them, and the answers, should be recorded at the end of the prisoner's own statement and signed by him.

"The prisoner should invariably be allowed to read over, to himself, any statement which has been taken down at his dictation, and should also be given ample time to peruse and correct any statement which has been taken down at his dictation, and should also be given ample time to peruse and correct any statement, whether dictated or written by himself.

"Two officers, of whom one should be the officer in charge of the station, should always be present throughout the whole time when a prisoner is dictating a voluntary statement. A prisoner who wishes to make a voluntary statement should be entitled, if he so desires, to have his legal adviser present."

The Judges' Rules are given a chapter to themselves, and the conclusion is reached that whilst their "spirit" is faithfully observed, the "letter" is productive of misunderstanding. In the light of the Commission's views the precise form of the Rules will no doubt be reconsidered.

(*To be Concluded*).

Judicial Slang.

Upon the subject of the judicial use of metaphor, simile and "slang," an original and delightful essay is waiting to be written. The writing of it will, of course, involve an immense labour. Sparkles in the Law Reports are by no means common, but the tireless "prospector" in both old and modern reports, will in the end be rewarded with some choice unexpectedness in the judicial use of language. The English Bench *en neglige* is, of course, a picture we are too reverent to conjure with ; but the old reporter who preserved intact for us Judge Jeffreys' hectoring protest against the admission in evidence of what he called, with more expressiveness than restraint of phrase, "a little lousy history written by God knows whom," gave us, we are tempted to believe—Lord Birkenhead's polished *apologia* notwithstanding—the true index to the nature and manner of the man. Judge Jeffreys, however, must be the only member of the Bench who permitted himself to use in Court such an adjective as "lousy," his isolation in this respect being, no doubt, characteristic. But, in Moseley's Reports, 1726-1730, we find, at page 211, the Lord Chancellor using the expression "pretty odd." And Lord Bramwell's classic phrase, "This beats me," (*Bank of England v. Vagliano Bros.*, (1891) A.C. 107, at page 138) was quoted with relish by Russell, L.J., in a dissenting judgment in the Court of Appeal as recently as July last. Equally "classic," too was the phrase "giving the go-by" used by Vaughan Williams, L. J., in *Re Pitt Rivers : Scott v. Pitt Rivers*, (1902), 1 Ch. at page 407. These are, no doubt, but few of many such instances.

Law though sometimes a necessary medicine, is generally a nauseous one ; and it resembles some other medicines in this, that it is apt to induce ailments more disagreeable than those for the cure of which it is invoked. I trust that the respondent when he reflects on the order of this Court will realise the truth, and will also realise that attempts to administer medicine to others may sometimes result quite justly, in having to swallow it oneself.—Sir Edmund Barton.

The Offence of "Dangerous Driving."

Motor-Vehicles Act, 1924, Section 28.

By S. A. Wiren, B.A., LL.B.

Deserved prominence in the daily Press has been given to a judgment of Mr. Maunsell, S.M., at Nelson, to the effect that merely exceeding the speed limit along a street where no members of the public happen at the time to be is not an offence under Section 28 of the Motor-vehicles Act, 1924. The offences created by that section include driving " at a speed or in a manner which, having regard to all the circumstances of the case, is or might be dangerous to the public or to any person." The writer had previously contended before a Magistrate at Wellington that the presence of the public or some person was necessary before the offence was established, but the contention was rejected somewhat contumeliously. Mr. Maunsell's judgment recalled this fact, and also suggested as a natural sequence some of the other abuses which the section has brought with it.

The penalties fixed by the statute are substantial, namely, a fine of £100 or imprisonment for three months ; a sum recoverable as a fine of £50 for any person injured (Section 30) and suspension of a motor-driver's license for any period whatever (Section 22). It is a fair inference that the section was intended to be invoked only where there was strong reason for complaining of the motorist's behaviour. The police have not so regarded it. With some officers it has become a habit to prefer a charge under Section 28 either in addition to or in lieu of a prosecution under other regulations. This is done although the conduct complained of is quite a pecadillo. At Nelson where the *gravamen* of the charge was travelling at 35 miles an hour where the speed limit was 30 miles is by no means an isolated one. In almost any newspaper one finds reports of motorists being convicted for what the reporter calls " dangerous driving " and fined probably £2 or £3 ; there have been cases where the fine has been costs only.

For such purposes it is suggested, the statute was never intended. But the Legislature has chosen to use language of glorious uncertainty. Some of the words can undoubtedly be treated as surplusage. Every police information so treats them. The charge is always driving " in a manner which . . . . might be dangerous . . . . to any person." Why worry about " at a speed " when you have the wider words " in a manner " ? Why worry about " the public," when " any person " is sufficient ? Why worry about " is " when you have the delightful freedom of " might be " ? The length of Chancellor's feet has varied, but the variation is small compared with the varying distances that Magistrates will venture into this land of the " might be." One cannot, however, blame the Magistrates. One was understood to have laid it down that any breach of a motor regulation or by-law can be punished under Section 28. Possibly he is right. Who can say what might be or might not be dangerous ? Inevitably every Magistrate regards these cases, be he motorist or pedestrian, in a different manner from his colleagues. What is the result ? Large numbers of motorists are prosecuted under the section, and nearly every one of them must defend. He must defend because of the penalties that can be inflicted upon him. It would be different if he were sure that only the facts as he believes them would be placed before the Court. He could then do what he usually does when prosecuted for speeding—submit whether guilty or not guilty. But he can seldom do that. The facts in such cases are so susceptible of misstatement or exaggeration. A witness may be honest, he may be impartial, he may be a police officer, but his observation of fast-moving vehicles is probably inaccurate. When the penalties can be so heavy a motorist must attend in Court and see that the facts are not distorted against him. Again, he usually wishes to defend because of the very nature of the charge. The offence is popularly called " dangerous driving." Nobody likes to be convicted of that. Possibly he was guilty of a small offence—he is willing to pay the penalty. He does not want to be branded in the newspaper as a dangerous driver nor does he want to have brought up, in the event of a future brush with the police, the previous conviction of " dangerous driving." At such a time the offence might mean anything and will probably be regarded in the worst light possible. He himself does not regard his offence as " dangerous driving " and he cannot understand why a Magistrate should so regard it.

These being the results of the section, the position should be remedied. The remedy should not be difficult to find. We have now—which we had not when Section 28 was passed—a comprehensive set of regulations under which every motoring offence can be dealt with. A motorist so charged is charged with a specific offence and should know at once whether or not to defend himself. Any person examining the records of the offence at a later date will know wherein exactly the motorist offended. All ordinary cases should be so treated.

There may be cases where the gravity of the offence requires a greater penalty than is provided for by the regulations. These cases should not be frequent, and for them a separate offence may be retained. The section should, however, require proof of actual dangerous driving. The words " might be " should be eliminated ; and so, from the standpoint of good draftsmanship, should expressions growing from the less to the greater, such as " at a speed or in a manner," " to the public or to any person." Let us be drastic but let us be precise.

It should be noted that the English statute from which our Act is taken is better than its offspring—Motor Car Act 1903, Section 1 (1). The offence there, is driving " at a speed or in a manner which is dangerous to the public having regard to all the circumstances of the case, including the nature, condition and use of the road and to the amount of traffic which actually is at the time or might reasonably be expected to be on the road." The words from " including " to the end have been held to be mere surplusage."—**R. (Cahill) and Dublin Justices** (1904) 2 I.R. 698, and see **Elwes v. Hopkins,** (1906) 2 K.B. 1.

A Paris newspaper has recently drawn attention to an old law of 1770 which has never been repealed. It reads :—

> " Anyone who entices into marriage a male subject by rouge or secret, or artificial teeth, or false hair, shoes with high heels, crinolines, or false hips, will be prosecuted for fraud and the marriage will be declared invalid."

Lord Halsbury.

His Life and Times.

Permission has been granted to the " New Zealand Law Journal *" to publish a series of extracts from the Biography of the first Earl of Halsbury, which is shortly to be published.*

(*Continued from page 140*)

Election Expenses!

Sir Edward Clarke was proved a true prophet in the matter of election petitions, for at Westminster, at Bolton, and at Windsor, Hardinge Giffard saved Conservative seats that had looked hopeless. Before the passing of the Ballot Act, Giffard had had some strange election petitions to deal with. On one of these at Bewdley, Worcestershire, when it was sought to upset the election of Sir Richard Glass, for bribery and corruption, he and Poland had found two curious entries. They were not unnaturally questioned by the petitioners, as 12*l* 12*s*. was charged for "Screaming women" and 100*l*. for "Watchers." They thought this smacked rather of the police court, and had some difficulty in unravelling the mystery. They turned out to be that when the candidate addressed the crowd from the hustings, certain ladies of strong lung power were hired to scream him down. "Watchers" were a more reputable company, being men paid to prevent the kidnapping of voters in the good old times.

By this time Giffard had almost ceased to appear in the Criminal Courts, and was in the full tide of a leading practice at Westminster.

Candidate for Cardiff.

In the jubilee year of the *Western Mail* in 1919, Lord Halsbury wrote an article for the paper, which is framed and hung in the hall of the Cardiff Conservative Club, of which he was one of the founders. The original founders had a star opposite their names in the list, and his was the last star for many years. He was ninety-six when he wrote it.

"I suppose there are but few people living at Cardiff who can remember as vividly as I can my two attempts to capture Cardiff for the Conservative cause. Although both were unsuccessful, I may be permitted to say that the poll on the second occasion was so close as to constitute a moral victory for the Constitutional Party, while it foreshadowed the complete triumph which came later. In 1868, the Conservatives of Cardiff, then a comparatively small body, determined to undertake what we all recognised was the formidable task of endeavouring to eject Colonel Stuart, a cousin of the then Marquis of Bute. The *Western Mail* was not, of course, in existence, and I remember how we were hampered by the fact that we had no powerful press support. The *Cardiff and Merthyr Guardian* did its best, but it was a weekly paper, while against us was the *Cardiff Times*, which kept up a vigorous and determined attack on my cause and myself from first to last. It was indeed violently Nonconformist and anti-Tory.

"My supporters in Cardiff naturally felt that the town and district of South Wales ought to have a Conservative daily paper, which should present and defend our cause with force and dignity, especially as those who were associated with me in that first contest shared my view that we should be able to put up a much better show when we fought again. But it was urgent that we should be fortified with a robust paper. . . . . The *Western Mail* began its career well. It was edited and managed with commendable vigour, right up to the time of my second and final Cardiff election in 1874, when, largely owing to the work of the *Western Mail*, we reduced the majority of Colonel Stuart to nine votes. Mr. Gladstone's Government had resigned, after what had been a precarious existence, and I ventured to come forward again. The election was, of course, notable because it was held under ballot, the old hustings, which were in the first contest erected where the Cardiff Arms Park stands now, having been done away with.

"One amusing incident lives in my memory. After one of my meetings, a fellow came to my rooms, pressing for an interview. He was described as a Scotsman, and he was particularly anxious to see me privately. I complied with his request.

"'There is no beating about the bush,' he said. 'I have got a vote, and I will give it to you if you will lend me twenty pounds.'

"I do not propose to relate here and now the precise terms in which I intimated I could not yield to the temptation!

"I also remember a remarkable gathering at the Sophia Gardens at which 30,000 people came to demonstrate in my favour, and I lost my voice trying to make that vast crowd hear me. Cardiff people, who had always been very kind to me, gave me many gifts before I left, including a piece of plate, a clock, and some vases. In addition they made me their guest at a great function, of which, no doubt, the early files of the *Western Mail* have a record. Decades have rolled by since then, but I afterwards had the kindest thought for Cardiff, which later I visited so often in a professional capacity. I read the *Western Mail* for a great many years, and always had, and still have, the greatest admiration for the unswerving devotion to the great cause it has been its purpose to expound and defend, for its vigour and brightness, and for what it has done in so many ways for the service of Cardiff and of Wales."

Last Days on Circuit.

The last case Hardinge Giffard appeared in on Circuit was one in which he was retained by Mr. Price, solicitor, of Haverfordwest, for the defence of a military surgeon who was accused of the murder of a brother officer. The Lord Chief Justice presided. For the prosecution Mr. Francis Williams, Q.C. For the defence Mr. Giffard, Q.C., and Mr. Bowen Rowlands. Sydney Alder, 45, was charged with the wilful murder of Philip Carrol Walker, at Hubberston, on May 21, 1875. There appeared to have been a quarrel between two brother officers, while both were more or less under the influence of drink. Evidence was given by the corporal in charge of the mess that they were alone together when the crime was committed, and various officers testified to their previous friendship and amity. The prisoner had suffered from fever in the Boer War, and was subject to fits of anger and depression. Mr. Giffard's examination of the witnesses was very skilful, and called forth several expressions of approval from the Judge. The prisoner was acquitted.

(*To be continued*).

London Letter.

Temple, London,
13th March, 1929.

My dear N.Z.,

It is a new, and by no means unhealthy, thing for a Judge to protest from the Bench against the exaggeration of counsel's fees and the disastrous effect which the tendency has upon litigation in general. It is the more exciting when the Judge is not only a Judge of the High Court but a Lord Justice of Appeal. Whatever the fashionable leaders may think, and whatever arguments any critics of the Bench may see fit to advance, I have no doubt whatever that the observations of Scrutton, L.J., made early last week upon the subject, are entirely right; that his warning to the Bar as to the killing effect of the extortion is beyond gainsaying; and that his action in the matter, supported by Sankey, L.J., who agreed to disallow the luxury fee while allowing the necessary fees in the case before them, is, if the first, yet the wisest possible step in the right direction.

We know quite well, and if we do not know of our own knowledge the fact is readily ascertainable in chambers of any standing and of any distinguished past, that the leaders in our forefathers' days habitually demanded fees hardly equal to a tithe of the fees our big leaders demand to-day. Next, we know that so far from the leaders of to-day being of more value than those of yesterday, the reverse is probably the case; their acumen is probably as great, but their guts are infinitely less. Last, we know that whereas almost every other professional business in the country is as thriving and as remunerative as it has never been before in living memory (medicine, money and even the solicitors' trade being as never before) the work of the Bar grows less and less, until it has become a feasible prospect that it will soon cease to exist at all in any reality. Is it possible to refrain from putting two and two together and arriving at a total of four The cause for litigation remains, and the spirit to litigate is undying; into every junior's chambers comes, or came till recently, a flow of contentious business wherein the contention is maintained and there is much at stake at the first stages, but the later stage is never reached and no more is heard of the case when all the arduous and barely remunerated work of initiation has been done.

The truth is, many of our present day leaders are, in a way, feckless people, never as ready to put up a battle to the death against the Judge as they are ready to put up the fee as high as it will go against the client. They are all very nice, and I am sure very clever; but I sometimes think they are rather poor stuff (I am not sure that your learned leader, who came over to the Privy Council some time ago, did not feel the same way about them?) and never more so than when this subject of extortion and exorbitancy is in the air. The un-warlike and, it must be confessed, the unsporting element tends to predominate. The older Judges comment audibly and disappointedly that there are no longer any "bruisers" at the Bar, an epithet whose contempt is affectionate merely and bespeaks not satisfaction but regret; the younger Judges do not share this view, but welcome the atmosphere of sweet reasonableness between Bench and Bar and between Bar and Bar, and applaud and encourage the tendency to politeness rather than persistence, conciliation rather than conflict, tact rather than tactics, and any other agreeable sounding alliteration you can think of which represents a high ideal of court conduct, but a singularly little concern for the interest of the client. He has, after all, employed the advocate rather less to improve the manner of advocacy than to win his case. To sacrifice the interests of ones client, in any degree, to the convenience of the Court or the abstract conceptions of the Judge seems to me to be, in an intelligent man who knows or should know what he is doing, something like treachery: and once such treachery is the vogue, well, it is a short step further to run up the fee against the man betrayed, isn't it? Lord Justice Scrutton and Lord Justice Sankey, though not the most popular personalities on the Bench, are well fitted to protest against the inordinate tendency of fashionable leaders' fees, for they are the uncompromising sort themselves. To sum the matter up: I think you will see at the English Bar, or your sons will see, the old prestige, the old brisk business, the old fighting qualities and the old reasonableness as to fees, just so soon as the existing generation-in-power is gone and forgotten and the new generation has taken up the lead. There is not getting away from the fact, and from the grim results of it, that much of the present "influence," whether leading the Bar or forming the tail of the Bench, consists of men who did not fight and who are the abnormal substitute for the men who did fight; the latter, if they had not had to fight, would be the main influence now in the Courts.

The most interesting matter, of a technical nature in English legal matters, has transpired in Scotland, a Bench of 12 Judges having been assembled to pronounce upon that very vexed question: once a habitual criminal, always a habitual criminal The question arose, as it has previously arisen from time to time, upon the appeal of a man convicted of being, and sentenced as, a "habitual criminal" upon proof only of a previous conviction in this regard. The logic and illogic of the position are at once and simultaneously apparent, if you have (as I make no doubt you have) the corresponding provision in your criminal law and administration. If you have not, then the matter can be of no interest to you, and I had best get through with it quick. The position is not quite the same in Scotland as in England, but the state of the law in the former serves to bring the question into stronger relief; there the section of the Act has been so construed as to preclude the calling of evidence that for a term of years a man has been leading an honest and useful life to rebut the effect of the previous conviction. The Scottish Court, though not being too precise upon the question, appears to have gone some way to establish the fairer, whether more or less logical, position that a previous conviction of being a habitual criminal shall not be decisive upon a present charge, or indeed unduly influential upon it.

I digress to raise the question: do I bore, or insult, you by dwelling at too much length in these letters on the criminal aspect of the common law practitioner's practice? What I mean is this. No doubt with you, as with us, in the ordinary practice crime assumes a large, overshadowing proportion in the beginning of things, but as a man progresses it looms smaller and smaller, till he observes, with complete satisfaction, that it has disappeared altogether; in their capacities, as private practitioners, readers of this paper will not, for their interest or their pride's sake, wish to hear

too much of this side of the law. But is it, or is it not, also so the case with you, as with us, that any common law practitioner of any distinction is also in some capacity or other, most often as Recorder, a Judge in criminal matters, so that the forgotten interest of his youth becomes even more present in his maturity ? I must find out the truth as to the general situation with you ; if I knew it now it would enable me to know whether or not your Eminents are interested in such matters as "habitual criminals." If I have insulted you, you will be good enough at least to observe that I have made good by accrediting all of you with Old Age and Eminence ?

Yours ever,

INNER TEMPLAR.

Correspondence.

The Editor,
"N.Z. Law Journal."

Sir,

Divorce or Dissolution ?

Under the above heading a correspondent raises the question whether a petition should now be for "divorce" or "dissolution," since the 1928 Act has introduced the word "divorce" for "dissolution," and attention is called to the fact that the old form has been retained in *Sim on the Divorce and Matrimonial Causes Act*. I am glad of the opportunity afforded to add a few words on the subject.

Under the title of "Forms" (at page 85 of the book) the following comment appears: "It is to be noted that these forms existed under the 1908 Act, and minor alterations may be necessary in certain cases, e.g. Forms No. 2 and 18 (2)," and in the preface the following observation is made: "The Rules at present in force are those existing under the 1908 Act. In certain instances slight modifications are called for, and attention has been called to these in the notes."

As the Act came into force on the 1st day of February, it seemed to me desirable, for the convenience of practitioners and as this had been the late Judge's intention, to bring out a new edition before that date, or as soon thereafter as possible. In the meantime I made reasonable efforts to have the Rules and Forms brought into line with the new Act, but in the circumstances this was not possible. The Rules and Forms are, therefore, produced as they exist in statutory form, and comment is made where the 1928 Act has made any radical alteration. Where the amendments are mostly trivial such as the substitution of "George the Fifth" for "Edward the Seventh," no attention was called to these matters, following the practice of Mr. Justice Sim in this respect in the 1921 edition of the Divorce Work and the Civil Code. The forms cannot control the Act (*Thomas v. Thomas*, (1916) N.Z.L.R. 676) and it would seem, in answer to your correspondent, that the petition should now be for "Divorce." One may perhaps respectfully submit that Their Honours would take a generous view of an application for amendment in the event of a practitioner having followed a form which in a minor matter is not in keeping with the Act.—I am, etc.,

W. J. SIM.

Christchurch,
1st June, 1929.

Australian Notes.

(By WILFRED BLACKET, K.C.)

The Lord Justices of England many years ago met to consider the draft address for presentation to Royalty upon some great occasion. The clerk read "Conscious as we are of our own shortcomings we nevertheless" and then "the shoutings and the tumult" began, for their Lordships thought the words were too abject. Lord Justice Bowen suggested a small amendment. "I think," he said, "we should alter it to read 'Conscious as we are of each other's shortcomings.'" The Industrial Commission of N.S.W. at the present time would be quite justified in signing any document containing the statement drafted by Lord Justice Bowen. Mr. Piddington, who was or had been President of the Federal Interstate Commission, some years ago, acting under Federal authority, fixed the basic wage for adult male workers at £4 4s. This rate was fixed upon the assumption that each such worker had one wife and two children. With the Lang Labour Government in office, Mr. Piddington was appointed President of the Industrial Commission and again enquired as to the basic wage and left it at £4 5s. The Lang Government passed a Child Endowment Act, providing for the additional payment as wages of 5s. per week for each child of any employee, and imposed a tax of three per cent. on wages to provide for Workmen's Compensation on a generous scale. The next thing was the reduction of the working week in most trades from forty-eight to forty-four, the wages remaining unaltered. Then the Lang Government by Act of Parliament directed Mr. Justice Piddington, for his position gave him the status of a Justice of the Supreme Court, to fix the basic wage of an adult worker in rural and non-rural industries. The Bavin Government, whose Premier has never really loved Mr. Justice Piddington, appointed two admirable colleagues Mr. Justice Street and Mr. Justice Cantor, to assist him. That was fifteen months ago and the wage for one adult has not yet been fixed, although at intervals some evidence has been taken as to the high cost of the silk ties and the silk socks necessary for navvies. Months ago Mr. Justice Piddington addressed a protest to Parliament pointing out the evil, i.e., the reduction of wages, that would ensue if the Commission performed its statutory duty, but Parliament made no response and now is about to prorogue for six months. Mr. Justice Cantor and Mr. Justice Street want to get busy and fix the living wage under the Act, while the President wants to call certain evidence which his colleagues think unnecessary. He also regards it as "the duty of the Commission to keep the wheels of industry moving," and thinks that the decision should not be declared until September, so that Parliament may have "an opportunity to rectify any injustice that may follow from the new wage." Vehement in his own opinion as to the proper view of the matter the President has on several occasions said some bitter things that show him to be fully conscious of the shortcomings, if any, of his colleagues, but so far they have exercised admirable restraint. We get about a column a day of this deplorable disagreement, and as good old Pepys says: "What the end of all this shall be I cannot tell."

I read recently that an American Judge had called a witness a "liar," and on its being pointed out that

he had committed a contempt of Court assented and fined himself five dollars. I at once thought of Judge McFarland. He was sitting at Wollongong District Court in the seventies when *Curran v. McFarland* was called on—a case in which the plaintiff was suing for the cost of repairs to the Judge's buggy. His Honour proceeded to hear the case. He took off his wig because he was the defendant, but retained his gown because he was the Judge. After a long and patient hearing of the case the Judge gave the plaintiff a verdict for half the amount claimed with leave to the defendant to move for a new trial next time the Judge sat at Wollongong, for the defendant was not at all sure that the plaintiff's work was well done, and thought he would be able to convince the Judge that it wasn't.

R. v. McCann, a case in the Court of Criminal Appeal—not the "Criminal Court of Appeal" as erroneously stated by a nervous junior recently—established a very important rule in respect of a Judge's power of revision of the notes of his charge to a jury. In our Courts the summing up is taken down in shorthand and the transcription is before the Court on appeal. In *McCann's* case, counsel appearing on an appeal stated that one sentence in the summing up noted by him at the trial did not appear in the transcription (it was not a direction but a somewhat confused explanation of a direction already given). The matter was referred to Judge Mocatta and he said:—

> "I dealt with the transcript notes of my summing-up when they were sent to me for the usual revision in a manner in which I have hitherto regarded as intended and required in such circumstances—that is, by making such emendations only as in my mind were properly to be regarded in relation to the entire text as being merely tautological and redundant, while duly preserving all matters which to the best of my judgment appeared to be of substance or import."

Upon this report the Court allowed the appeal and in giving judgment Ferguson, A.C.J., said that the notes should be a "phonographic reproduction of what was actually said," and further stated: "Any revision that so alters the language in which the direction was expressed as to remove obscurity or make the direction more precise may defeat the very object for which the shorthand note is required. Every Judge, unless he is exceptionally fortunate, finds many passages in a report of his direction to a jury which he would prefer to have expressed differently, but while it is his right and duty to correct any material errors in his report it is essential that in the result the Appeal Court should be informed as accurately as possible, not what he would like to have said, but what he actually did say."

In *Rex v. Babcock and Wilcox Ltd.*, the decision depended upon the sufficiency of evidence. Mr. Arnott, of Sydney, acting on behalf of the Company in England, whose tender for machinery to be supplied had then been accepted, agreed with S.Y. Maling an official of the Sydney Municipal Council whose duty it was to deal with contracts made with the Council, that £10,600 should be paid by the Company to the credit of one Buckle to the use of Maling. Arnott wrote, stating the agreement to Sir James Kemnal, acting for the Company in London, and shortly thereafter £10,600 was paid into Buckle's account and used by Maling. Maling, against whom further facts than those here stated were proved, was prosecuted and convicted under the Secret Commissions Act, and the Company was then prosecuted under the same Act, convicted, and fined £1,000 and ordered to pay £10,600 to the Council. On an application for a prohibition the majority of the Court, Ferguson, A.C.J., and James, J., did not think that the conviction was "based on evidence clearly sufficient to lift the case out of the region of suspicion into that of established fact." Mr. Justice Halse Rogers dissented, and in the course of his judgment said: "Suspicion of course was not enough to make a case on a criminal charge, but on the other hand the Crown had only to prove its case beyond reasonable doubt. Such a multiplicity of coincidences, interconnected and unexplained, was sufficient to carry the mind beyond suspicion to certainty." The prohibition was granted with costs.

Bench and Bar.

The Honourable Mr. Justice Herdman, senior puisne Judge of the Supreme Court, has had conferred upon him in the Birthday Honours List the title of Knight Bachelor.

Mr. James Watt, of the firm of Watt & Blenerhasset, Wanganui, has joined the firm of Currie & Jack, Wanganui. The new partnership will practise under the style of Watt, Currie & Jack.

Rules and Regulations.

British Nationality and Status of Aliens (in New Zealand) Act, 1928.—Notification of His Majesty's assent to Act which is to come into operation on 1st July next.—Gazette No. 31, 2nd May, 1929.

Motor Vehicles Act, 1924: Motor Vehicle Amendment Regulations, 1929, re erection of compulsory-stop signs.—Gazette, No. 38, 23rd May, 1929.

Motor-vehicles (Tractors) Regulations, 1928. Tractors declared to be Motor-vehicles.—Gazette No. 37, 16th May, 1929.

Motor-vehicles Insurance (Third Party Risks) Act, 1928. Amendment to Motor-vehicles Insurance (Third Party Risks) Regulations, 1929, re premium payable in respect of certain classes of motor-vehicles.—Gazette No. 39, 24th May, 1929.

Prisons Act, 1908. Prisons Regulations: regulation 389, re prisoners escaping from custody, and replacement of departmental property damaged or lost by prisoners, amended.—Gazette No. 31, 2nd May, 1929.

Public Works Act, 1928. Motor-lorry Regulations, Amendment No. 3, re payment of Heavy Traffic Fees.—Gazette No. 39, 24th May, 1929.

War Regulations Continuance Act, 1920: Passport Regulations, 1929.—Gazette No. 31, 2nd May, 1929.

Law Lords and their Privileges.

The recent promotion of Tomlin, J., from the High Court of Chancery to the House of Lords recalls the fact that the Law Lords were once upon a time hedged about by insidious conditions. After their retirement from office they could neither sit nor vote in the House of Lords and, further, their children could not take the prefix "Honourable." The first grievance was removed by a statute passed, it is said, because a certain Law Lord despite failing faculties refused to relinquish either his post or his stipend unless he were allowed to retain the privileges of the peerage. The other matter was remedied in 1896 when by Royal Warrant it was directed that the sons and the daughters of life peers, living or deceased, should be entitled to the courtesy prefix of "Honourable." The origin of this latter reform was alleged to be the complaint of one of their Lordships that the existing system caused the ignorant multitude rashly and regrettably to assume that there had been some technical flaw in his matrimonial arrangements.

Legal Literature.

Redman's Law of Landlord and Tenant.

Supplement to Eighth Edition: By J. C. Arnold and G. E. Hart.
(pp. xiii; 144; xii: Butterworth & Co. (Publishers) Ltd.)

Occasionally there is a feeling that an excuse for the publication of a new edition of an established work is somewhat too lightly seized upon, and that in many cases the work could be brought up-to-date efficiently and at comparatively slight expense to the practitioner, by a supplement. This new and highly commendable supplement to *Redman* proves adequately that there are occasions which permit of the adoption of such a course. And to the New Zealand practitioner this method of modernising a legal treatise has, at least in this case, particular advantages, for the last edition of *Redman* was published in 1924, before the passing of the Law of Property Acts of 1925, and while the supplement, as well as including all the recent cases, shows the changes effected by these statutes, reference can always be made to the main work for the previous law, whereas in the case of a new edition one almost invariably finds the old law stated too briefly to be of real assistance to those who are not concerned at all with the recent changes in English Law.

The Supplement follows the last edition page by page and contains references to over one hundred and sity cases. The remainder of the volume is devoted to an annotation of the Landlord and Tenant Act, 1927, and to an annotation of the statutory rules and orders under that Act. The volume has its own index.

New Zealand Justices Handbook.

Second Edition: By W G. Riddell, S.M.
(pp. iv; 127; vii: Butterworth & Co. (Aus.) Ltd.)

There are, it is believed, some 5,000 Justices of the Peace in New Zealand and each one of them has to take an oath binding his conscience to do right to all manner of people after the laws and usages of the Dominion without fear or favour, affection or ill will. Nobody, of course, really expects a Justice of the Peace to have a thorough or detailed knowledge of the law; but in order that the oath should not be considered a farce—it is a bad thing for the administration of justice when oaths become to be considered as meaningless formulae—every Justice of the Peace should, and there seems nowadays to be a tendency to recognise this obligation, make an honest endeavour to familiarise himself with that part of the law with which the performance of his ministerial and judicial duties is likely to bring him into touch. Mr. Riddell's "*New Zealand Justices Handbook*," the first edition of which appeared in 1923, since when the Justices of the Peace Act has been consolidated and there has been much change in the law as to youthful offenders, is apparently intended for this purpose and as such is an ideal little treatise. In a clear, succinct, essentially accurate, and, what is perhaps as important, readable manner the author states what a Justice of the Peace ought to know about his ministerial and judicial duties. On the criminal side the rules as to criminal liability generally, summary jurisdiction, conservation of the peace, indictable offences and their summary trial by justices, bail, probation, and suppression of names are given. Special chapters are devoted to juvenile offenders, Children's Courts, and the Child Welfare Acts, and there are chapters on the jurisdiction of justices in civil cases, as to mental defectives, and under the Coroners Act. The chapter on evidence, a branch of the law which is particularly confusing to the layman, which appears for the first time in this edition deserves special mention. This reviewer has not the slightest hesitation in saying that no Justice of the Peace can afford to be without this volume, and it can be recommended also to clerks and students.

Federal Bankruptcy Law and Practice.

By D. Claude Robertson and J. B. Tait, LL.B.
(pp. lxxxviii; 684; lxxix: (Butterworth & Co. (Aus.) Ltd.)

Robertson and Tait on *Federal Bankruptcy Law and Practice* is one of the most substantial Australian legal text-books which this reviewer knows and is in every way a credit to the authors and the publishers. In Australia by the Federal Bankruptcy Act, 1924-28, there has been created for the first time a uniform Commonwealth Law of Bankruptcy and each State no longer has its separate law differing in many important respects from the law in force in each of the other States. It would appear that on the whole the new law has been brought more into line with that of England and consequently the treatise cannot fail to be useful to the practitioner in this country—just as useful, in all probability, as the standard English works on bankruptcy, for as well as citing the important English decisions the work provides a readily accessible storehouse of the High Court's and State Courts' decisions applicable to the new law. Now and then a reference is given to a New Zealand case.

With the changes introduced by the new Federal Act it is not, probably, within the province of a review to deal, but an alteration which may be noticed as likely in its effects to be most far-reaching is one relating to the subject of fraudulent preference. By English and New Zealand law it is an essential ingredient of a fraudulent preference that it be made "with a view" to giving a preference; by the Federal Act it is sufficient if the transaction has the effect of giving a preference. This change in the law is one which might well be followed in New Zealand, for many a transaction which should not in justice to the general body of creditors be allowed to stand is rendered secure because of the difficulty in proving the bankrupt's intent, the preferred creditor being generally able to show that the transaction was effected under pressure by him, or that the debtor's real intention was to be able to carry on his business.

In a foreword the Hon. J. G. Latham, C.M.G., K.C., the Commonwealth Attorney-General, says:

> "I congratulate the authors upon the high standard and completeness of their work. They have rendered most useful service, not only to the whole legal profession but to the community as a whole. They have exhaustively annotated the Act, citing authorities from both Australian and English

Courts and indicating the distinctions which must be remembered in applying such precedents to the elucidation of the Federal Act."

So far as this reviewer has been able to see from a lengthy series of tests this praise of the leader of the Australian Bar is well-merited.

New Books and Publications.

Butterworth's Index to the N.Z. Statutes, 1928. By J. D. Willis. (Butterworth & Co. (Aus.) Ltd.). £1/-/-.

N.Z. Justices Handbook. By W. G. Riddell. Second Edition, 1929. (Butterworth & Co. (Aus.) Ltd.). 7/6.

Elements of the Law of Contract. By Victor Morawetz. Second Edition, revised, 1927. 12/6.

Snell's Principles of Equity. By H. C. Rivington and A. Clifford Fountaine. Twentieth Edition. Sweet and Maxwell. £1/15/-.

Questioned Documents. By A. S. Osborn. Second Edition. Boyd Printing Co. and Carswell Co. £3/2/6.

Shipping Enquiries and Courts. By A. R. G. McMillan, M.A., LL.B. Stevens & Sons. 12/-.

Trial of J. Donald Merrett. By William Roughhead (Notable British Trial Series). (Butterworth & Co. (Aus.) Ltd.). 9/-.

Guide to Law Reports and Statutes. (Sweet & Maxwell). 5/-.

Annual Survey of English Law, 1928 and London School of Economics and Political Science. (Sweet & Maxwell). 12/6.

Kerr on Fraud and Mistake. Incorporating May's Fraudulent Dispositions. By Syd. E. Williams. Sixth Edition. (Sweet & Maxwell). £2/7/6.

Roman Law in Medieval Europe. By Paul Vinogradoff. Second Edition. By F. de Zulueta. (Oxford Press). 6/-.

Lawrence on Equity Jurisprudence. 2 Vols. 1929. Matthew Bender & Company. £4/10/-.

The Agra Double Murder. By Sir Cecil Walsh. (Ernest Benn). Price 9/-.

Administrative Law. By Fred. K. John Port, LL.D. Foreword by Rt. Hon. Lord Justice Sankey. (Longmans Green & Co.). Price £1/4/-.

English Port Law History. Part 2 (2 volumes). By Sydney and Beatrice Webb. (Longmans Green & Co.). Price £2/1/-.

The Working of the Bill of Exchange. Second Edition. By A. M. Samuel. (Effingham Wilson). Price 9/-.

The Conveyancer's Note Book. Third and Revised Edition. By A. H. Cosway. (Effingham Wilson). Price 9/-.

The Practice of the Divorce Division. By C. A. Phillips, LL.B. (Solicitors Law Stationery Society). Price 18/-.

The Landlord and Tenant Act, 1927. By S. P. J. Merlin. (Solicitors Law Stationery Society). Price 3/6.

Principles of the English Law of Contract. By Sir W. R. Anson, Bart. Seventeenth Edition. By J. C. Miles, Kt., M.A., and J. L. Brierly, M.A. (Oxford Press). Price 18/-.

Cases in Law of Contract. By J. C. Miles, Kt., M.A., and J. L. Brierly, M.A. (Oxford Press). Price £1/9/-.

Wellington Law Students' Society.

The following case was argued before H. F. O'Leary, Esq., on May 17th :—

"Mr. Crabb has at the back of his shop a door leading to his private apartments on the upper floor. Close to this is a flight of steps leading to a cellar, and ordinarily covered by a trap door which is suitable for the purpose in all respects. Mr. Crabb invites Mr. Brown to his house. As Mr. Brown is leaving he falls down the cellar steps, the trap-door covering of which has been carelessly left open by Mr. Crabb's servant. Mr. Brown, who is severely injured sues Mr. Crabb for damages."

Ball for plaintiff. Plaintiff was a licensee. It is a licensor's duty to warn licensees of circumstances of danger : *Corby v. Hill*, 4 C.B. N.S. 556 ; *Barrett v. Midland Railway Co.*, 1 F. & F. 661 ; *Gallagher v. Humphrey*, 6 L.T.N.S. 684 ; *Clerk and Lindsell on Torts*, 8th Edn. 445. ; *Fairman v. Perpetual Investment Society*, (1923) A.C. 74, and *Connor v. Howden*, (1924) N.Z. L.R. 181, are recent cases in point. It is submitted that *Fairman's Case* proceeded on the ground that the defect in the stairs in that case was a patent defect. In *Salmond on Torts* 7th Edition, 454, it is stated that a concealed danger is a danger which a reasonable person would not have seen and that an occupier is bound to give notice to licensees of any concealed danger.

Jessop in support. Persons on dangerous premises can be classified as (1) Trespassers ; (2) Licensees, and (3) Invitees. An invitee is defined in *Salmond on Torts*, 6th Edition, 436. It is submitted that the distinction between a licensee and an invitee is unsatisfactory : see *Salmond*, 436. It is submitted Brown was both a licensee and an invitee. It is the duty of an occupier to protect an invitee from hidden dangers : 21 *Halsbury* 388. An invitor must use reasonable care : *Indemaur v. Dames*, L.R. 1 C.P. 274 ; *Norman v. Great Western Railway*, (1915) 1 K.B. ; *Public Trustee v. Waihi G.M. Co.*, (1926) N.Z. L.R. 449. Submitted defendant liable even if only a licensee : *21 Halsbury* 393. *Gallagher v. Humphrey* covers this case. In *Latham v. Johnson*, (1913) 1 K.B., a trap is defined by Hamilton, L.J., at p. 415. It is submitted *Fairman's case* distinguishable on ground that there (1) The danger was obvious. (2) There was no negligence of defendant.

Rollings for defendant. It is submitted Brown visited Crabb's for social purposes and was consequently a licensee. *Gallagher v. Humphrey* is distinguishable. In that case there was definite evidence of negligence. This case is similar to *Mersey Docks v. Proctor*, 39 T.L.R. 275. A licensor is liable only if a positive trap is laid and not for a mere omission : *Latham v. Johnson*. A licensor is not bound to correct existing traps ; he must not create fresh ones : *Hayward v. Drury Lane Theatre*, (1917) 2 K.B. 899. In *Sutcliffe v. Clients Investment Co.* (1924) 2 K.B. 746, Bankes, L.J., said a trap was something of which the licensor did know or should have known. It is submitted : (1) There was not a trap here ; (2) It was not known to defendant.

Paul in support. There was no duty of care on defendant. Plaintiff was a licensee : *Salmond*, 435. A licensor must reveal a concealed danger. This is not a concealed danger : See *Sullivan v. Waters*, 14 Ir. C.L.R.

Mr. O'Leary, delivering "judgment" said that it must be found as a fact that an ordinary man would not have seen the trap door. There were four relationships : (1) Contractual ; (2) Invitor and Invitee ; (3) Licensor and Licensee ; (4) Trespasser. Brown was either an invitee or a licensee, but he did not think it mattered which. In his opinion defendant was liable. In the absence of evidence that a reasonable man would have seen the opening, he must hold that he would not have seen it. He held there was a concealed trap and thought that the defendant must be fixed with the knowledge of his agent.

Proctor's case was explainable on the grounds that the plaintiff had ceased to be a licensee. Had Brown in this case commenced to wander all over Crabb's house and been injured, Crabb would, no doubt, not have been liable. In *Fairman's case* plaintiff was up and down the stairs in question all day and every day.

Judgment for plaintiff.

The Bar alone knows whether a Judge is competent to do his duty. The Bench knows better than anyone else who is doing the work of the Bar best and most effectively.—Mr. Justice Duffy.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"There never was a time when the position of the advocate was of greater importance or responsibility than to-day." —*Mr. Justice McCardie.*

Vol. V. Tuesday, June 25, 1929 No. 9.

Reasonable Inference in Actions of Libel.

The libel actions brought by Mr. Hayley Morriss against various newspapers in England should act as a warning to reporters that it is unsafe, even in accounts of judicial proceedings, to publish additional defamatory matter of a man convicted of a serious crime, without being satisfied first that the statements are true; and *Cassidy v. Daily Mirror Newspaper Ltd.*, will serve to remind them how even innocent and *bona fide* statements, if found to be untrue, may cast their proprietors in damages for libel.

Cassidy v. Daily Mirror Newspaper Ltd. was heard by a Court of Appeal consisting of Lords Justices Scrutton, Greer and Russell, on appeal from the verdict and judgment in an action tried before Mr. Justice McCardie and a common jury. In the course of a dissenting judgment Lord Justice Greer put one or two illustrations which indicated, in his opinion, the danger of carrying the law of libel as far as it was argued that it should be carried, and it must be supposed, since Lord Justice Scruttonand Lord Justice Russell upheld the decision of the Court below, was in fact carried by the decision of the Court of Appeal from which Lord Justice Greer dissented. "Take this case," said Lord Justice Greer. "It was written of A.B. that he was ill-mannered and uneducated. It turned out, though the writer did not know it, that A.B. was, in fact, brought up by his uncle. Could it be said that the uncle could succeed in an action alleging that the words meant that he had badly brought up and educated A.B?" The learned Lord Justice then proceeds: "Take another case. 'A,' being under the mistaken impression that he saw 'Mr. B.' walking away from a theatre with 'Miss C,' said next morning to an acquaintance: 'I saw 'B.' and 'C' leaving the theatre together last night.' Unknown to 'A,' but to the knowledge of his acquaintance, 'C' had been murdered by the man with whom she left the theatre. Could 'A' be successfully sued by 'B.' for saying he had murdered 'C?'" Although these examples have the appearance of questions that might well be argued by a moot court, on the answer to them depended, in the opinion of the learned Judge who advanced them, the question in the case before the Court of Appeal, for he says in reference to the last example given: "If the case against the present defendants was rightly left to the jury, 'A.' could be so sued." To him it seemed quite "certain that it would be the duty of the Judge to rule that the words were incapable of being so interpreted."

In *Cassidy v. Daily Mirror Newspaper Ltd.* Mrs. Cassidy, the wife of Mr. K. E. Cassidy, otherwise known as Mr. Michael Corrigan, a racehorse owner, claimed damages for alleged libel against the defendant in respect of the publication of a photograph in the *Daily Mirror* of her husband and a Miss X, and with the words following explaining the photograph and the story intended to be sold: "The Daily Mirror." "To-day's Gossip." "News and Views about Men, Women, and Affairs generally." "Mr. M. Corrigan" (meaning the plaintiff's husband, the racehorse owner) "and Miss X whose engagement has been announced." The plaintiff contended that the defendant meant that her husband had become engaged to be married to a Miss X, that he was not a man bound in lawful wedlock to the plaintiff, and that the plaintiff had lived in adultery with him. The evidence of the reporter who supplied the information and the photograph to the defendant was to the effect that he knew Mr. Corrigan by sight and saw him at Hurst Park Races in the company of a woman. Corrigan informed him that he was engaged to the woman who was with him, whose photograph the witness had taken on an earlier occasion. The reporter asked Corrigan if he could publish the news of the engagement with the photograph of the woman which had been taken. Corrigan answered "Yes," but said that he did not like the photograph. He called the woman over and Corrigan and the woman then posed together, and the witness took the photograph in question. Mr. Justice McCardie, in the course of his summing up to the jury, said that there was no malice on the defendant's part. On behalf of the plaintiff evidence was given that the newspaper was read by the female acquaintances of the plaintiff and that they understood from it that the plaintiff was not married to Corrigan, and had no legal right to take his name, and that they formed a bad opinion of her in consequence. Lord Justice Scrutton said that the real questions involved were: (1) Was the alleged libel capable of a defamatory meaning? (2) As the defendants did not know the facts which caused the friends of Mrs. Cassidy to whom they published the words to draw defamatory inferences from them about the plaintiff, were they liable for those inferences? Lord Justice Scrutton and Lord Justice Russell found that the alleged libel was capable of a defamatory meaning and that the defendant's ignorance was no excuse. In answer to the contention that the alleged libel did not mention the plaintiff, Lord Justice Scrutton said that he thought it clear that words published about "A." might indirectly be defamatory of "B.", giving as an instance: "'A.' is illegitimate." To persons who knew his parents, those words might be defamatory of his parents, or again: "'A.' has given way to drink. It is unfortunately hereditary." To persons who knew "A.'s" parents, those words might be defamatory.

The division in judicial opinion, and the striking examples given by Lord Justice Scrutton and Lord Justice Greer, are due to differences in opinion as to the scope of the judgments of the House of Lords in *Capital and Counties Bank v. Henty and Sons*, 7 A.C. 741, and 5 C.P.D. 514, and *Hulton v. Jones*, (1910) A.C. 20. *Cassidy v. Daily Mirror Newspaper Ltd.* will go to the House of Lords and it will be interesting to see whether, as to statements innocently made, and on the face of them innocuous, a limit of liability will be drawn as suggested by Lord Justice Greer, despite the possibility of a defamatory meaning being attached to them by persons acquainted with circumstances unknown to the publisher. Unless some such line is drawn the newspaper man must tread warily if he will avoid traps.

Supreme Court.

Herdman, J. April 15, 16; May 14, 1929.
Christchurch.

ATTORNEY-GENERAL (EX RELATIONE GOULD) v. CITY OF CHRISTCHURCH.

Municipal Corporation—Reserve for Public Gardens and Promenades—Buildings Erected and Further Buildings Proposed to be Erected on Land Reserved—Trespass—User of Land as Public Highway for Over Twenty Years and Maintenance and Control of Same by City Council During Such Period Held Not to Make Land a "Street"—User Creating No Rights in Reserve—General Act Not Affecting Special Act—Rights of Public Not Affected by Uninterrupted Possession or Acquiescence in User—Land Act, 1924, Section 13—Municipal Corporations Act, 1920 Section 171 (1).

Claim by the plaintiff for an injunction compelling the Christchurch City Council to remove an existing tramway shelter and buildings situated in the Cathedral Square, Christchurch, and to prevent the Council from proceeding with the erection on the Square of a building which comprised a shelter, public lavatories and other conveniences. It was admitted that the Council proposed to demolish the existing tramway shelter and to proceed with the erection in its place of a more extensive structure. The Attorney-General claimed that the existing structure had been erected by the City Council on land which had been reserved for the people, and that it could not proceed with the erection of a new building upon the site selected without violating the provisions of a trust created in favour of the citizens of Christchurch. It was in effect alleged that the City Council was a trespasser. In 1877 by the Christchurch City Reserves Act, 1877, the reserve was vested in the Mayor, Councillors, and Citizens of the City of Christchurch for the use of the inhabitants of the City of Christchurch as public gardens and promenades subject to such rights of roads or streets as then legally existed over the same. The principal dispute between the parties was as to the boundary of this reserve, and Herdman, J., held on the evidence that the existing tramway shelter were, and the proposed buildings would be, on the land reserved.

Gresson and Wanklyn for plaintiff.
Donelly and Loughnan for defendant.

HERDMAN, J., said that it followed from his finding as to the correct boundary of the reserve that, unless excused by some rule of law, the City Council had done and was doing something that was unlawful, and that it threatened to commit an unlawful act. His Honour had to deal really with a trespass committed and a trespass contemplated by the Christchurch City Council upon property which, in the year 1877, was dedicated to the public for a special purpose. What defence could there be to the claim for relief which the plaintiff set up? It was submitted that paragraph (d) of Subsection (1) of Section 171 of the Municipal Corporations Act, 1920, protected the Council. That section provided: "'Street' means the whole of any land which is within a borough, and which—(a) In the case of a borough originally constituted before the first day of January, nineteen hundred and one, has actually, and whether legally or not, been maintained and controlled as a public highway by any one or more of such local authorities and used by the public for twenty years immediately preceding the said first day of January, nineteen hundred and one." It was said that assuming a trespass to have been proved, user by the public for 20 years and more, and maintenance and control by the local body, made the land which was the subject matter of the litigation a street. But first of all it might be pointed out that Section 13 of the Land Act, 1924, protected the reserve. The City Council relied upon user over many years as establishing a right over the reserve, but it was held in **Watt v. Wilson,** 29 N.Z.L.R. 635, that the above Section was an answer to such a claim. Secondly, the Act constituting the reserve in favour of the people of Christchurch was a special Act. It conferred a benefit upon a particular class. Accordingly the well known rule stated in **Craies on Statutes,** 3rd Ed., 317, that a subsequent general act did not affect a prior special act by implication applied: see also **Maxwell on Statutes,** 6th Edn., 315, and **Garnett v. Bradley,** 3 A.C., 967. Thirdly, a legal problem similar to that now under consideration was dealt with in New Zealand in **In re McDowell,** 15 N.Z.L.R. 765. That case related to a public reserve in Wellington which had been occupied by a person for over 30 years. It was held that neither the acquiesence of the Superintendent of the Province nor of the Wellington City Council nor uninterrupted possession for 20 years availed against the rights of the public. His Honour added that the ability and diligence of counsel concerned in the case had made his task, which at first sight looked difficult, a comparatively easy one. Apart from any legal questions, the dispute really resolved itself into one about a boundary and as to that plaintiff's evidence was never seriously assailed. There would accordingly be judgment for the plaintiff. The injunction and mandatory order should not, in the circumstances, issue until the City Council had had time to consider the matter, and they would, therefore, lie in the Court until further order.

Solicitors for plaintiff: **Lane, Neave and Wanklyn,** Christchurch.
Solicitors for defendants: **Izard and Loughnan,** Christchurch.

Herdman, J. May 17; 23, 1929
Auckland.

MORRIS MOTORS (1926) LIMITED v. MORRIS MOTORS LIMITED.

Passing-off—Company Incorporated in England Under Name of "Morris Motors (1926) Limited" Selling "Morris" Motor Cars to Wholesalers in New Zealand—No Agents or Registered Office in New Zealand—Company Incorporated in New Zealand Trading in Used "Morris" Cars Under Name of "Morris Motors Ltd."—Injunction Granted Restraining New Zealand Company from Trading Under Such Name—Name "Calculated to Deceive"—Probability of Confusion Sufficient—Not Necessary to Prove Actual Confusion—Evidence that Appropriation Wilful—Foreign Company Having Market in New Zealand Entitled to Protection Against Having Trade Name and Reputation Appropriated by New Zealand Trader.

Action claiming an injunction to restrain the defendant company from trading under the name of "Morris Motors Limited," on the ground that such name was "calculated to deceive" by leading the public to believe that the business of the defendant company was that carried on by the plaintiff company. The plaintiff company, which was incorporated in 1926, acquired and was carrying on the business formerly carried on from 1913 to 1926 by Morris Motors Limited. It was one of the largest manufacturers of motor cars and motor vehicles in Great Britain. The vehicles manufactured by the plaintiff and sold in New Zealand were "Morris," "Morris Oxford," and "Morris Cowley" cars. The reputation of the vehicles produced by it was well recognised and well established in Great Britain, in New Zealand and throughout the British Empire. As successor to the former Morris Motors Limited it possessed in New Zealand by virtue of Section 70 of the Patents Designs and Trademarks Act, 1921-1922, the word "Morris" as a trademark and as distinctive of cars which it manufactured and sold. The company had no registered office and no agent in New Zealand. It marketed its cars in the Dominion by selling them direct to a company in New Zealand styled "Cycle and Motor Supplies Limited" and to several other purchasers, but it had no dealings with the defendant company or the defendants. There existed in New Zealand a steady demand for the plaintiff's vehicles due to the reputation that the company possessed for turning out a serviceable and reliable machine.

The defendant company, which had precisely the same name as the plaintiff company, excepting that the figures 1926 were omitted, was a private company formed on 15th March, 1928, for the purpose of taking over the business which had been carried on by the defendant Gray, under the style of "The British Motor Company." Its business was to purchase secondhand Morris cars in England and to sell those cars to customers in New Zealand; but by its memorandum of association the objects of the company were not limited to the purchase and sale of secondhand cars. It could manufacture, import and sell any kind of car. Gray had commenced trading in New Zealand in February, 1927, and confined his attention to used cars. He gave as his reason for adopting the name "Morris Motors Limited" the fact that he had "decided on the policy of dealing exclusively in secondhand Morris motors," and that he se-

lected a name which he considered most appropriate to describe the commodity in which he was dealing. The plaintiff company could not obtain registration in New Zealand on the ground that the name of the company was identical with the name of the defendant company already formed and registered in New Zealand or so nearly resembling the same as to be calculated to deceive. There was evidence that, in interviews between the defendant Gray and the officials of the plaintiff company, the former had intimated that he proposed to sell secondhand Morris cars and conduct a campaign which would damage the plaintiff company's trade in New Zealand. Complaints were made by the plaintiff company about Gray's business operations in New Zealand and negotiations took place with a view to his becoming a sub-agent in New Zealand. Gray made a counter offer which was not accepted. Gray then proceeded to appropriate the plaintiff company's name and to use the names "Morris Car," and "Morris Motors Ltd.," late "British Motor Company" extensively in advertisements. In these advertisements the fact that the company traded in "used Morris cars" appeared in small letters while the words "Morris Cars" figured conspicuously.

McVeagh for plaintiff.
Northcroft for defendants.

HERDMAN, J., said that the plaintiff company could not, of course, object to the defendant Gray selling used cars or any other kind of car. He was free to sell secondhand cars of any make when and where he pleased, but when he sold the plaintiff company's cars using the plaintiff company's name for the purpose, that was another matter. The plaintiff company alleged that defendants had conspired together to deceive the public of New Zealand into the belief that their company was a branch of the English company, or that it was its agent, and in making that allegation His Honour thought that it had ample justification. His Honour had no doubt whatever that anyone reading the advertisements would at once come to the conclusion that the British company owned the defendant company's business or that it was in some way closely associated with it. A plainer case of piracy it was difficult to imagine. His Honour could think of no reason which justified the defendants' action except a desire to appropriate for their own gain the plaintiff company's reputation. The fact that they dealt in secondhand cars was no justification for their conduct. They traded in the plaintiff company's name and they sold the plaintiff company's cars claiming that they were better than the product issued new from the plaintiff company's factory.

The facts against defendants were these. The company was started by Gray and a clerk. They chose for the name of their company "Morris Motors Limited." Why? The reason which Gray gave was that his policy was to deal exclusively in Morris secondhand cars, but whether the cars were new cars or secondhand cars did not matter. They were Morris cars. The conduct of the defendants could, His Honour thought, best be described by paraphrasing slightly the words of Warrington, J., recorded in **Lloyds and Dawson Brothers v. Lloyds Southampton Limited,** 28 T.L.R. 338, at p. 339. "I have no doubt that this is an attempt and, I might say, an impudent attempt, to obtain by the use of this name some benefit from the reputation attaching in the motoring world to the use of the name 'Morris Motors Limited.'" His Honour was unable to distinguish the present case in principle from **La Societe Anonyme des Anciens Etablissements Panhard et Levassor v. Panhard Levassor Motor Company Limited,** (1901) 2 Ch. 513, where Farwell, J., had no hesitation in granting relief to the plaintiff company. He held on the authority of **Collins v. Brown,** 3 K. & J. 423, that the plaintiffs though a foreign business firm were entitled to restrain the piracy of their trade name and reputation, and commenting on that decision he said: "But, apart from that authority, I should have thought it was plain that in a case such as I have stated this Court would certainly interfere to protect a foreign trader who has a market in England, in the way I have specified, from having the benefit of his name annexed by a trader in England who assumes that name without any sort of justification." Moreover, he decided that, as the company had the fraudulent intention of annexing the benefit of the plaintiff's name, the persons who were signatories to the memorandum of association were parties to a fraudulent conspiracy. The reason why the Court interfered in cases of that kind was that the use of plaintiff's name was calculated to deceive the public and so to divert business from the plaintiff to the defendant. The law would step in to prevent a man dishonestly representing that his business was the business of another man, and if the use of a name by a defendant tended to create confusion between two businesses it would intervene. Furthermore in considering whether the use of a name was "calculated to deceive," the Court would not confine the application of the words to the circumstances existing at the time of the proceedings; it would have regard to the way in which the business might be carried on in the future and to its not being carried on precisely as carried on at the date of the proceedings—see **Cuvah Ceylon Estates Ltd. v. Uva Ceylon Rubber Estates Ltd.,** 27 R.P.C. 753—and in deciding whether it should act upon the ground of "confusion" the Court need not have proof that confusion had actually occurred. If it were of opinion that there was a strong probability of confusion in the normal course of trade that was sufficient: **Valentine Meat Juice Co. v. Valentine Extract Co. Ltd.,** 83 L.T. 259, and 17 R.P.C. 673, 680. The present case was one of deliberate appropriation of the name and reputation of the plaintiff company. All the excuses that defendants offered for their conduct in His Honour's opinion failed, and as His Honour had been unable to discover that the authority of the **Panhard case** had been questioned, he stated that he would follow it in the present case.

Judgment for plaintiff granting injunction.

Solicitors for plaintiff: **Hadfield and Peacock,** Wellington.
Solicitor for defendant: **A. Goldwater,** Auckland.

Ostler, J. April 18; May 6, 1929.
Wellington.

SAMOAN GUARDIAN NEWSPAPER CO. LTD.
v. McCARTHY.

Libel—Practice—Samoa—Appeal from High Court of Western Samoa—No Regulations Prescribing Procedure—Appeal Determined on Same Principles as Appeal from Magistrate—Attempted Arrest of Native Chief by Commissioner of Police for Holding Meeting in "Disturbed Area"—Arrest Resisted—Commissioner Ignorant of Understanding Between Natives and the Administrator of Samoa—Conversation by Commissioner Through Interpreter with Native Chief Expressing Regret that Arrest Resisted—Newspaper Report of Conversation Stating that Arrest Declared by Commissioner to be a Mistake—Newspaper printed in English and Published for European Population—Accuracy of Report Tested by What Was Said in English Not by Language of Interpreter—Words Defamatory as Tending to Show That Commissioner Unfit for Office—Samoa Act, 1923, Section 27.

Appeal on law and fact from the decision of the High Court of Western Samoa in an action brought by respondent against the Samoan Guardian Newspaper and Printing Co., Ltd., and William Tarr, the editor of the paper, claiming £1,000 damages for libel. The respondent was a Judge of the High Court, Crown Solicitor, Registrar of Land, and was temporarily acting as Commissioner of Police and Prisons. In February and March, 1928, a large part of the native population in the Territory were in a state of political unrest. An organisation known as the "Mau" had been formed, and it was fostering a state of things which appeared to be rapidly approaching armed rebellion. On 21st February, 1928, the Legislative Council of Samoa had passed an Ordinance which (*inter alia*) empowered the Administrator in certain events to declare "disturbed areas" within which the holding of native meetings without the consent of the Commissioner of Police was forbidden. On 28th February, 1928, 400 natives had been sentenced to six months imprisonment for the offence of besetting certain stores in Apia. On 5th March they had been liberated by the order of the then Administrator, but before their liberation he had placed before them certain points for the consideration of the "Mau," and it seemed that there was an understanding between the Administrator and the "Mau" that after the liberation of these prisoners they were to be at liberty to hold a meeting to discuss the points submitted. The leading spokesman for the prisoners had been Tamasese, a high native chief and a prominent member of the "Mau." On the morning of 8th March the respondent heard that a meeting of the "Mau" was to be held in Tauese, a part of the town of Apia, and within a "disturbed area." The respondent warned Tamasese not to hold the meeting. Tamasese did not mention, and the respondent was unaware, of the understanding with the Administrator. The meeting was held and Tamasese attended it. The respondent ordered the police to arrest Tamasese. An attempt to arrest him was made as he was returning from the meeting, but Tamasese escaped to his

house at Vaumoso. A further unsuccessful attempt to arrest him with the assistance of armed forces was made that evening. On 9th March the respondent went to Tamasese's house at 8 a.m., with Constable Betham, who acted as interpreter. A conversation took place between the respondent and Tamasese, the respondent speaking in English and Betham interpreting what was said into the Samoan language The evidence of the respondent which was accepted by the trial Judge established that in that conversation the respondent expressed regret that the "Mau" had opposed the arrest on the previous day, that it was possible he would receive instructions to go on with the arrest, and if that happened it would mean the use of a larger force, and someone would get hurt if resistance were met with

A report which purported to be an accurate account of what was said by respondent to Tamasese was published in the Samoan Guardian of 15th March. The libel sued on was contained in that report. It was headed': "Spectacular Police Stunt. Tamasese's Arrest Declared to be a 'Mistake.'" The words complained of were that heading and the following passage: "On the morning of the 9th, at about eight o'clock the Commissioner of Police, Mr. McCarthy, and a constable arrived at the house of Tamasese, when Mr. McCarthy stated that the attempted arrest of Tamasese on the previous day had been a mistake. He expressed regret at the happening, and said that it arose over a misunderstanding." The learned Judge who tried the case decided that those words were false and defamatory of the respondent in his office as Commissioner of Police, and gave judgment for him for £100 damages against appellants. The appeal was from that decision.

Cousins and Harding for appellants.
O'Leary for respondent.

OSTLER, J., said that Section 87 of the Samoa Act, 1923, provided that "the procedure on the hearing of any such appeal and in all matters incidental to any such appeal, whether in the High Court or in the Supreme Court, shall be determined by regulations, and in default of such regulations, or so far as they do not extend, shall be determined in such manner as the Court thinks fit." No regulations had so far been made, and, therefore, His Honour thought that the procedure and the principles to be observed by the Court on the hearing of the appeal should be the same as were observed upon the hearing of an appeal on law and fact from a decision of a Magistrate. In **Thomas v. Richardson,** (1925) N.Z.L.R. 749, it was held that the High Court of Western Samoa was a superior court of record; but although that was so and although it had a very wide jurisdiction a right of appeal had been given from its decisions to the Supreme Court. It was not enacted that that appeal should be in the nature of a rehearing, and, therefore, His Honour thought that the interests of justice would be served best by applying the same principles as were applied by the Supreme Court upon an appeal from a Stipendiary Magistrate.

The first question for decision upon the appeal was whether the words complained of were true, i.e., whether they were an accurate report of what the respondent said to Tamasese. His Honour reviewed the evidence and said that the learned trial Judge had seen the witnesses and observed their demeanour. He had chosen to believe the evidence of the respondent. Therefore in accordance with the well-known and salutary principle applicable to all appeals on fact, whether from a Magistrate to the Supreme Court, or from the Supreme Court to a higher Court, the Court must accept the finding of the Court below on that question of fact. That being so His Honour must hold that the report was false in stating that the respondent said there had been a mistake and expressed regret. It was argued before His Honour that the real question for the Court was not what was said by tht respondent in English, but what was said by the interpreter in Samoan. It was urged that the respondent had chosen his own interpreter, and if the interpreter chose to misinterpret what he said, so long as a true report was given of what the interpreter said, it could not be libellous. His Honour could not agree with that contention. The report purported to be a report of what the respondent said in English, not of what the interpreter said on his behalf in Samoan. The report was obtained by the newspaper from a native who had a sound knowledge of the English language, and was clearly intended to convey to the readers of the paper what the respondent said in English. The newspaper was printed wholly in English and was published for the benefit of the European population. When it reported what the respondent had said, every reader would naturally take that as a report of what he had said in English.

The question was whether the words used were defamatory. It was urged that in their ordinary sense they were not capable of a defamatory meaning. His Honour did not agree with that contention. An admission by the Commissioner of Police in the midst of such a crisis to an offender against the law that the attempts to arrest him were a mistake on the Commissioner's part for which regret was expressed, would tend to show that the Commissioner was unfit to hold the office. Therefore a false report that the Commissioner made that admission at such a time and in the circumstances of the case would be defamatory. The report was ambiguous as to whose mistake it was which was admitted. It might have been that of the Commissioner himself, or it might have been that of a higher authority. If the words complained of were ambiguous, i.e., capable of either an innocent or a defamatory meaning it was a question of fact for the jury to determine in which of the two meanings they were understood by those to whom they were published; see **Hart v. Wall,** 2 C.P.D. 146; **Gatley on Libel and Slander,** 2nd Edn., 38, 39, and cases there cited. His Honour was, therefore, of the opinion that the words in themselves and in the circumstances of the case which were known to all readers of the report in Western Samoa were capable of a defamatory meaning without any innuendo being pleaded. There was, however, an innuendo pleaded that the words imputed an admission by the respondent that he had made a mistake in attempting the arrest. In His Honour's opinion that innuendo was unnecessary. The words themselves were capable of that meaning.

It was strongly urged that a false report of an admission of a mistake made by respondent could not be defamatory. In His Honour's opinion in the circumstances of the case known to all local readers of the paper such a false report would have a tendency to disparage the respondent and bring him into contempt. It would show that he was quite unfit for the responsible position he held. There was an incipient rebellion against established authority which had almost come to a head. Warships were in the harbour, and armed troops were ashore to keep the peace. There were frequent rumours of war parties of natives being about to attack Apia. As was said by the learned Judge in the Court below: "The view of a reasonable man, understanding from the 'Guardian' that the plaintiff had admitted no later than next morning that he had made a mistake in attempting it, and that he regretted it, would undoubtedly be that the plaintiff was not equal to the occasion; that he acted foolishly and rashly in making the attempt and vacillatingly and almost abjectly in regretting it to Tamasese when he failed." His Honour agreed with the view so expressed, and under the circumstances so stated, not only were the words used capable of being understood by reasonable men in a sense defamatory of respondent, but that was precisely the sense in which His Honour thought a reasonable man would be most likely to read them.

Appeal dismissed.

Solicitor for appellants: **T. B. Slipper,** Apia.
Solicitors for respondent: **Wynyard, Wilson and Baxter,** Apia.

Ostler, J. May 13, 1929.
Palmerston North.

CANTWELL v. WAIRARAPA FARMERS' CO-OPERATIVE ASSOCIATION.

Money-lender—Reopening Transaction—Claim for Relief on Ground That Transaction Harsh and Unconscionable—Loan of Certain Sum in Consideration of Payment of Premium—Premium Unreasonable in Circumstances—"Money-lender" Including for Purpose of Re-opening Transactions Person Lending Moneys in a Single Transaction at a Rate Exceeding Ten Per Cent—Action commenced Within a Year of Closing of Transaction—Not Too Late in Circumstances of Case—Money-lenders Act, 1908, Sections 2, 3.

Action claiming relief under the Money-lenders Act, 1908. The plaintiff was in 1923 the owner of a farm property near Dannevirke subject to three mortgages—one of £377, one of £1,216, and one to one Mitchell of £800. In May, 1923, the defendant company, who had assisted the plaintiff financially in the purchase of the farm, arranged with Mitchell to accept £350 in satisfaction of his claim provided that sum was paid in cash. The plaintiff arranged a mortgage for £1,700 which was sufficient to pay off the first two mortgages, but he required £288 in order to pay off Mitchell. The defendant company advanced this sum of £288 to the plaintiff who could not get finance elsewhere. For this loan interest was to be paid at 8%

on the balance due from day to day with half-yearly rests. In addition the defendant company demanded and received a bonus or premium of £225, and as the plaintiff was not in a position to pay this sum it was secured by a second mortgage over his farm for this amount. The plaintiff signed an agreement which stated on its face that the sole consideration for the mortgage was the loan of £288. The plaintiff all along protested at the amount demanded. The plaintiff paid the defendant company the sum of £225 and all interest thereon in March, 1928, and shortly afterwards commenced these proceedings.

Cooper for plaintiff.

Robinson for defendant company.

OSTLER, J. (orally) said that it was argued that the sum stipulated for was charged not as a premium on a loan but as a commission for services rendered. In His Honour's opinion that was not so. The form of the agreement, which was prepared by the defendant company showed that the £225 mortgage was intended to be and it was in substance and in fact a premium for the loan of £228. No doubt the defendant company's officials who prepared the agreement felt that they had done plaintiff a substantial service in obtaining so large a reduction in Mitchell's mortgage. But when the agreement was prepared that service had already been rendered. So far as the agreement was concerned it was a past consideration. Plaintiff could not take advantage of that service unless he obtained £288, and the defendant company offered to lend him that sum in consideration of his giving them a mortgage for £225 being half the amount they would enable him to save by lending him the money to take advantage of Mitchell's offer. For those reasons, in His Honour's opinion the sum charged was not charged as a commission for services, but as premium for the loan.

The question arose as to whether defendant company came within the special definition of a money-lender in Section 3 (9) of the Money-lenders Act, 1908. In His Honour's opinion it did. The object of that Section was remedial. It was to give power to the Court to enquire into and if necessary to reform any single transaction in which a lender of money had made a harsh and unconscionable bargain in which interest (including any premium as part of the interest) was charged at a rate exceeding ten per cent. It would destroy the remedial effect of that Section if Subsection 9 were construed to apply only to lenders of money who habitually and as a business lent money at a greater rate of interest than 10 per cent. A comparison of the definition in Subsection 9 with that in Section 2 which spoke of "the business" of a money-lender, seemed to His Honour to show that the Legislature intended the special definition in Subsection 9 to apply to a single transaction.

The next question was whether the transaction was harsh and unconscionable. In His Honour's opinion it was. The company was really taking very little risk in lending the £288. It knew the plaintiff. He had been a client since 1928. They apparently knew that he was a worker and worth carrying on. He had just made a good arrangement to consolidate his mortgages, and there must have been a good equity left in his land. They got £225 secured, and they knew that they could get a mortgage over the stock at any time. They knew their man and really were not taking any great risk. For the risk they took His Honour thought they asked for an unreasonable premium on their loan. They certainly made a very good bargain for plaintiff and in equity they were entitled to be paid something for that. But they asked more than a fair thing. In His Honour's opinion the transaction was harsh and unconscionable within the meaning given to that term by Lord Macnaghten in **Samuel v. Newbold,** (1906) A.C. 461. In His Honour's opinion it came within the very class of transaction which was in the contemplation of the Legislature when Section 3 of the Money-lenders Act was enacted.

The only other question raised on behalf of defendant company was that plaintiff paid the debt voluntarily and that it was too late for him to bring the case before the Court. The proviso to Section 3 (3) of the Act provided that no action should be brought more than a year after the transaction had been closed. There was no such provision in the English Act of 1900. In **Michaelson v. Nichols,** 26 T.L.R. 327, it seemed to have been laid down that in the absence of fraud or pressure the Court would not enquire into a transaction where it had been voluntarily closed by the person complaining of it. But the Court of Appeal in **Kerman v. Walnewright,** 32 T.L.R. 295, said there was no such rule, but that each case must be determined by its own circumstances. In the present case there was no suggestion that there was acquiescence by the plaintiff. He protested before he signed the mortgage. He saw the man at the head of defendant company in an endeavour to obtain redress. His effort to obtain redress were continued up to the month before he paid. It was only three weeks before he paid that defendant company finally refused to make any reduction in the amount it claimed, and soon after the payment his solicitors were demanding a revision. The action was brought within twelve months after payment. In His Honour's opinion, in the circumstances of the case which His Honour had referred to, the action was in time. Section 3 gave the Court power to reform the bargain in accordance with its sense of what was fair and reasonable considering all the circumstances of the case. In His Honour's opinion if the company had charged £100 for its services that would have been very generous payment for the risk it was taking in making the loan. The loan was paid off in about 4 years and nine months, and according to the analysis of the accounts made by Mr. Sim, a Public Accountant, the total sum paid by plaintiff in respect of the mortgage was within a shilling or two of £300. If the mortgage had been for £100 with interest at 5 per cent. plaintiff would have paid in that time a shilling or two less than £125. Therefore defendant company was in His Honour's opinion paid £175 too much.

Judgment for plaintiff for £175.

Solicitors for plaintiff: **Cooper, Rapley and Rutherfurd,** Palmerston North.

Solicitors for defendant: **Robinson, Cunningham and Beckingsale,** Masterton.

Ostler, J. May 13; 15, 1929.
Palmerston North.

CANTWELL v. WAIRARAPA FARMERS' CO-OP. ASSN. (No. 2).

Practice—Costs—Amended Statement of Claim Filed by Plaintiff After Statement of Defence Filed—Amended Statement of Defence Filed—Plaintiff Succeeding in Action—Plaintiff Ordered to Pay Defendant's Costs of Original Statement of Defence—Rule 148 of Code.

In this action judgment was given for the plaintiff by Ostler, J., (ante p. 164), the question whether the defendant company should be allowed the costs of their first statement of defence being reserved. After this statement of defence was filed the plaintiff had filed an amended statement of claim putting the defendant company to the necessity of filing an amended statement of defence.

Cooper for plaintiff.

Robinson for defendant company.

OSTLER, J. (orally) said that Order XXVIII Rule 13 of the English Rules provided that the costs of and occasioned by any amendment should be borne by the party making the same unless the Court or a Judge should otherwise order. Rule 148 of our Code of Civil Procedure provided: "Where an amended statement of claim or defence has been filed under the foregoing rules, the party filing the same shall bear all the costs of the original statement and any application for amendment, unless the Court otherwise orders." In **Crawford v. Ryland,** 18 N.Z. L.R. 714, it was held that that rule applied to the case of a party who filed an amended statement of claim and succeeded in the action. But, the rule itself had not been construed in that or in any other case. In His Honour's opinion the rule meant that a plaintiff who had filed an amended statement of claim, which necessitated the filing of an amended statement of defence, and who succeeded in his amended claim should bear all the costs of and occasioned by the original statement of claim. The first statement of defence was such a cost and therefore the plaintiff must bear that cost. His Honour would, therefore, allow the defendant company the costs of its original statement of defence.

Solicitors for plaintiff: **Cooper, Rapley and Rutherfurd,** Palmerston North.

Solicitors for defendant: **Robinson, Cunningham and Beckingsale, Masterton.**

Smith, J. March 22; May 9, 1929.
Wellington.

ECLIPSE DAIRY CO. LTD. v. THOMPSON.

Practice—Set-off of Cross Judgments—Judgments Obtained by Wife of Defendant as Trustee for Defendant in Separate Actions Set-off Against Plaintiff Company's Judgment—Judgments Between Substantially Same Parties—Rule Applicable to Independent Actions—Quaere Whether an Assigned Judgment Not Between Substantially Same Parties May be Set-off—Just and Equitable to allow Set-off—Discretion of Court—Appointment of Receiver of Plaintiff Company Not Preventing Set-off—Rule 302 of Code.

Summons by the defendant calling on the plaintiff company to show cause why: (a) two judgments against the plaintiff obtained by defendant's wife and held in trust for him by her, and assigned by her to him pursuant to such trust, and (b) the judgment on the counterclaim in this action, should not be set-off against the judgment recovered by the plaintiff against the defendant in this action. The two judgments obtained by the wife of the defendant were recovered in respect of four promissory notes given by the company for money advanced to the company in March, 1928, at which date the company was in financial difficulties. The promissory notes fell due in June, July, August and September, 1928. From the only evidence before the Court on this application it appeared that the money advanced was advanced by the wife out of moneys held by her in trust for her husband, the defendant. One judgment was recovered in the Magistrates' Court on 4th February, 1929, on two promissory notes for £221 0s. 1d. That judgment was entered in the Supreme Court, the amount being £223 12s. 8d. The other judgment was obtained in the Supreme Court on 8th February, 1929, upon the two remaining promissory notes, the amount of this judgment being £234 14s. 0d. On the same day the wife, by deed, assigned the two judgments to her husband pursuant to the trust affecting them. The other judgment for the defendant was a judgment upon a counterclaim in this action commenced by the plaintiff company on 22nd September, 1928, claiming £802 0s. 9d. The defendant admitted an item of £119 17s. 2d. and counterclaimed for items totalling £294 8s. 8d. On 6th February, the plaintiff desiring to have the use of certain books held by Messrs. Robert Dobson & Co., a firm of accountants to whom the company was indebted, and which had a lien over the books, assigned, in consideration of the release of such books to such firm the amount of the claim admitted by the defendant and the amount of any judgment which might be recovered. The plaintiff on 8th February, obtained judgment for £659 16s. 7d., and a certain amount for interest and costs and the defendant obtained judgment upon the counterclaim for £187 18s. 8d. with costs. On the same day the plaintiff, by deed, assigned the whole judgment to Robert Dobson & Co., the principal consideration for the assignment being the monies owing to such firm for work done by it as accountants. On 9th February, 1929, the defendant by his solicitors notified the plaintiff by registered letter of the assignment of the judgment debts obtained by his wife against the company and required the plaintiff to pay the debts to the defendant. The company acknowledged receipt on 13th February, 1929. By letter dated 15th February, 1929, the defendant's solicitors notified the plaintiff's solicitors that the defendant proposed to set off his assigned judgment against the judgment obtained by the plaintiff in his action. On 19th February, 1929, the plaintiff's solicitors replied objecting to such set-off, and at the same time notified the defendant's solicitors that the judgment debt in the present action had been wholly assigned to Robert Dobson & Co. The present summons was then issued by the defendant. It appeared from the affidavits filed that towards the end of January, 1929, various creditors were pressing the company, and that one creditor had issued execution on his judgment. To conserve the assets A. S. Paterson & Co. Ltd., a debentureholder of the company, appointed a receiver on 29th January, 1929. The receiver took possession and a return of *nulla bona* was made to the execution. Although the company was financially embarrassed liquidation had not occurred at the date these proceedings were commenced.

Ongley in support.
P. B. Cooke to oppose.

SMITH, J., said that he found as a fact that the defendant's wife recovered her judgment against the plaintiff in trust for her husband. The actions on the promissory notes were, therefore, substantially between the plaintiff and the defendant in the action. Counsel for the defendant contended that the judgments held by the defendant were cross-judgments between the same parties within Rule 302, and that it was just and equitable that they should be set off against the plaintiff's judgment in this action. The defendant agreed that any set-off was not to affect prejudically the taxed costs of the plaintiff's solicitors as between solicitor and client in the action. Counsel for the plaintiff in showing cause contended: (1) That Rule 302 applied only to judgments in the same action and not to judgments in independent actions; (2) That the assigned judgments were not cross-judgments between the same parties, within the Rule; (3) That the Court had no other jurisdiction to deal with cross-judgments save that conferred by Rule 302; (4) Assuming jurisdiction, that it was not just and equitable that any of the judgments should be set off.

As to the first contention, His Honour was of opinion that Rule 302 applied to judgments in independent actions and that claim and counterclaim not arising out of the same subject-matter were to be regarded as independent actions. The words "in the particular action in which the set-off is sought" clearly contemplated some other action: per Buckley, L.J., in **Reid v. Cupper,** (1915) 2 K.B. 147, 150. No provision for a counterclaim existed in the Regulae Generales of 1856, and the Rule must then have dealt solely with independent cross-actions. In 1882, provision was made for a counterclaim, and Rules 294 and 295 (now Rules 301 and 302) were introduced to provide for one judgment only where the claim and the counterclaim both arose out of the same subject matter: **McPhee v. Wright,** 19 N.Z.L.R. 321. Rule 530 (now Rule 566) provided for the awarding of costs on claim and counterclaim as if each party had succeeded in a separate action. The better opinion was that that Rule applied only where the counterclaim was a pure counterclaim, *i.e.*, really a cross-action: **Stout and Sim's Code,** 6th Edn., 341. It followed that a counterclaim which did not arise out of the same subject-matter as the claim was to be regarded really as a cross-action, although it was not so technically, as it was not commenced by a writ of summons: **Mc Gowan v. Middleton,** 52 L.J.Q.B. 355. The cross-judgments referred to in Rule 302 ought then to be construed as comprising both cross-judgments and counterclaim when they did not arise out of the same subject-matter. As all of the present rules were in force in 1890, His Honour thought that that was the view taken by Denniston, J., in **Smith v. Ogden,** 8 N.Z.L.R. 546, 549, when he said: "Rule 296 (Rule 302) obviously refers to cross judgments in separate actions." The Rule was applied to cross-judgments in independent actions in **Lane v. Heighton,** (1929) G.L.R. 75.

As to the second contention, Rule 302 first appeared in the Regulae Generales (N.Z.) in 1856 as Rule 204. There appeared to have been no corresponding rule in England conferring a substantive authority to allow cross-judgments to be set off. Prior to the year 1832 the various Common Law Courts of King's Bench, Common Pleas and Exchequer, exercised a jurisdiction to order a set-off. The Court of Chancery exercised its own jurisdiction. The jurisdiction itself in the Courts of Common Law was called an equitable jurisdiction (i.e., a jurisdiction to do what was fair) to order a set-off. The only difference in the practice lay in the terms upon which it was exercised with regard to the attorney's lien for costs. In 1832, Rule 93 of 2 William IV (3 B. & A. 388) affecting the Courts of Common Law, provided that no set-off was to be allowed to the prejudice of the attorney's lien for costs in the particluar suit against which the set-off was sought, save as to interlocutory costs in the same suit awarded to the adverse party. That rule was repeated as Rule 63 of the Regulae Generales of 1853 (22 L.J. Q.B. xii). The substance of that Rule, but excluding the reference to interlocutory proceedings, appeared as the second half of Rule 204 of the Reg. Gen. (N.Z.) of 1856. It was repeated in Rule 296 of the Rules of 1882, and now appeared as the second part of Rule 302. In 1873 on the fusion of law and equity in England, the English rule was altered, and it was provided (Order LXV Rule 14) that a set-off might be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off was sought. As the result of **Edwards v. Hope,** 14 Q.B..D 922, **Reid v. Cupper,** (1915) 2 K.B. 147, and **Puddephatt v., Leith,** (1916) 2 Ch. 168, it was clear that in England the Courts had a discretion to order a set-off of cross-judgments, and that the discretion rested either on Order LXV Rule 14 in the cases to which it applied, as determined by **David v. Rees,** (1904) 2 K.B. 435, or on the old practice in the cases to which the Rule did not apply and that the set-off might or might not be to the prejudice of the solicitor's lien as the Court thought fit and just.

In New Zealand Rule 302 was a specific authority enabling a set-off of cross-judgments. The first question which presented

itself was whether it was exclusive of any jurisdiction to set-off existing in New Zealand prior to the Rules of 1856. Although His Honour did not find it necessary to decide that point, **Prosser v. Miller,** 13 N.Z.L.R. 226, might be an authority that the Rule was not exclusive. Rule 302 could apply, His Honour thought, only to cross-judgments in the Supreme Court. In **Prosser v. Miller** (*cit. sup.*) Williams, J., held that a judgment against a married woman obtained in the Magistrates' Court in respect of her separate property could be set-off by the judgment creditor against costs recovered against the judgment creditor by the married woman in the Supreme Court, and, in effect, that the protection of the solicitor's lien was in the discretion of the Court. The learned Judge relied on **Sandys v. Louis,** (1875) W.N. 249, where Quain, J., after referring to the old practice of setting off one judgment against another, allowed a County Court judgment to be set-off against a judgment of the Court of Exchequer. If that were so, then the course of decision in New Zealand should tend in the same direction as in England, and the Court should hold that in cases not covered by Rule 302, the Supreme Court was entitled to exercise the old and inherent jurisdiction to set off cross-judgments. On the other hand, the jurisdiction exercised by Williams, J., was admitted by counsel, and Rule 296 of 1882 (Rule 302 of 1908) was not cited at the Bar or referred to in the judgment; and with much respect, His Honour thought it clear that the Supreme Court of New Zealand had no jurisdiction to allow a set-off to the prejudice of the solicitor's lien. The English Rule of 1832 had a similar effect upon the previously existing discretion of the Courts to which that Rule applied: **Reid v. Cupper,** (1915) 2 K.B. 147, 153, 154. His Honour did not, however, find it necessary to decide whether any independent equitable jurisdiction existed, as in his view the facts of the case brought it within the proper construction of Rule 302. In His Honour's opinion, that Rule ought to be construed, in so far as its text permitted, in the light of the previously existing practice. It was no doubt intended to state that practice. There was no doubt that the practice in England did permit a set-off when the judgments were substantially between the same parties: **Standeven v. Murgatroyd,** 27 L.J. Exch. 425. The English Rule at the time of that case was Rule 93 of 1832. It required that "no set-off of damages or costs between parties should be allowed to the prejudice of the attorney's lien," and that rule was at that time binding on all the Courts of Common Law: **Reid v. Cupper** (*cit. sup.*). It followed, His Honour thought, that the Court of Exchequer must have regarded the parties to the cross-actions involved in the setting off of judgments as being parties substantially the same. His Honour thought then that the words "cross-judgments for money between the same parties" in Rule 302, interpreted in the light of the practice existing before 1856, included cases where the parties were substantially the same, e.g., a judgment recovered by A as bare trustee for B against C was to be regarded as a cross-judgment in relation to a judgment recovered by C against B. That seemed a fair and just construction, for, to take the facts of the present case, the plaintiff would have been entitled in any action brought upon the promissory notes by the defendant's wife against the plaintiff, to have set up as a defence (though not as a counterclaim, for the parties were different) its claim against the defendant: **Bankes v. Jarvis,** (1903) 1 K.B. 549. His Honour, therefore, held that the cross-judgments in question in the present action were cross-judgments for money between the same parties within the meaning of Rule 302. The question was left open as to whether assigned judgments not obtained between substantially the same parties were within the terms of the Rule, or within any equitable jurisdiction existing independently of the Rule.

His Honour did not find it necessary to deal with the third contention. As to the fourth contention His Honour stated that the plaintiff's contention that it was not fair and equitable that the judgments should be set-off rested on grounds which might be summarised as the unfair and inequitable interference with the remedies of certain creditors of the plaintiff company, namely Dobson & Co., and the debentureholder. His Honour was unable to accept Mr. Cooke's contention that the discretion to set-off must be exercised upon settled equitable principles. **Reid v. Cupper,** (1915) 2 K.B. 147, and **Puddephatt, v. Leith,** (1916) 2 Ch. 168, showed that the discretion was one to be exercised when the Judge considered it fair and just to allow it. In the present case, His Honour thought it fair and just that in the exercise of the Court's discretion, the defendant should be preferred to certain individual creditors of the company. That would not be so if the company were in voluntary liquidation, and the general body of creditors was affected: **Hewitt v. Pigott,** 1 Dowl. 250; **Doe v. Dainton,** 3 East. 149. The last promissory note fell due in August, 1928, and from that time onwards the defendant was entitled to set up the promissory notes against the plaintiff in any action which the plaintiff might bring against him. It was true that the charge of the debentureholder crystallised upon the appointment of the receiver on 29th January, 1929, but the receiver was not the company or the liquidator, and he could not fairly insist on behalf of an individual creditor that a judgment debtor to the company must pay the whole amount to him, irrespective of the judgment debtor's cross-judgment against the company. As to Dobson & Co., it was true that all the assignments were made on the same day, but even so, notice of defendant's assignment was given to plaintiff's solicitors before notice of Dobson's assignment was given to defendant's solicitors. His Honour did not say that all or any of those matters were conclusive, but they supported the view that, as the general body of creditors was not affected, the defendant should not in the present case be required to suffer in order that specific creditors might reap a benefit.

Order made allowing set-off.

Solicitors for plaintiff: **Humphries and Humphries,** Napier.
Solicitors for defendant: **Gifford Moore, Ongley and Tremaine,** Palmerston North.

Kennedy, J. June 7; 10, 1929.
Auckland.

IN RE WHANGAREI DAILY NEWS LTD.

Company—Winding-up—Petition by Certain Creditors and Contributories to Have Company Wound-up by Court—Resolution for Voluntary Winding-up Passed After Presentation of Petition—No Evidence that General Body of Creditors or Contributories Desired Winding-up by Court—No Evidence That Petitioning Creditors Would Be Prejudiced by Voluntary Winding-up—Winding-up Order Refused—Companies Act, 1908, Sections 185, 228, 229 and 233.

Petition for order for winding-up by the Court. The petition was signed by two persons who claimed to be holders of bearer debentures, one person who claimed to be a creditor, two contributories, and two persons stated to be holders of fully paid-up shares. The grounds of the petition were: (a) that the company had suspended business for the space of a whole year; (b) that the company was unable to pay its debts, and (c) that it was just and equitable that the company be wound-up by the Court. The petition was presented on 13th April, 1929. It was stated at the hearing that the company had passed the necessary resolution for a voluntary winding-up on 20th May, 1929, and was in voluntary liquidation, but that the liquidator appointed had since declined to act. No material was supplied to enable the Court to ascertain whether either the general body of creditors or the general body of contributories desired a winding-up by the Court. No proper evidence was tendered of any transaction requiring an investigation which could not be equally well made in a voluntary winding-up, and no circumstance was disclosed calling for the exercise of the powers which the Court has in a compulsory winding-up. Counsel for Donohue, the receiver for the holder of the first and second debentures, appeared to oppose.

Woods in support.
Turner to oppose.

KENNEDY, J., said that a liquidator in the voluntary winding-up might be appointed pursuant to the power conferred by Sections 228 and 229 of the Companies Act, 1908. Section 233 of the Act provided: "The voluntary winding-up of a company shall not be a bar to the right of any creditor or contributory of such company to have the same wound-up by the Court, if the Court is of opinion that the rights of such creditor or contributory will be prejudiced by a voluntary winding-up." That section was not confined to the case where there was a voluntary winding-up in progress at the time when the petition for the compulsory order was presented; it applied also when the resolution for a voluntary winding-up was passed after the presentation of the petition: **West Hartlepool Iron Works Co.,** L.R. 10 Ch. 618; **In re New York Exchange,** 39 Ch. 415. Section 185 of the Companies Act, 1908, provided that the Court might, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence. That Section must be read with Section 233.

(*Continued at foot of p. 170*)

Police Powers and Procedure.

Summary of the Royal Commission's Report.

(*Concluded from p. 152.*)

Offences Against Good Order, etc.

A most important part of the Report of Lord Lee's Commission is concerned with the duties and difficulties of the police in dealing with certain offences by reason of the fact that public opinion is divided as to their seriousness, or as to the method in which they should be dealt with.

> "The task of the Police in dealing with those offences is . . . one of great difficulty. If they attempt rigorous enforcement of the law, public sympathy is apt to be shown to detected offenders, and criticism, which should properly be aimed at the law itself, is directed against the Police. If, on the other hand, they adopt a more lenient attitude, another section of the public inveighs against their inactivity or even hints at collusion or corrupt dealing between the offenders and the Police. Whichever policy is adopted it is the rarest occurrence for any member of the public, whatever his attitude may be in principle towards these offences, to be willing to assist in the enforcement of the law. The Police are thus deprived of the assistance, by way of information and evidence, to which they are entitled and which in other matters they commonly obtain."

With regard to offences against "public decency," the Commission refer to and endorse the recommendations of the Street Offences Committee which recently reported. Prevention by the use of uniformed police rather than detection by plain clothes men is stated to be the better view, and with regard to what are called "park offences" it is recommended:

> "that there should be an absolute prohibition of the use of plain clothes Police for the final step of arresting or taking the names of persons to be charged with indecent conduct, and that this rule if adopted should be given full publicity, so that members of the public should be less liable to be imposed upon by blackmailers posing as Police."

As to street betting and lotteries, the state of the law is rightly blamed, and so far as the Commission make any recommendations they are for a revision of the law. They make, however, a weighty pronouncement as to the harm which is done by laws which cannot be literally enforced:

> "In our view a grave responsibility rests on those who create criminal offences which are not precisely or clearly defined, or in respect of which the requisite evidence to support a conviction cannot be obtained by straightforward and unequivocal methods. It is also unfortunate that by reason of defects in the law the Police should be put in a position in which they must exercise a discretion as to whether the law is to be enforced or not, or as to the degree of strictness to be adopted in its enforcement. Any contempt for, or laxity in relation to, the law tends to spread, and the respect for and observance of the law is correspondingly weakened."

And with regard to the increasing employment of the police on duties outside the prevention and detection of crime, properly so called—*e.g.* the enforcement of the Shop Hours Acts, the Food and Drugs Acts, of warrants of distress for rates, etc., and, of course, their duties in connection with traffic—the Commission "look with some doubt upon those extraneous duties which impede that main aim [of suppressing crime] by dissipating the police strength and by antagonising considerable sections of the community which are normally well disposed towards them."

The Public Prosecutor.

The constitution and functions of the Department of the Director of Public Prosecutions are examined and found on the whole to be satisfactory. The suggestion made at the time of the Savidge case, that the statements of witnesses in cases with which the Public Prosecutor will deal, should be taken by a member of his Department and not by the police, is not approved except for special cases.

> "The Office of the Director of Public Prosecutions should continue to be, primarily, a prosecuting, as contrasted with an investigating, department, but there is room for some extension of the present practice whereby, in exceptional cases, statements are taken by a member of the Director's staff."

Women Police.

The employment of women police is held to have justified itself and a substantial increase in their numbers is recommended, particularly in cities for patrol work in uniform. It is suggested that a sufficient number of qualified and specially trained women should be made available to take statements from all young girls and children in sexual cases. The practice by which such statements are taken by a male officer in the presence of a "chaperon" is whole-heartedly condemned:

> "From the point of view of the person making the statement a mixed audience would seem to be the worst possible arrangement and the most embarrassing which could be devised for the narration of the details of some sexual offence."

Allegations Against the Police.

A considerable number of suggestions adversely affecting the reputation of the Police Force were referred to, and considered by the Commission. The general conclusion to which they come is that:

> "there is very little evidence of misconduct on the part of the Police in the investigation of crimes and offences, and this conclusion is corroborated by the testimony of all responsible witnesses whom we have questioned on the subject."

This is not, of course, to say that there is no misconduct among the police, nor any room for improvement. Recent instances are fresh in the public memory; but the energy with which offenders have been proceeded against has satisfied the public that there is nothing wrong with the *morale* of the police as a force. Once again the Commission reiterate their point that unsatisfactory results are bound to ensue when the police are required to enforce laws which have not the sanction of public approbation.

> "Police corruption, where it exists, seems to be mainly associated with the enforcement of laws which are out of harmony with public opinion, or in enforcing which the Police are compelled by lack of adequate powers to have recourse to unsatisfactory methods of detection. . . . The blame for such corruption as occasionally occurs cannot be concentrated entirely upon the Police. The public must also bear its share and recognise that in this matter it has its own obligations to the Police, first and foremost in ceasing to regard the successful offering of a bribe to a policeman as something of an achievement, and secondly in not exaggerating the extent of an evil which we are convinced is confined to comparatively few members of the Force."

The Police and the Public.

In a final chapter stress is laid upon the varied nature of the ordinary policeman's duties, and it is pointed out again that he is constantly compelled, without the possibility of delay for consideration or for consultation with others, to make decisions and to take action of the greatest importance.

> "Those members of the public who, for reasons good or bad, feel moved to keep a sharp and suspicious eye upon all doings of the Police, and to voice their dissatisfaction whenever the smallest mistake or error of judgment is committed by any individual member of a Force of 56,000 men, might perhaps give more weight than they do to the trials and perplexities which beset the ordinary constable."

Lotteries.

Two Recent English Decisions of Interest.

It is generally a matter of some difficulty to determine whether or not a given scheme constitutes a lottery, and there can be little room for doubt that it is difficult to reconcile all the authorities. In the King's Bench Division there have been recently decided two cases of more than the usual interest.

The first is *Hobbs v. Ward*, a note of which appears in 93 J.P. 220. The appellant was the advertising manager of Spratt's Patent Ltd., manufacturers of dog foods. He had organised a scheme whereby customers who purchased the company's products were given forms containing entry forms and rules of a competition. Circulars were also sent to retailers inviting them to make the competition known and push the sale of the company's goods. The entry form contained a list of thirteen different dog foods manufactured by Spratt's Patent Ltd., and competitors were required to place these in the order of popularity as disclosed by the voting itself, on the basis of their "use and fitness to the dog-loving community." No entrance fee was required but applicants for entry forms had to produce an identifiable piece of a bag or packet of one of Spratt's foods. Prizes were offered to those whose lists were nearest to the result shown by the voting. The competition was conducted in good faith. The magistrate convicted the appellant for breach of the provisions of Section 41 of the Lotteries Act, 1823. On appeal to the King's Bench Division, Lord Hewart, C.J., Avory and Swift, JJ., upheld the conviction. The competitors were not called upon to exercise skill and judgment in deciding what were the respective merits of the thirteen products, but to guess what other people's guesses would be, not upon such a question as, "Which is the best,?" nor even "Which two are the best ?" The question was: "How do you conjecture that other people will conjecture as to the whole order of popularity of thirteen different commodities." The magistrate was entitled to say that that was pure chance.

In the second case: *Howgate v. Ralph*, 93 J.P. 253, the scheme was also held to be a lottery. The respondent employed house to house canvassers to obtain regular orders for her tea. They were provided with handbills for distribution which stated: "To advertise our famous tea we will distribute among our customers cash gifts of £3 and £6" (according to the amount of the weekly order). "Each customer's name is entered in rotation in a ledger and cash gifts are paid out accordingly." Canvassers were not allowed to promise payment at any definite date. The names and addresses of new customers were entered in the ledger in the exact order in which they had been obtained by the canvasser, and against each name was entered the amount of tea which the customer had agreed to take each week. When more than one canvasser's report was made, the particulars of new customers were entered in the order in which the canvassers returned to the office, the list of one being completely entered before that of the next was begun. The recipient of the bonus which the respondent gave each week was the then continuing customer whose name was in the list next after that of the last person to receive a bonus. Customers who ceased to buy tea weekly were struck out of the list, and the probable dates at which the persons who had become customers after him would receive bonuses were correspondingly advanced. According to one of the circulars £1,920 was paid in gifts during the twenty-four weeks ending 16th June, 1928. The magistrate held that the scheme did not constitute a lottery, but this decision was reversed on appeal to the Divisional Court. Lord Hewart, C.J., Avory, and Swift, JJ., held that there was the greatest possible degree of fortuitousness in the question when any particular customer would receive the advertised gift. It might be after one payment, or he might have to attain the age of Methuselah. It was immaterial that the amount of the gift was defined since no human being could say what the present worth of £3 was when it might become payable a month hence or 500 years hence, or anywhere between even wider limits. The more successful the scheme in obtaining customers the longer must the individual customer wait for his turn. The scheme was, therefore, held to constitute a lottery.

Legal Conference Resolutions.

In the course of a general discussion towards the end of the proceedings of the recent Legal Conference held at Wellington, reported in our special issue of 30th April at page 105, reference was made to the resolutions passed at the previous Conference held at Christchurch. The Chairman (the President of the New Zealand Law Society) said that a number of those resolutions had been transmitted by the Conference to the Attorney-General, who afterwards referred them to the Council of the New Zealand Law Society for an expression of its opinion, and he stated how the Council had dealt with the resolutions, including the passing by the Council of a resolution regarding the setting up of a Rules Committee. "That resolution," the Chairman said, "was passed on to the then Attorney-General, but nothing was done."

It has been pointed out to the Chairman that his statement that nothing was done is capable of an implication that the representations of the Conference and of the Council of the New Zealand Law Society had been ignored or overlooked by the Attorney-General, Mr. F. J. Rolleston. He has asked us to explain that no such implication was intended or even thought of. He merely desired to mention the bare fact that the resolutions had not been carried into effect, and he acknowledges that there was no question of delay and that when the Attorney-General received the Council's communication it was too late, in consequence of the General Election, for him to deal with the matter.

The Chairman adds that the experience of the Council was that while Mr. Rolleston held the office of Attorney-General he, like other holders of the office, gave due consideration to the representations of the Council and dealt with them promptly.

The Attorney-General for Victoria proposes to introduce legislation to abolish the privilege of allowing prisoners to make unsworn statements from the dock. The "*Law Institute Journal*," the official organ of the Law Institute of Victoria, regards the reform as a desirable one.

Assignment of Choses in Action.

Effect of Assignment of Part of Debt.

The decision of His Honour Mr. Justice Ostler in *In re Gleeson* of which this Journal gave a note in Vol. IV p. 344, and a copy of the judgment in which now appears in (1929) G.L.R. 100 (though without any statement of the facts), calls for some comment. It was there decided that S. 46 of the Property Law Act, 1908, does not authorise the legal assignment of part of a debt. The learned Judge refers to the fact that counsel in their written arguments appeared to have overlooked *Mitchell v. N.Z. Loan and Mercantile Agency Company Ltd.*, 26 N.Z.L.R. 433, an omission which would appear quite excusable inasmuch as the decision of the Court of Appeal does not seem really to touch the point involved in *Gleeson's* case. What is more to the point is that apparently everybody overlooked the opinion of Cooper, J., in *In re McDonald*, (1918) N.Z.L.R. 626, where, discussing the question of the assignment of part of a debt, at page 630 he uses the following language :—

> "For it is, I think, clear that there may be an equitable assignment to a third person of part of a fund or sum of money held by a person in trust for or being a debt due by such person to another person."

It perhaps also calls for comment that *Bank of Liverpool and Martins' Ltd. v. Holland*, 32 Com. Cas. 56, was not referred to. In that case Wright, J., at page 60 says :—

> "The defendant contends . . . . that an assignment of part only of a debt, though it may be good as an equitable assignment, is not a valid assignment under the statute even though it may purport to be absolute. On this point there has been a conflict of authority but I hold, following the decision *In re Steel Wing Co. Ltd.*, (1921) 1 Ch. 349, in preference to authority in the contrary sense, that assignment of part only of a debt is not a legal assignment within the meaning of the section, although it may be good as an equitable assignment. The section speaks of the assignment of 'any debt' and in my view those words do not mean 'any part of any debt.' If part only of a debt could be assigned in this way a serious burden would be put upon the debtor, for he would be liable to separate actions and separate executions at the hands of the various assignees."

It will be observed that the judgments in the cases in favour of the view Ostler, J., takes, of which the opinion of Bray, J., in *Forster v. Baker*, (1910) 2 K.B. 636, is an example, proceed on the construction of the Judicature Act, Section 25 (6), from which the words "or equitable" which occur in the Property Law Act, 1908, Section 46, are absent.

It cannot be said that in *New Zealand Loan and Mercantile Agency Co. v. Mitchell* (*cit. sup.*) the Court of Appeal approved of the *obiter dicta* of Stout, C.J., whose judgment it overruled. The only conclusion from the judgment of the Court of Appeal which is material for present purposes is that from the passing of the Judicature Act there had been a tendency to allow an assignee, whether under a legal or an equitable assignment, to sue in his own name. When, as is the case in New Zealand, the statute gives express effect to an assignment of a chose in action legal or equitable it seems absurd to say that on the ground of inconvenience to the debtor full effect is not to be given to the statute. "Equitable choses in action or choses in equity have always been assignable in equity." To give effect to the statute it must be held that an assignee of an equitable chose in action can sue in his own name. *New Zealand Loan and Mercantile Agency Co. Ltd. v. Mitchell* did not really deal with this question at all but only with the question of the assignment of a mere right to sue to which the Court held the statute did not extend.

Ostler, J., in *In re Gleeson*, decided that, as between the assignments there in litigation, priority in date of the assignment gave priority in right to payment notwithstanding that notice of the assignments was simultaneous. It is difficult to see how this can be so as notice was necessary to complete each assignment and these notices were simultaneous.

—"Senior Counsel."

Change of Christian Name.

What is the law about changing one's Christian name? No one seems to know. It is held by some that if a person has not already been confirmed, he can, with the consent of the clergyman, change his Christian name at Confirmation. At once comes the question, what about those who are not members of the Church of England and who are not confirmed? Quite so. What's the answer? Does anyone really know? The official view, at any rate in the Province of Canterbury, is that change at confirmation is not now possible. Apparently, the only sure and certain way to change your Christian name is by private Act of Parliament. This was done in 1907—one Raymond Hill Barnes changed his name to Henry Rudd Barnes. In Co. Litt. 3a, it is stated that a man may have divers names at divers times, but not divers Christian names, whatever that may mean. Sir Robert Phillimore was of opinion that a Christian name can be changed at Confirmation. Sir Francis Gawdy, Chief Justice of the Common Pleas, at Confirmation, took the name of Francis instead of Thomas. With regard to surnames, the use of which first arose about the time of the Norman Conquest, no difficulty has ever arisen.—"Law Notes."

(*Continued from p. 167*)

If then it were the wish of the general body of creditors that the company be wound up by the Court, the Court, although no prejudice was shown to the petitioning creditors, might order the company so to be wound-up. But if there was no such evidence that the general body of creditors desired a winding-up by the Court, the individual creditors petitioning would fail unless they established that their rights would be prejudiced by a voluntary winding-up. It appeared from the resolution passed that the majority of the shareholders were in favour of a voluntary winding-up. There was no evidence before the Court that the general body of creditors or that the general body of contributories desired a compulsory order, and, as the petitioning creditors and contributories had not proved that their rights would be prejudiced by a voluntary winding-up, the petition would be dismissed.

Solicitor for petitioners : **A. M. Woods**, Whangarei.
Solicitor for respondents : **A. K. Turner**, Auckland.

Lord Halsbury.

His Life and Times.

Permission has been granted to the "New Zealand Law Journal" to publish a series of extracts from the Biography of the first Earl of Halsbury, which is shortly to be published.

(*Continued from page 155*)

Last Days on Circuit. (Ctd.)

The last time Mr. Giffard went on Circuit, as he did not go after he became Solicitor-General, he left Paddington with over three hundred retainers, which shows what a change has come over the Circuit system. There was rather an amusing little scene at his departure. As, with his arms full of papers, and maybe a novel or two, he was about to step into the train with his friends, the station-master arrived, rather flustered, waving a telegram. He had just received it from a solicitor, and it said "Detain Mr. Giffard at all costs." Giffard's face as he perused it must have been amusing, with its rather pre-occupied lines breaking into smiles, and his blue eyes twinkling with mirth, as he sees the mistake, and his genial laugh as he jumps into the carriage, leaving the official reassured, to the good-humoured chaff of his companions, as they explain the situation.

The only case where a client of Giffard's was found guilty and sentenced to death was a curious one. The man was a ne'er-do-well son of a respectable family, who had been in some of the wilder mining districts, and returned a reckless drunkard. He got very drunk one day in a public-house, and shot a man dead, also the policeman who arrested him. The only chance, of course, was a verdict of manslaughter. The jury found murder. It came out that the jury were six to six, and tossed up. The Home Secretary at once interfered. When Giffard was told of it, he said he have never heard the suggestion made. It was said that the jury were bribed not to deny the story that they had tossed up. It was a strange situation, but the prisoner shared the good fortune of Giffard's other clients, and was not hanged.

At the Windsor Election petition before Baron Bramwell, the sitting member was Colonel Richardson-Gardiner. It was a sensational case, for Gardiner's agent had ratted, and was prepared to give evidence of bribery and corruption. All the county attended to hear Giffard cross-examine him. In his evidence in chief, the agent only spoke of a children's tea-party, where buns had been given away free. Giffard instantly saw what had happened. The agent did not wish to lose his character. If he could say to Gardiner "Well, I could not help myself. Your own Counsel dragged it out of me," he could have kept a semblance of honour. Giffard saw that Bramwell could not unseat Richardson-Gardiner on the evidence as it stood, and asked no question. The eagerly expected cross-examination did not take place, and Richardson-Gardiner kept his seat.

A Fateful Meeting.

It was on this occasion that Giffard first saw Miss Woodfall. With characteristic decision and promptitude, he said to a friend, "That young lady must be my wife." As she and her friend left the Court he followed them, and with his usual good luck found them to be in some little difficulty about sufficient change to pay their return tickets. He was able to assist them, and as they had seen him in Court, an introduction was effected. As they walked down the street a ladder stretched across the pavement, and Miss Woodfall prepared to pass outside it. "Why do you do that?" enquired Giffard. "It's so unlucky to go under a ladder," she said. "Nonsense," said he, "it only means that you will be married this year." This new reading of an old superstition was duly fulfilled, and Miss Woodfall became Mrs. Hardinge Giffard before the twelve months had expired.

Attitude to Law Reform.

Giffard was always bitterly against the alteration in pleading made by the Judicature Act of 1873. He was never desirous of reverting to the old and meticulous style of pleading which would defeat justice on some highly technical point, but he believed that the loose rules introduced by the Act destroyed the logic and accuracy which he considered so valuable for the administration of justice and saving of costs.

In the administration of justice he had strong views, and always said that a judge had two functions to perform, both equally important, one was to do justice, and the other to convince the parties and the public that justice was being done.

Lord Halsbury was opposed to many of the reforms of legal procedure that have been introduced in recent years. But as the author of the Criminal Evidence Act and the Land Transfer Act, he was himself entitled to be numbered among the really practical reformers.

Relaxations.

About this time Giffard frequently paid visits to his friend, the Rt. Hon. Henry Cecil Raikes, M.P., who was then Chairman of Committees and Deputy Speaker of the House of Commons, and afterwards Postmaster-General, at his house in Hertfordshire. Mr. Raikes had a large family, and the news that Mr. Giffard, or afterwards Sir Hardinge, was expected, always caused great jubilation. He never arrived without bringing gifts for them, and took part in all their games and amusements. The writer well remembers seeing him sitting on the floor in her father's library, with the children crowding round him, playing with a beautiful box of lead soldiers he had brought for them, and as eager and intent upon them as the youngest there. On Sunday afternoons it was the curious custom of the family to run races on the lawn, correctly placed and handicapped by their father, and on one occasion Hardinge insisted on being entered, and coerced two other friends, one of the Hamiltons and Mr. Stanley Leighton, M.P., into competing, with the condition that each runner carried a little girl, as handicap. Mr. "Tom" Collins, M.P., who was also of the party, mounted into the branches of a tall tulip tree, and incited the competitors to fresh efforts by sonorous quotations from the classics, which Mr. Giffard probably understood the best of the company. Mr. Giffard won, of course, and received the garland of parsley or bay leaves—it is forgotten which—with appropriate gravity and dignity. Another memory is of a beautiful doll with chestnut hair and "real" eyelashes, which was dressed as a bride, and always called Lady Giffard.

Dates and details are somewhat blurred by time, but it must have been about the date of his second

marriage when, as he settled into his own happy home, these pleasant visits became less frequent.

SOLICITOR-GENERAL.

Then one day he received a letter from the Prime Minister.

2, Whitehall Gardens, S.W.
November, 1875.

Sir,—The office of Solicitor-General being vacant, I shall have pleasure, if consistent with your wishes, in recommending the Queen to appoint you to that post in Her Majesty's service. The tenure of the office necessarily involves obtaining a seat in the House of Commons, but I trust an opportunity may be found to accomplish this.

I have the honour to be, faithfully yours,
B. DISRAELI.

To Hardinge Giffard, Esq., Q.C.

Followed by another on November 22, 1875, from "Monty Corry," Disraeli's confidential secretary:—

Dear Mr. Giffard,

Mr. Disraeli wishes me to inform you that the Queen has been pleased to approve of your appointment as Solicitor-General.

I am, yours very faithfully,
MONTAGU CORRY.

This appointment was made when Sir John Holker succeeded Sir John Burgess Karslake as Attorney-General, and Hardinge Giffard received his knighthood shortly afterwards. He had one more electioneering disappointment after this, for he was asked to stand for Horsham, through some misunderstanding on the part of the Central Conservative Office. He was told that the sitting member was about to retire, and went down there, issued his address, and began his canvass, before discovering that there had been a blunder. Directly he knew it, he at once withdrew his candidature, and addressed a message to the voters, calling upon them to support their old representative, as the last thing he would wish to do would be to cause a split in the Conservative party. But one vote was cast for him, and he used to relate, with a twinkle, that he had had a wonderful number of letters from people claiming to have cast that one vote in his favour and thereby establishing a claim upon his gratitude.

It is interesting to find that in a letter to Lady Bradford, dated November 17 (a few days before the official confirmation) Disraeli had written somewhat cautiously of his new choice. "Hardinge Giffard is Solicitor-General. . . . I don't know whether he will turn out as strong a man as his friends suppose, but, at any rate, I shall have a lawyer of high reputation, who will be able to state his opinion with effect." Those, however, who were well qualified to judge—the members of Giffard's own generous but ever critical profession—were aware that "Dizzy" had chosen perhaps better than he knew. From among the many letters that now filled Giffard's letter box, the following may be quoted—

From A. E. Cockburn (afterwards Lord Cockburn, L.C.J.):

Dear Mr. Solicitor,

Allow me to congratulate you cordially on your well-deserved promotion. I should have greatly blamed the Government if their choice had fallen on anyone else.

Yours very sincerely,
A. E. COCKBURN."

From Thomas Lloyd:

"Llandyssil, S. Wales.

I feel that I am not only expressing my own feelings, but those of my brother magistrates, in this and the adjoining counties also, when I say how we heartily rejoice at your well-deserved promotion. *Palmam qui meruit ferat*, and I am sure we all join in wishing you a long and uninterrupted career of happiness. It needs no prophet to augur great success for you in the House of Commons, and I trust you will get a seat at once. I say it as a Whig, that Mr. Disraeli for this appointment and his general policy deserves the gratitude and confidence of the nation.

THOMAS LLOYD."

From Alfred Wills:

"I am, as you know, on the other side of ——, but I shall none the less sincerely rejoice to find you seated in the House of Commons, and I should not like to be the last to congratulate you. That you may keep your seat as long as ever you wish to do so, and may only give it up for something—whatever it may be—that you like better, is my very hearty wish. That you will be liked and respected in the House by friends and antagonists alike, no one who has enjoyed as thoroughly as I have many years of intercourse with you at the Bar, can doubt.

Believe me, my dear Giffard,
Very faithfully yours,
ALFRED WILLS."

From John Eaton:

"My dear Giffard,

I daresay you are overwhelmed with congratulations by this time, and begin to weary of them. But, as an old Merton man, I cannot refrain from sending my contribution of good wishes, and also my thanks for adding lustre to the old College. Your career has been one of marked and steady ability and it is now receiving its reward. Wishing you the highest honours of your profession now within reach.

I am, sincerely yours,
JOHN EATON."

We have already seen that Sir Edward Clarke had prophesied truly on Giffard's merit and prospects. Naturally, he is now delighted, for—

"I have been anxiously waiting for the announcement of the new Solicitor's name, hoping and expecting that that name would be yours, and now I beg you to accept my heartiest congratulations. I trust this will be the beginning of a long career of public honour and usefulness; and that you may fully enjoy the pleasures that wait upon high ambition worthily achieved.

You have a right to be proud of the universal recognition of the wisdom of the choice which places you in power. And it is not only to you that congratulation is due. It has been a relief to the whole Party to know that when Parliament meets we shall have you in the front of the battle, and have in one, at any rate, of the Law Officers of the Crown, not only the highest legal capacity, but a strong and manly political sentiment.

Your very faithful friend,
EDWARD CLARKE."

"A long career of public honour and usefulness." Once again, Sir Edward was a true prophet, and happily he lived to see the prophecy fulfilled.

(*To be continued*).

Counsel, arguing a commercial cause recently before the Supreme Court of New South Wales, the dispute being as to the meaning and application of that oft-litigated term "peril of the sea," submitted that "a peril of the sea could be compared with a charming woman"; but the Court did not encourage him to develop further the analogy. One of his colleagues is understood to have informed him afterwards that his comparison failed at the outset, for a man on land need fear no disaster from a peril of the sea.

London Letter.

Temple, London,
27th March, 1929.

My dear N.Z.,

The death of Lord Finlay involves the disappearance of a fine old veteran from our ranks, if Bench and Bar be one at heart and if an ex-Lord Chancellor, even in his last days seen upon the Boards of the Judicial Committee, be properly described as of the Bench. If there be technical error, let it be overlooked; the grand old man was one of whom we were all ever so proud, that no technical point should deprive us of the honour of his memory as of one of us. I described him at some length, in a letter of long ago; and in a cartoon of long ago, also, Kapp (in the "Law Journal" of London) gave a beautifully true and attractive picture of him; beetling eyebrows, manifest integrity, great intellectual strength and absolute kindness were all portrayed and were all in the man in quintessence, so far as they were qualities, and were characteristic of him, so far as they appeared. I remember, when I was pupil to Rowlatt and afterwards when I was "devil" to Sir Erle Richards, the first of whom was "old Fin's" pupil, the second of whom, till his death, "old Fin's" stable companion and increasingly frequent opponent in the Privy Council: I remember, then, being set to make notes for old Finlay, K.C., and the terror I felt, of his powerful brain and searching eye, as I presented my note to him upon his return from Court, and the pleasant modification of my fears and too intense respect as he, according to his inveterate custom upon coming from the forum to Chambers, set about to change most of his clothes, even the most intimate. . . . Shall I be too frank if I tell how, as Rowlatt once sat behind him, in Court, and I sat beside Rowlatt, Rowlatt said to me: "Have I taught you nothing for your pupil's fee? Then I'll now teach you hundreds of guineas' worth. Would you ultimately be like old Fin? Then be regular in your habits, and especially after breakfast. That is all." Of the old man's achievements you will have read in the newspapers, though, if you would really appreciate the length of them, you should see how far back you can trace his name in the Law Reports and whether the Law Reports or he started first. . . . But if you would know the man, you may conceive the picture as above and know that "old Fin" heard the dictum, in full, himself, said nothing, did nothing and only smiled very gently upon me, as if to say "And who may this young man be, whose future is thus being trifled with . . . ?" The only thing we can have up against him is that he delivered such an astonishingly unsatisfying judgment of the Judicial Committee in that never-to-be-sufficiently-discussed *Crown Milling Case* of yours: unsatisfying in that, however right it may have been, it helped not at all. But for this Lord Haldane was also to blame; the combination of his subtlety with Finlay's simplicity produced a singularly unimpressive result on this occasion. In the *Coal Vend Case*, so far as I remember, Lord Haldane gave a much more satisfactory pronouncement, and Sir Robert Finlay, Q.C., assisted from the Bar only. His son and successor, Sir William Finlay, is not much mentioned in the obituary notices. He was not very famous, at the Bar, and owes his promotion, it is said, as much to his father's ability as to his own. Be it so: he is proving to be the best Judge of them all; at least he has far outstripped my earlier selection, Mackinnon, J., who started off with everything and everyone in his favour and with much more of a splash, but who is now ahead of Finlay, J., in the regard of few, if any, of the Bar.

I have just seen Donald Somervell, K.C., in Court, he having been K.C. for little more than a week or two. I asked him what it feels like, and he confirmed the answer of Disturnal, of old times, who said, "The difference is just the same as that between travelling first-class and third-class by train. You start from the same point; you arrive at the same destination; but there is all the difference in the comfort of the going . . ." I believe I told you this before; I tell you it again, to point Somervell's further observation. He says that the difference is noticeable immediately: that is, a week or two ago the same Judge, who now treats him automatically with a certain and appreciable favour, would treat him with that curtness used to the Junior, and it does not require the maturity of time to effect the change; it happens at once and arbitrarily, upon the change of gown. Very well then; let us all take silk. . . .

We have had the judicial entertainment of His Lordship in the witness box. Luxmoore, J., was called to speak to the settling of a matter in those not very remote days when he was of counsel; had he still been of counsel, his evidence could, of course, have been given by way of a statement from the Bar; but things being as they are, he could not mount upon the Bench and give his evidence from there. So he must needs go into the witness-box and be cross-examined; and the learned counsel who had the cross-examining of the learned Judge made nothing whatever of his opportunity, played none of the usual tricks upon him, did not even remind him that he was on his oath and should be careful. . . . It fell to the lot of Avory, J., to do the little which was done in this regard; and if you know the vivacity of Luxmoore, J., and the very slow deliberation of Avory, J., you may conceive how necessary that little was. The witness was asked to be good enough to speak a little more slowly, as his Lordship had to take a note of the evidence being given. Well, if it is necessary to prosecute his other Lordship for perjury, I shall be very happy to hold the brief for the defence; because as there was never a jollier, so there was never a more honest, fellow at the Bar, and the Bench cannot yet have had time to corrupt his morals.

I think I informed you some months ago of the terrible complexities with which we were faced upon the drafting of the Companies Bill and as a result of the claim, from the solicitors, to have their privilege respected, with regard to the new provisions as to disclosure of matters upon the part of or concerning the directorate? The devil it was to find out, when we came to think of it, exactly what this privilege was, exactly how far it extended and (most difficult of all) exactly who might claim to exercise it or benefit by it. You will find, in the most interesting case of the current period, a decision of the Court of Appeal upon this same question—*Minter v. Priest*, dealt with by the Master of the Rolls, Lawrence and Greer, L.JJ. It arose upon a slander action tried before Horridge, J., a Judge, by the way, regarded with most terror by the young and with least affection by the gentle, but as good a Judge as there is or has been for some time in *nisi prius*, partly because he has a rare intelligence in affairs and

an essentially strong "horse sense," and still more, some say, because he has the most marvellous clerk that ever was, a man as knowledgeable as he is urbane, as shrewd a lawyer as he is polite administrator. To return, however, to the lesser lights: solicitors, and their privileges. In this case you will see reviewed this particular aspect of the question: what are the privileged communications, as regards their origin? Must they be from a client, from a potential client, from an intending client? What of the communications made by a man who never in fact becomes the solicitor's client? You will find that, according to this Court of Appeal, the privilege is a wide one, capable of covering communications from almost any source provided they be made in the course of professional business.

The report of the Commission, which enquired with great expedition and diligence into the affairs of the Police, seems to be highly satisfactory, in that it acquits the force of any substantial failings but yet makes some very pertinent suggestions for the elucidation of the rules regulating their procedure as to taking admissions and administering cautions. I know little or nothing, professionally, of the work of the London police and less (I am happy to be able to tell you) as a layman. But in the Midlands of England, where my own jurisdiction is and where I have for long had the experience of practice, I will stand for it that the county constabulary are a body beyond reproach, excellent men of an honest and sympathetic outlook and regarded as such by the classes over whom they reign. It is said of some such constabularies that they are almost excessive in their paternalism and prone "to cut up rough" if the same is regarded as officious and resented and resisted. This is not so with my particular lot; and I should say that, on the whole, the experience of the counties is favourable, very favourable, to the Police; the experience of boroughs varies; and criticism is most rife and most justified in the large cities. I observe that, on Circuit, the majority of H.M. Judges have seized the opportunity to comment favourably on the Police, when the occasion arose and while their conduct has been subject of controversy recently. The truth is, however, that criticism is good for all of us; the greater our authority the more beneficial the criticism. The Police flourish on periodical commissions, enquiring into them.

The almost infinite argument of that bull-dog breed of King's Counsel, Sir Henry Maddocks, K.C., failed of its effect in Mrs. Meyrick's appeal; and you will have observed that leave was granted by the Judicial Committee of the Privy Council to appeal to itself from the murder conviction on the Gold Coast. That should be an inquiry of interest. With that my news and, for me, the term's work ends.

Yours ever,

INNER TEMPLAR.

Rules and Regulations.

Rabbit Nuisance Act, 1928. Regulations relating to elections of members of Rabbit Boards by a system of postal voting.—Gazette No. 43, 6th June, 1929.

Correspondence.

The Editor,
"N.Z. Law Journal."

Sir,

Collection of Moneys Paid into Magistrates' Courts.

Time was when it was possible for a Solicitor who had issued proceedings in a foreign Court to collect the fruits of the proceedings by having them sent to him, *via* the home Magistrates' Court, by the Clerk of that foreign Court. But official zeal has put an end to so convenient a practice.

Rule 56 under the Magistrates' Court Act provides shortly, that no Solicitor shall be entitled to uplift monies from a Court without first lodging an order in the prescribed form. The inference is that if he produce such an order, he will be entitled to the money,

A recent Departmental circular contains (*inter alia*). I am informed, the words:—

> "It frequently happens that plaints are issued by Solicitors residing at a distance—moneys paid into Court in such cases can only be paid to the Plaintiff or person holding an order *in person*—on no account can they be transmitted to another Court for payment to the Plaintiff."

I do not know the intention of the order, but the result is plain: a local agent must be employed to collect and transmit the amounts so paid into Court. To the credit of many Clerks of Court, the rule as published is disregarded, and the money is remitted to the Solicitor on his producing an order entitling him to uplift the monies, and what more simple. The matter is a small one, but in the Magistrates' Court, where the desideratum is speed and cheapness, no rule calculated to increase the cost of litigation without commensurate gain should be tolerated.—I am, etc.,

JOHN DOE.

The Editor,
"N.Z. Law Journal."

Sir,

Rulings of New Zealand Law Society.

Nearly a year ago, in your number of July 10th, 1928, your correspondent "Conveyancer" drew attention to the fact that there had then been no compilation of the rulings of the New Zealand Law Society since 31st December, 1923, up to which date the practice had been to issue biennially indexed booklets containing the rulings given during the preceding two years.

Now it must be obvious that one of the best methods of securing the observance of these rulings is to ensure that each member of the Profession is supplied with them in a convenient and more or less permanent form, and I would accordingly make the suggestion either that there should be compiled by the Secretary of the New Zealand Law Society a comprehensive indexed consolidation of all the rulings to date, or else, if this is for any reason unknown to the rank and file of the Profession impracticable, that the practice of issuing biennial booklets be resumed.—I am, etc.,

"COUNTRY SOLICITOR."

Forensic Fables.

MR. JUSTICE HEAVYSIDE AND THE FAITHFUL CLERK.

Sir Ebenezer Heavyside was a Judge of the High Court of Justice. He had been Elevated to the Bench with the Full Approval of the Profession. Nor were his Many Admirers Disappointed by his Performances in the Judgment-Seat. Indeed, it was Clear to All that (if Merit were the Qualifying Test) Mr. Justice Heavyside would Shortly be Promoted to the Court of Appeal or the House of Lords. Heavyside, J., was Gratified that he Stood so High in Public Estimation;

but he had One Abiding Sorrow. He Suffered Severely from a Faithful but Incompetent Clerk. Man and Boy, the Faithful Clerk had been with Mr. Justice Heavyside for Forty Years. Day by Day his Imbecility Appeared to Increase; yet his Employer had Never Summoned Up Courage to Dismiss him. It was when Heavyside, J., Travelled on Circuit that the Doings of the Faithful Clerk became Particularly Infuriating. The Faithful Clerk could never Remember at what Hour the Train Started, and he was Liable to Confuse St. Pancras with Waterloo and Euston with Paddington. Also he Made it a Practice to Lose the Tickets and Leave the Depositions Behind. Here you Observe Heavyside, J., and the Faithful Clerk on the Platform. Once More the Faithful Clerk has Made a Mess of it. They have Just Missed the Train. Mr. Justice Heavyside will Arrive at Bodmin Two Hours Late for Dinner and he is Furious. Heavyside, J., is Wearing a Bowler, and the Faithful Clerk is the Gentleman in the Silk Hat.

MORAL; *Appearances are Deceptive.*

Legal Literature.

Butterworth's Index to the New Zealand Statutes, 1928.

By J. D. WILLIS, LL.M.

(pp. 108: Butterworth & Co. (Aus.) Ltd.).

It is quite right to say that, since 1920 at all events, the legislation of New Zealand has, year for year, with the sole exception of the year 1925, exceeded in length, in novelty, and in complexity, that of England. And in England whenever a new enactment of any importance is placed upon the Stature Book, new editions of the leading text-books the scope of which includes that statute are at once announced and soon a reality, with the result that the effect of the new law is almost immediately available in the most convenient of forms to the Profession. But in New Zealand, where a limited market necessarily restricts the number of legal text-books and of new editions, the unfortunate practitioner has in most cases nothing to assist him but the Act itself. Without an index worthy of the name, and with but meagre and frequently misleading marginal notes, his task is an unenviable one and he is faced always with the spectre of the overlooked and unexpected statutory provision. This new index, which it is believed will appear annually, should go far, both by saving valuable time and obviating the risk last-mentioned, to assist the practitioner in such cases. Mr. Willis has done his work well and his index would appear to be both accurate and exhaustive. Indeed this reviewer's only criticism is that in including references to the analysis and short title of the Act he has erred too much on the side of exhaustiveness—but this is a good fault.

The INDEX is attractively bound, well arranged, and well printed and, if it appears in subsequent years soon after the release of the annual volumes of Statutes, it should become before long a very popular "tool of trade."

Sim's Divorce and Matrimonial Causes Act and Rules.

Fourth Edition: By W. J. SIM, LL.B.

(pp. xxii; 123; xviii: Whitcombe & Tombs Ltd.)

The greatest tribute to the merit of *Sim's Divorce and Matrimonial Causes Act* is that it has gone through four editions in nineteen years, for few indeed of our New Zealand legal text-books are found in more than two editions. To edit a work written by the late Sir William Sim one would naturally expect to be a difficult task; few editors could hope to express their additions to the text so concisely and so clearly as the late Judge. This task, however, has most fittingly devolved upon his son, Mr. W. J. Sim, of Christchurch, for whose work this reviewer has nothing but admiration. The present edition is rendered necessary by the Divorce and Matrimonial Causes Act of last year which, while purporting to be a consolidating enactment, effected many changes in the law, particularly in the direction of adopting some of the improvements introduced in the English Consolidating Act of 1925. So far no Rules have been made under the Act of 1928, the Rules at present in force being those made on 15th December,

1909 (as amended from time to time) under the Act of 1908. These Rules are in many respects not now reconcilable with the provisions of the new Act, and alterations are required in the forms, but there can be not the slightest doubt that the editor has adopted the proper course, and indeed the only course open to a text-writer, in reprinting the Rules and forms as they stand. To the necessity for occasional modifications ample attention is called in the preface and, where necessary, throughout the book, as in the notes preceding Rule 49, the notes to Rules 75, 76, 77, 91 and 92, and the notes to forms 2, 3, and 18 (2). It is not within the province of a review to deal with the recent changes in the law but it is of interest to notice that at p. 68 Mr. Sim shows—and it is doubtful if the fact is generally recognised—that the effect of the omission in S. 11 of the 1928 Act, which corresponds to S. 28 of the Act of 1908, of the provision in the latter Section as to the right of trial by jury in proceedings based upon adultery, is that the only instance where a party is now entitled *as of right* to trial by jury is under S. 31 where damages are claimed.

Mr. Sim has done much more than annotate the new Statute. He has added in the present edition references to some eighty or ninety fresh cases, and the work is now in all respects thoroughly up-to-date. In 1927 (the figures for last year are not yet available) there were filed in New Zealand over 800 petitions in divorce—including petitions for dissolution, nullity, judicial separation and restitution of conjugal rights—and when these figures are borne in mind it is doubtful whether there is any member of the Profession who can afford to be without this lucid, accurate and authoritative guide to the provis ons of our divorce law.

New Books and Publications.

Stringer's Oaths and Affirmations in Great Britain and Ireland. Fourth Edition. By E. R. Cook and A. O. Thomas. (Stevens & Sons Ltd.) Price 6/-.

Municipal Local Government Law. Second Edition. By H. Emerson Smith, LL.B. (Pitman & Sons). Price 12/6.

Wheaton's International Law. Sixth Edition. Two Volumes. By A. B. Keith. (Stevens & Sons Ltd.) Price 70/-.

Executorship Law and Accounts. Ninth Edition. By D. F. de L. Hoste Ranking, M.A., LL.D., Ernest Evan Spicer, F.C.A., and Ernest C. Pegler, F.C.A. (Pitman & Sons). Price 18/-.

The Law of Master and Servant. By Francis Raleigh Bolt, LL.M. (Pitman & Sons). Price 12/6.

Lord Justice Bowen provides us with the classical example of the effect of ironic comment by a Judge to the jury. In a burglary trial he said in his summing up: "If you believe that the prisoner saw the door open, and, actuated by kindly motives, entered to see that all was well, that he hung his boots round his neck so that he might not disturb the sleeping inmates, that his presence on the roof was due to his desire for a little fresh air, you will acquit him." And the jury did

Canterbury College Law Students' Society.

Mr. M. J. Gresson, on the 13th April, delivered the opening address of the Society at a well-attended meeting. Mr. Gresson gave a very interesting lecture dealing with the Second Legal Conference held at Wellington during the recent Easter vacation. He touched on the various remits passed at the Conference and gave his own personal opinion regarding each. Some very bright personal experiences were related, making a very enjoyable evening. After the lecture the rest of the time was devoted to informal discussion on the remit: "That no Solicitor shall be entitled to practise on his own account until he has attained the age of 25 years."

A Special General Meeting of the Society was called on the 2nd May to consider the proposed regulations dealing with the legal profession. Such matters as the formation of a solicitors' guarantee fund, the proposed age limit for private practice of 25 years, and the inclusion of additional practical subjects in the course for the Degree of Batchelor of Laws were the main subjects of discussion.

A moot, presided over by Mr. W. J. Hunter, as "judge," was held at the Supreme Court on Saturday the 4th May. The following case was argued: "John Andrew is the occupier of a public house. Attached to the house is a heavy sign portraying the name of the inn, "The Lawyers' Arms." Charles Brown when in an intoxicated state enters the public house and is removed forcibly. The sign falls on Brown when outside on the highway and injures him. The sign fell in consequence of a defective hook of which Andrew did not know and which he could not with reasonable precaution have discovered. Brown appeals."

J. N. Laurenson for plaintiff: I submit that the falling of the sign created a nuisance from which the defendant is absolutely liable. See *Tarry v. Ashton*, 1 Q.B.D. 314, and *Mullan v. Forrester*, (1921) 2 I.R. 412. Alternatively submit that the sign was "a thing likely to do damage if it escaped" within the meaning of the rule in *Rylands v. Fletcher*, L.R. 3 H.L. 330, and that the defendant is, therefore, absolutely liable.

C. E. Purchase in support: Submit that the defendant was negligent. *Res ipsa loquitur*. No proof was given in the lower court that defendant had satisfied the duty of care laid upon him.

T. K. Papprill for defendant: Submit that there is no liability for nuisance as the defendant had no knowledge of the defect. *Barker v. Herbert*, (1911) 2 K.B. 633, and *Ilford Urban District Council v. Beale*, (1925) 1 K.B. 671. The sign was not inherently dangerous and is distinguishable from the class of thing in respect of which there is absolute liability under *Rylands v. Fletcher*, (*cit. sup.*).

C. E. Weston-Wacher in support. Submit that the question of negligence does not arise as the cause of the accident was not the negligence of the defendant. Further, erecting a sign board is a natural use of land bringing the case within the rule in *Rylands v. Fletcher* (*cit. sup.*).

Mr. Hunter, delivering "judgment," said: "I exclude from consideration the matters of the entry upon and ejection from the hotel as the accident occurred upon the highway. In *Tarry v Ashton* (*cit. sup.*) the defendant was aware that the gas fittings were getting out of repair. It was not a case of latent defect. The real point of the case is that where there is a duty to repair the obligation cannot be avoided by the employment of a third party. *Pritchard v. Peto*, (1917) 2 K.B. 173, was a case of an invitee and an accident on the premises and not on the highway. In *Palmer v. Bateman*, (1908) 2 Ir. R. 393, the action was based on negligence and not on nuisance. The wall which formed the subject of the action in *Mullan v. Forrester* (*cit. sup.*) was ruinous and this was the reason that Pim and Gordon, JJ. held it to be a nuisance and that it was unnecessary to prove knowledge of defect. And see dissenting judgment of Moore, J. at p. 436. For the reasons given by Mr. Papprill I do not think the doctrine of *Rylands v. Fletcher* (*cit. sup.*) applies. I conclude, following the judgments of Blackburn, J. in *Tarry v. Ashton* (*cit. sup.*) and of O'Brien, L.C.J. in *Palmer v. Bateman* (*cit. sup.*) that the sign board in this case was not a nuisance. It might become a nuisance and it was the duty of defendant by reasonable inspection to see that it did not become dangerous. There is no absolute liability and negligence is excluded by the case itself. Judgment will be for the defendant—with the usual consequences."

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"A strong, upright and independent Bar is essential to the welfare of a free people."
—Mr. Justice McCardie.

Vol. V. Tuesday, July 9, 1929 No. 10.

Privilege of Solicitors.

In a previous article this Journal, when calling attention to and discussing the judgment of His Honour Mr. Justice MacGregor in *Keep Brothers v. Birch and Bradshaw Ltd.*, (1928) N.Z.L.R. 360, 4 N.Z.L.J. 108, dealt with the question of privilege attaching to communications made to a solicitor. The authority of *More v. Weaver*, (1928) 2 K.B. 520, for the principle that communications passing between solicitor and client on the subject upon which the client has retained the solicitor, and which are relevant to that matter, are absolutely privileged, has been confirmed by recent English decisions, and the application of the principle is well brought out in the questions submitted to the jury in *Minter v. Priest* reported in the *Weekly Notes* of the 6th April, 1929, at page 94, and more fully in 45 *Times Law Reports*, 393. In that case the plaintiff appointed one, Taylor, as his agent to find a purchaser of a Mayfair residence. Taylor obtained an offer to purchase from one, Simpson, and the offer was accepted. Simpson's solicitors not being able to assist him to pay the deposit required, suggested he should go to the defendant who was also a solicitor, and said that if he could find the money they would stand down and allow the defendant to act as solicitor in carrying out the business. Simpson and Taylor accordingly interviewed the defendant at his office and told him that they wanted his assistance to find the deposit and that, if he found it, he should act as solicitor for Simpson in completing the purchase. The defendant declined to have anything to do with the matter and, in giving his reasons, slandered the plaintiff, with whom he had had previous dealings. Taylor repeated the slander to the plaintiff in confidence and the plaintiff commenced an action for slander. At the trial the plaintiff called Taylor on subpoena to prove the slander but Taylor claimed privilege on the ground that he saw the defendant in his professional capacity. His Honour Mr. Justice Horridge ruled that the witness must tell what took place before he could give a decision on the question of privilege. The witness then said he went to the defendant to obtain "£475 good money and a good solicitor," and that at that interview the defendant gave cogent reasons why the business should not be proceeded with and made the remarks defamatory of the plaintiff. The defendant, relying on absolute privilege, called no witnesses. After leaving the usual question to the jury as to whether the defendant had uttered the words complained of, which the jury answered in the affirmative, Horridge, J., left them the following two questions: (*a*) At the time when the words complained of were uttered, did the relationship of solicitor and client actually exist between the defendant on the one part, and Simpson and Taylor, or one and which of them, on the other part? (*b*) Did the defendant reasonably believe that Simpson and Taylor, or one and which of them, would wish to retain him as solicitor? The jury answered both of these questions in the negative and fixed the damages at £1,500. On appeal, the Court of Appeal consisting of Lord Hanworth, Master of the Rolls, and Lords Justices Lawrence and Greer, allowed the appeal, the Master of the Rolls saying that, in his opinion, all that passed between a solicitor and a presumptive client with a view to, and for the purpose of, the client retaining the solicitor, was protected by privilege even if the solicitor did not accept the retainer.

The interest of the decision lies first in the finding that despite the fact that the solicitor refused to act, and never accordingly became the solicitor of the defendant, the privilege attached. It seems that the privilege belongs to the solicitor so long as he is acting as solicitor and does not appertain only to a solicitor and client relationship. The second point of interest is that the nature of the business on which Simpson and Taylor consulted the defendant, although it was only to find out whether the defendant could make the necessary advance, was properly characterised as "solicitor's business" The Court relied on *Jones v. Pugh*, (1842) 1 Ph. 96, and *Carpmael v. Powis*, (1846) 1 Ph. 687, for its finding that the business in question was properly characterised as a solicitor's business. In the former case, Lord Lyndhurst definitely stated that it was the business of a solicitor to lay out money for his clients, and in the latter, that it was an ordinary part of a solicitor's business to treat for the sale or purchase of estates for his clients, and that it was not possible to dissect the proceedings at an interview for the purpose into parts which were protected and parts which were not protected, without getting involved in inextricable confusion. The Court held, following these cases, that, as the effect of the evidence was that the visit to the defendant was on professional business, and there was no evidence that the professional interview had ceased when the defamatory statements were made, questions (*a*) and (*b*) should not have been left to the jury.

It seems clear that the statements made by the defendant were made to explain to gentlemen, who were not and never had been his clients, why he could not oblige them, even though by doing so he would acquire them as clients, by making an advance to meet a deposit due by them under an agreement for sale and purchase. It does not appear that the defendant had any duty to either Simpson or Taylor in regard to the advisability or otherwise of their going on with the purchase but that such statements were made solely to explain why the defendant would not make the advance and consequently act as solicitor in the transaction.

The case is not on all-fours with either *Keep Brothers v. Birch and Bradshaw Ltd.* or *More v. Weaver*, but is an interesting example of the application of the broad principle that a solicitor's privilege, which is established in the interests of the administration of justice and for the protection of the confidence which exists between a solicitor and his client, will cover all cases where the solicitor is acting within the scope of his business. The principle has been established as one of public policy and the latest decisions of the Court seem to show that, rather than allow it to be whittled down, it will be extended to cover all the circumstances of a modern solicitor's varied practice.

Full Court.

Myers, C.J.
Blair, J.
MacGregor, J.

May 27; June 1, 1929.
Wellington.

MATHESON v. SCHNEIDEMAN.

Defamation—Practice—New Trial—Damages—Words Spoken on Privileged Occasion—Qualified Privilege—Evidence of Malice—Direction to Jury that Failure to Apologise Element for Consideration but not Evidence of Express Malice—No Misdirection—No Substantial Wrong to Defendant as Otherwise Ample Evidence of Malice—Damages Excessive—Limited Publication and Prompt Admission of Error—Probability that Malice Rather than Slander Considered by Jury—Exemplary or Punitive Damages—Damages not such as Twelve Men Could Reasonably Have Awarded—New Trial Ordered Limited to Issue of Damages.

Motion on behalf of the defendant for nonsuit, or alternatively for judgment for the defendant, or in the further alternative for a new trial, in an action wherein the plaintiff claimed £500 damages for slander. The slander alleged occurred in the course of an investigation into the value of certain stocks which had been sold by the plaintiff to the defendant, such enquiry being held with a view to verifying the stock sheet which were to be the basis of payments. The words alleged were spoken in the presence of two accountants, one representing each party, who were called in to verify the stock sheets. Three separate slanders were alleged. They were as follows: "You have wilfully overstated the stock sheets. You are a party to this wilful overstatement. They are overstated against my interests and in favour of your own." "Mr. Matheson, I wish you to leave these premises immediately as it is now probably a matter for the police to handle. Yes that is quite correct and I am quite prepared to prove all I said." "I do not know where he (Smith) is but I suppose he is so ashamed of himself over the part he has taken in the affair (of the overstatement in the stock sheets) that he would not turn up again."

Macgregor, J., held that the occasions on which the words complained of were spoken were occasions of qualified privilege. The jury awarded the plaintiff £500 damages.. The Full Court held that there was ample evidence of malice to go to the jury and held also that the words complained of were capable of a defamatory meaning, but the case is not reported upon these points.

O'Leary in support of motion.
Watson and Wilson to oppose.

MYERS, C.J., delivering the judgment of himself and BLAIR, J., after holding that there was ample evidence of malice to go to the jury and that the words complained of were capable of a defamatory meaning, said that it remained to consider the two other grounds upon which the defendant based that part of his application in which he asked for a new trial, namely (a) misdirection and (b) that the damages awarded were excessive.

As to the first point, the defendant claimed that the learned Judge misdirected the jury on a material point of law in that he directed that it would be evidence of malice or absence of honest belief on the part of the defendant if, after he had ascertained that he was mistaken, he refused to withdraw or apologise for the statements made. It would seem that while a refusal on the part of a defendant to apologise for, or retract, a defamatory statement when he became aware of its falsity might be properly considered by the jury on the issue of damages as part of the defendant's conduct, it was not (at all events *per se*) to be regarded as evidence of malice: **Gatley on Libel and Slander,** 2nd Edn. 713, citing **Couper v. Lord Balfour,** (1913) S.C. 492, 50 Sc. L.R. 320. And see also **Adams v. Coleridge,** 1 T.L.R. 84, at p. 87. But it was somewhat difficult to see, although it was unnecessary in their Honour's view of the case to express a concluded opinion upon the point, why a defendant's refusal to retract a defamatory statement under certain circumstances, and particularly when its falsity was made clear to him, should not be taken into consideration with the other facts of the case for the purpose of considering the issue of malice. That view seemed to be justified by **Simpson v. Robinson,** 12 Q.B. 511, 513. The learned Judge's report of his summing up on the issue of malice showed that he first of all explained what "express malice" meant; and the report proceeded: "By way of illustration I suggested to the jury that they might endeavour to put themselves in the defendant's place in considering the issue, e.g., would they in his position have persisted in the accusation made against the plaintiff after receiving a satisfactory explanation of the altered stock sheets? I then added, would they have declined to withdraw, or would they have declined to apologise? Could the defendant have had an honest mind in making the accusations when he refused to apologise after receiving this explanation?" The report then proceeded: "At the express request of defendant's counsel, I afterwards added that I did not direct them as a matter of law that defendant's failure to withdraw his charges or answer the solicitors' letter of the 8th March" (the letter did not in terms demand an apology, but purported to give him an opportunity of taking such steps as he might think fit in palliation of the matter) "was evidence of express malice on the part of the defendant." Counsel for the defendant had referred to the statement contained in **Gatley on Libel and Slander,** 2nd Edn. 713, as containing the law on that particular point, and the learned Judge told the jury that notwithstanding that statement they were entitled in his opinion to look at the whole conduct of the defendant, before, at, and after making the charges in coming to a conclusion as to whether or not the defendant was actuated by actual malice towards the plaintiff when making the charges; and the learned Judge emphasised that the important matter to consider was the state of the defendant's mind at that time. At the conclusion of the summing-up counsel for the defendant rose and said: "Do I understand your Honour to direct the jury as a matter of law that defendant's failure to withdraw his charges or reply to the solicitors' letter is evidence of express malice?" The learned Judge replied: "Oh, no," and then, addressing the jury, said:—"Gentlemen, you will understand that the defendant's failure to withdraw his charges or reply to the solicitors' letter is not evidence of express malice on his part." Counsel then said: "So long as the jury understand that, I am satisfied." In their Honours' opinion there was no misdirection on the part of the learned Judge. Even if their Honours had thought that there was reason for holding that there had been a misdirection on the point complained of, the defendant would still not be entitled to an order for a new trial on the issue of malice because plainly, in their Honours' opinion, the misdirection would not have occasioned any substantial wrong or miscarriage of justice inasmuch as, apart from the fact that the defendant had failed in answer to the letter of the 8th March to apologise for having made the defamatory statements, there was ample evidence not merely to justify, but to compel, an answer to that issue in favour of the plaintiff; and it was plain from the learned Judge's report that the minds of the jury were directed to that evidence. If there were a misdirection, and it was such a misdirection as might have affected the issue of damages, the position would be different: **Bray v. Ford,** (1896) A.C. 44, per Lore Hersehell at pp. 52, 53.

There remained the question whether a new trial should be ordered on the ground that the damages were excessive. The plaintiff claimed the sum of £500 and the jury awarded the full amount. Plainly the amount was greater than would have been awarded by a Judge sitting without a jury. That however was not sufficient to justify the Court in setting aside the verdict. Before the verdict could be set aside the Court must come to the conclusion that having regard to all the circumstances of the case the damages were so excessive that no twelve men could reasonably have given them. If the Court was so satisfied then it was its duty to interfere and set aside the verdict. If the Court could see that the jury in assessing damages had been guilty of misconduct, or made some gross blunder, or had been misled by the speeches of counsel, those were undoubtedly sufficient grounds for interfering with the verdict: **Praed v. Graham,** 24 Q.B.D. 53; **Harris v. Arnott,** 26 L.R.Ir. 55; and see **Watt v. Watt,** (1905) A.C. 115, per Lord Halsbury at p. 118. There must be some reasonable relation between the wrong done and the damages awarded: **Greenlands Ltd. v. Wilmshurst and the London Association for the Protection of Trade,** (1913) 3 K.B. 507, per Hamilton, L.J., at pp. 532, 533; **Eden George v. Truth and Sportsman Ltd.,** 26 N.S.W. S.R. 595. The true test seemed to their Honours to be whether the Court could see that the jury had taken a reasonable view of the case and returned a verdict such as reasonable men would find. That was the test applied in **Daley v. Lundin,** 8 N.S.W.S.R. 447. It was true that in **Praed v. Graham** (*cit. sup.*) the Court refused to grant a new trial in an action to recover damages for a libel contained in a letter written by the defendant to the plaintiff's wife where the jury assessed the damages at £500. It might well be said that in that case the publication was of a restricted character; but nevertheless, although the report did not indicate what the defamatory matter was, the publication, being

to the plaintiff's wife, was of such a nature as might have caused injury of a most serious character. In **Butler v. Black,** (1920) N.Z.L.R. 17, the Court refused to disturb a verdict for £750 awarded as damages for slander. It might well be that in that case— the report was silent on the point—the defamatory words were spoken in such circumstances or to such person or persons as might have resulted in at least the probability of serious injury to the plaintiff.

It was necessary then to consider the facts in the present case which seemed to their Honours to be relevant to the issue of damages. The first of the defamatory statements was made on the 12th February at 6.45 p.m. at a meeting on the defendant's premises, at which there were present the plaintiff, the defendant, and Messrs. Forsyth and Benjamin, public accountants appointed by the parties respectively, to act in their respective interests in connection with the subject matter out of which the defamatory statements arose. The meeting was adjourned until the following morning, at the same place, when at 8 o'clock the same persons met again. At that meeting the second of the defamatory statements was made, and the third statement was made an hour or two later during the continuation of the discussion in another part of the defendant's premises. The publication therefore was of a most restricted nature. Further than that, at about 10 o'clock in the morning of the 13th February, before the conference concluded at which the last of the defamatory statements was made, and after the quantity of one of the lines of goods in dispute had been checked, it was common ground that the defendant accepted all the figures contained in the stock sheets submitted by the plaintiff and admitted their correctness. It was true that in his evidence the plaintiff said that the defendant "did not retract the statements he had made and made no apology." And Mr. Forsyth said that the defendant "in no way withdrew the charges of dishonesty against Matheson, nor did he apologise." But although the defendant did not apologise, as in the circumstances he undoubtedly should have done, his admission of the correctness of the stock sheets was, in their Honours' opinion, necessarily in effect a withdrawal of the charges of any dishonesty against the plaintiff. Mr. Forsyth himself said that the defendant said that "he was quite satisfied"; and the plaintiff gave evidence to the like effect. In those circumstances it was difficult to see what real damage it was possible for the plaintiff to sustain, as the only persons to whom the defamatory statements were published heard almost immediately afterwards the further statement which necessarily connoted the falsity of the defamatory statements previously made. True there was a faint suggestion that at the outset at all events of the interview on the morning of 13th February there was a fifth person present. If there was someone else present from the defendant's office when the parties first arrived, it was difficult to believe that he remained during the proceedings that followed. The identity of such person must in the circumstances of the case have been known to the plaintiff; but the plaintiff did not in his evidence mention the presence of a fifth party, and in the statement of claim all he alleged was that all the defamatory words complained of at each and every interview were spoken in the hearing of Mr. Forsyth and Mr. Benjamin. If there had been a fifth person present when any of the defamatory words were spoken, it was most extraordinary that that fact should not be alleged in the statement of claim or referred to by the plaintiff in his evidence; and if there were a fifth person present and he remained with the other members of the party during the whole of the proceedings on the morning of the 13th February he must, like Messrs. Forsyth and Benjamin, have heard the admission which was eventually made by the defendant and to which their Honours had already referred. It was somewhat curious that, though the plaintiff alleged in his statement of claim three separate slanders, one on the evening of the 12th February, and two on the following morning, he claimed only one sum in respect of all three. The three slanders seem to have been regarded as being connected each with the others and were in effect treated as one cause of action. On the argument of the motion counsel for the plaintiff urged a number of specific acts or episodes upon which he relied as evidence of malice. In all he relied on something like fourteen such specific acts or episodes, of which it was sufficient for present purposes to refer to no more than two. One was the defendant's dismissal of the plaintiff in such a manner as to commit a breach of a contract between the parties which was to subsist for two years; the other was the stoppage by the defendant of certain work which was being done for him under contract by the plaintiff and one Cowley, such stoppage being at least arbitrary and high-handed if not constituting a breach of contract. The learned Judge reported that at the trial counsel for the plaintiff in his address to the jury stressed the specific acts or episodes, upon which he relied as evidence of malice. Their Honours were not to be regarded for a moment as suggesting that counsel's conduct was in the least degree improper, but in the peculiar circumstances of the case the stressing of malice (and particularly the acts or episodes relied on and stressed) was likely, and indeed almost certain, to mislead the jury into the belief that it was the malice rather than the slander for which damages were to be given. True a jury was entitled to award exemplary or punitive damages in a proper case, and their Honours felt bound to say that in the present case there was evidence that the defendant's conduct was such as to deserve punishment. Nevertheless there must, their Honours thought, be some limit to the extent to which a jury might award exemplary or punitive damages, especially in a case of slander like the present case where malice was not regarded primarily as aggravating the damages but as an ingredient without which, the occasion being one of qualified privilege, no cause of action at all would exist, and more especially where as in the present case the publication was restricted and the amount the jury had chosen to award was out of all proportion to the loss or damage which the plaintiff under any reasonably conceivable circumstances could sustain. Their Honours took the same view of the case as was taken in **Eden George v. Truth and Sportsman Ltd.,** 26 N.S.W.S.R. 595. Taking all the relevant factors into consideration as in the case last cited their Honours thought the sum awarded was so excessive, and the proportion between it and the circumstances of the case was so unreasonable, as to suggest, and indeed compel, their Honours to think, that the jury must have considered the matter from a wrong point of view or without a proper understanding of their duty. It might be not altogether without importance to note that the jury were not satisfied to award the full amount claimed but also, although they were merely asked in the usual way: "What damages, if any, is the plaintiff entitled to recover," added the words "and costs" which words were struck out by the learned Judge's direction. The damages were so excessive in their Honours' opinion that no twelve men on a proper consideration of all the facts and circumstances could reasonably have given them. That being so the judgment was set aside and a new trial limited to the one issue of damages ordered.

MACGREGOR, J., delivered a separate judgment concurring.

Solicitors for plaintiff: **Chapman, Tripp, Cooke and Watson,** Wellington.

Solicitors for dfendant: **Bell, Gully, Mackenzie and O'Leary,** Wellington.

Supreme Court.

Blair, J. March 3; May 18, 1929
Hamilton.

IN RE CORNFOOT AND OTHERS: EX PARTE GOULTER.

Mortgage—Transfer of Land Subject to First and Second Mortgages—Transferor Mortgagor Under Second Mortgage—Second Mortgage Subsequently Extended Under Mortgages Extension Act, 1919, on Application of Transferor and Transferees—Further Application by Transferees for Extension Under Mortgages Final Extension Act, 1924—Transferor Not a Party to Application—Extension Granted Conditional on Observance of Provisions of Memorandum of Agreement Signed by Counsel for Parties—Memorandum Providing that Mortgagors Should Do Certain Clearing and Burning—Provision that Mortgagors Should Perform their Covenants Under First and Second Mortgages "with Respect to Any Covenants where there has been a Breach" Except Covenant for Repayment of Principal Prior to Extended Date—Mortgagee's Rights Against Original Mortgagor Expressly Reserved—Transferees Not Personally Liable to Mortgagee for Repayment of Mortgage Debt.

Motion by one, Goulter, for an order reversing the decision of the Official Assignee rejecting a proof of debt lodged by him in the bankrupt estate of George, Margaret Elizabeth, and Harry Cornfoot. The proof was for £8,300 being for "arrears land tax, county rates and interest and difference of price obtained for Spring Hill Station on 1st and 2nd mortgages." The facts were as follows: In 1916 Goulter who was the registered proprietor under the Land Transfer Act of the "Spring Hill" station which was subject to a mortgage to the McLean Institute for £18,000, sold the property to one Monckton, Monckton

taking over the first mortgage and executing in favour of Goulter a second mortgage for a further £18,000 to secure the balance of purchase money. The second mortgage was duly registered. About March, 1918, Monckton sold the property to the above-named bankrupts. George Cornfoot was the husband of Margaret Elizabeth Cornfoot and Harry Cornfoot was their son. At the time of the purchase the last-named was an infant, 18 years of age, and all three signed the transfer as transferees. The arrangement between the Cornfoots was that Harry Cornfoot took only a very small interest (not exceeding one one hundred and eightieth part) in the property. The second mortgage to Goulter became due on 30th March, 1921, and in September, 1921, upon the application of Monckton and the three Cornfoots, an order was made under the Mortgages Extension Act, 1919, extending the time for payment of the purchase moneys under Goulter's mortgage to 31st December, 1922. The application was opposed and the order was made conditional on interest being raised to 6 per cent., on the payment of costs, and on leave being reserved to Goulter to apply for review if the property was neglected. In 1925 a further application was made under the Mortgages Final Extension Act, 1924, by the three Cornfoots (Monckton not being a party to the application) and on 11th June, 1925, an order was made by the Supreme Court pursuant to an agreement made by the three Cornfoots on the one part and Goulter on the other part. Mr., Grant, who acted as counsel for the Cornfoots in that application, in an affidavit stated that originally it was attempted to embody the terms of the arrangement in an order, and that a draft order was submitted to Hosking, J., who refused to accept the draft order, and endorsed on the notice of motion a minute stating that the parties having come to an agreement as per copy annexed the order extending the mortgage to 31st March, 1927, was made and that the Court's order was to cease to have effect in event of breach of the terms and conditions of the memorandum. His Honour forbad the sealing of the order until a copy of the memorandum was furnished. Accordingly counsel for the parties then prepared and signed a memorandum of their agreement. The memorandum was not signed by the parties themselves but bore the signature of N. R. Grant as "Counsel for Mortgagors" and of E. H. Sladden as "Counsel for Mortgagees." It was not disputed that Mr. Grant's signature must be taken as the equivalent of a signature of all the Cornfoots. The memorandum provided, in consideration of the parties having consented to an extension of the mortgage to the 31st March, 1927, (a) that certain paddocks would in certain respects be scrubbed and burnt before 1st November, 1925; (b) that certain blackberry be cut or burnt during the extended term; (c) that certain gorse be burnt or grubbed; (d) that up to date of the extension the mortgagors would faithfully perform their covenants under Goulter's mortgage and also under the first mortgage "with respect to any covenants thereof where there has been a breach and particularly the covenants hereinbefore mentioned" excepting the covenant for repayment prior to 31st March, 1927; (e) that the first mortgage be also extended so as not to expire before the second mortgage; (f) that interest be 6 per cent., and (g) that Goulter expressly reserved his rights against Monckton (the original mortgagor) and that neither the making of the extension order nor anything in the memorandum should release or be deemed to release Monckton from any liability under the second mortgage. The terms of the memorandum were not complied with by the Cornfoots and they failed to pay interest on the mortgage and as a result Goulter in exercise of his powers of sale as mortgagee had the property submitted for sale through the Registrar and in January, 1928, he himself bought it in at such sale subject to the first mortgage, at the declared price of £12,858 18s. 2d. His claim on the bankruptcy of the Cornfoots was in respect of the reduced price realised at the sale plus certain arrears of interest, rates, taxes, costs, etc. The Cornfoots filed a petition in bankruptcy in June, 1928, and were granted their discharge on 8th September, 1928. The only question argued before His Honour was whether Goulter was entitled to claim in the bankruptcy.

Johnson for Goulter.

Watts for Official Assignee and bankrupts.

BLAIR, J., said that the plaintiff's claim to rank as a creditor was based upon the fact that the bankrupts purchased the Spring Hill property and as such purchasers became liable to indemnify Monckton the original mortgagor, and that the bankrupts by their application to the Court for an extension of the mortgage and by the execution of the memorandum above-mentioned became jointly and severally liable to him, Goulter, on the second mortgage. It was admitted in argument that no claim to privity on the part of Cornfoot junior could be established because of his joining in the application for extension of mortgage made in the year 1921.

The authorities relied upon by Goulter were **Nelson Diocesan Trust Board v. Hamilton,** (1926) N.Z.L.R. 342; **Paterson v. Irvine,** (1926) N.Z.L.R. 352, and **Perpetual Trustees v. Elworthy,** (1926) N.Z.L.R. 621. In the last-mentioned case, following **In re Goldstone's Mortgage,** (1916) N.Z.L.R. 489, it was held that the execution of a memorandum of renewal of a mortgage implied an undertaking by the executor of a deceased assignee of the equity of redemption to pay the principal and interest in terms of the new contract.

The terms of the memorandum in the present case contained an express reservation by the mortgagee of his rights against Monckton, the original mortgagor. Goulter was not, therefore, relying upon the substitution of the liability of the Cornfoots for that of Monckton but must claim the liability of the Cornfoots as in addition to that of Monckton. That was of course possible: see **Lindley on Partnership,** 9th Edition, 320. Mr. Watts had submitted that there was no undertaking express or implied on the part of the Cornfoots to assume liability on the mortgage. His Honour was invited, therefore, to look at the order to see whether it contained any express or implied covenant by the Cornfoots to assume liability under the mortgage. Mr. Watts submitted that it contained no covenant but that its effect was that if the Cornfoots did certain things they got the advantage of an extension of the mortgage, but if they omitted to do those things the penalty was that the extension disappeared and the mortgagee was free to exercise all his rights including his rights under his personal covenant with Monckton. His Honour thought Mr. Watts' contention that the memorandum was really part of the order was sound. And it was clear also that if the terms of the memorandum were not complied with then Goulter was no longer bound by the extension granted. The order said: "This order is to cease to have effect in the event of a breach of any of the terms and conditions set forth in the memorandum." Monckton was no party to the last application to the Court and the memorandum expressly reserved all rights against him. The position, therefore, as far as Monckton was concerned was that he was no party to an extension of the mortgage. In **Nelson Diocesan Trust Board v. Hamilton** (*cit. sup.*) the Court at page 350 pointed out that if the arrangement between assignees and mortgagees were not substitutionary the result would be that the original mortgagor could have sued the assignees for breach of their covenant with him to pay the principal on the due date. Here the parties themselves had expressly declared the arrangement not to be substitutionary and if that resulted in absurdity it was their own making. In the three cases quoted the Court held that the variation arranged between assignee and mortgagee created a new contract compounded of the terms of the old and the new instrument. It was held in the **Perpetual Trustees v. Elworthy** (*cit. sup.*) following **In re Goldstone's Mortgage** (*cit. sup.*) that all just inferences were to be drawn as were necessary to make the new contract effective. Mr. Watts claimed that there was no undertaking by the Cornfoots to pay the mortgage debt, and he submitted that full business efficacy could be given to the order and its accompanying memorandum without implying such an undertaking.

His Honour proceeded to examine the order and memorandum. The order itself merely extended the term of the mortgage, but did not purport to create additional liabilities on the Cornfoots. If that were done it was done by the memorandum itself. The document commenced as follows: "Memorandum of Agreement made this 11th day of June, 1925, between the abovementioned parties in reference to the abovenamed application in consideration of the parties hereto having consented to an extension of the term of the above-mentioned Memorandum of Mortgage registered number 28413 to 31st day of March, 1927." As a matter of fact the "abovenamed parties" included Monckton, but he was not a party to the agreement. Following directly upon the above-quoted heading there were mentioned certain things to be done. It was usual in any agreement to state which party was to do any specified thing. But the first three items to be done comprised scrub cutting and clearing but the document did not state which of the parties was to do those things. If the specified scrub cutting and clearing was not done the extension of mortgage became ineffective so that it would fall upon whomsoever desired the subsistence of the extension to have that work done. Of all the clauses in the memorandum clause 4 was most like a covenant or undertaking. It read: "That up to the expiration of the said extension the mortgagors will well and faithfully perform their covenants under the said Memorandum of Mortgage No. 28413 and under Memorandum of Mortgage No. 20144 prior thereto with respect to any covenants thereof where there has been a breach and particularly the covenants hereinbefore mentioned (excepting howsoever the covenant for repayment of principal moneys prior to the 31st day of March, 1927.) That

was a somewhat remarkable piece of draftsmanship and its meaning was obscure. Goulter himself was the mortgagor under the first mortgage (No. 20144) and Monckton was mortgagor under the second mortgage (No. 28413). The Cornfoots were never mortgagors except that by virtue of their liability as purchasers of a mortgaged property they were "mortgagors" within the definition of that word in the 1924 Act. Moreover Mr. Grant acted as counsel for them and not for Monckton and Mr. Grant signed as "counsel for Mortgagors." Was the use of the word "mortgagors" in that clause intended to exclude any reference to Monckton or Goulter or both? The rights against Monckton were preserved. The clause called for the performance up to the date of the extension of all covenants in respect of which there had been a breach. Did that mean that breaches already committed must be repaired or did it mean that for the term of the extension there must be no more breaches like those in the past? His Honour presumed that the latter was the meaning intended but if so it would not have been difficult to make the meaning clear. Clause 5 of the memorandum stated: "That an order of extension be made by the Court in respect of Memorandum of Mortgage No. 20144 (and of collateral Deed of Mortgage No. 45640) so that the same shall not expire before the extended term of the said Memorandum of Mortgage No. 28413." That meant that a Court order had to be obtained extending the first mortgage and some other mortgage collateral with it. The mortgagee of the first mortgage was a stranger to the proceedings and it would be difficult to read clause 5 as a covenant by the Cornfoots that the Court would grant such an application. The wording of that clause was more consistent with the interpretation contended for by Mr. Watts that there was no undertaking or covenant by the Cornfoots but only the loss of the extension if the conditions were not fulfilled. Clause 6 of the memorandum provided that the rate of interest on Goulter's mortgage be 6 per cent. That was the statutory increase of interest provided by Section 12 of the 1924 Act and such increase of interest had already been provided for by the earlier extension order. The clause was susceptible of the meaning that the Cornfoots agreed to pay 6 per cent. and it was equally susceptible of the meaning that as long as Goulter got his 6 per cent. the extension should stand. The last clause in the agreement was that providing for the preservation of all Goulter's rights against Monckton. There was certainly nothing in the clause to support the claim that the agreement must be read as constituting an undertaking by the Cornfoots to assume liability to Goulter for the mortgage as extended. A somewhat remarkable result ensued owing to Monckton not being party to the proceedings and the rights against him being reserved. As was pointed out by the Court in the **Nelson Diocesan Trust Board v. Hamilton** (*cit. sup.*) Monckton not being bound by the extension order could have sued the Cornfoots for their failure to pay the mortgage on due date. It was also open to Goulter at any time to call upon Monckton to fulfil his covenants, one of such covenants being to pay principal on due date. Monckton could not successfully raise as a defence to such a claim by Goulter that Goulter had agreed with the Cornfoots not to exercise his claims against him (Monckton), because the answer to him would be that he was no party to the arrangement with Cornfoots, and even if he was, such arrangement specifically provided that Goulter was to be free to pursue all his remedies against Monckton. Although, therefore, the Cornfoots had obtained an order whereby Goulter agreed that as far as they were concerned he, Goulter, would on the fulfilment of certain conditions allow the due date of the principal moneys to be extended, Goulter stipulated as one of such conditions that Goulter could at once pursue Monckton who would pass the responsibility on to the Cornfoots, and the result also of the stipulation was that Monckton need not wait for the extended term to expire or even wait for Goulter to move before he, Monckton, sued the Cornfoots. It would appear, therefore, that if the Cornfoots by signing the memorandum thereby assumed full personal and several liability to Goulter as fully as if they were original parties to the mortgage, they did not get really anything in return. It would be answered that when Goulter agreed to extend the term, he did not intend to worry Monckton until the extension had expired. But clause 7 of the memorandum did not provide for that but stated the very contrary.

In the cases His Honour had quoted novation had taken place and the original mortgagor was discharged. In the present case novation had not taken place. The claim was that the responsibilities of the original mortgagor remained untouched and in addition that third persons had agreed to shoulder the whole of the original mortgagor's responsibilities with one exception only, namely, that additional time was to be given to them. His Honour had already shown that the document had been so framed as to make illusory that promised additional time. In the present case the position contended for by Goulter was that novation did not occur, that the contract with A and B remained intact but that in addition C had agreed with B that a new contract was created between B and C, such contract being compounded of the A and B contract and additional terms inconsistent with the A and B contract. Not only was that new contract inconsistent with the A and B contract, but B could not exercise his rights under the A and B contract without entirely disregarding the rights of C in the new compounded contract. The above appeared to His Honour to be the result if the memorandum were construed as imposing on the Cornfoots the whole liability as original mortgagors. The memorandum required the assistance of an implied covenant in order to give it that effect. Mr. Watts submitted that the document had complete business efficacy if it was read as meaning that the Cornfoots did not covenant to assume the whole liability under the mortgage, but had provided that if the matters mentioned in the memorandum were done then the extension so far as they were concerned became effective. That extension, as His Honour had already shown, did not amount to very much, and it was at best a kind of floating extension liable to sink at any moment if any of the matters mentioned in the memorandum should not materialise. A refusal by the Court of an application to extend the first mortgage would have wrecked the extension. The order ceased to have any effect if the conditions in the memorandum were not complied with. If the order became void then, if the memorandum were part of the order, it would fall with the order. The facts showed that by reason of breach of the conditions the order actually did become ineffective and Goulter exercised his rights before the expiry of the extended time. The preparing and signing of a separate memorandum was due to the Judge's objection to the form of the order. The parties agreed to a form of order and a copy of that was attached to Mr. Grant's affidavit. That document provided that the Court was to be at liberty to rescind the order. Had the form of order as agreed upon and settled by the parties been adopted then Goulter, if he had desired to be free to exercise his power of sale, would have required to get the order rescinded. In that event the whole order and its conditions would have gone. The affidavits showed that counsel did not consult the parties as to the preparation of the memorandum because they looked upon the alteration as formal. It was thus the accident of the Judge's objection which placed Goulter in possession of the document which was now invoked as creating rights against the Cornfoots. His Honour thought that looking at the document and the whole circumstances the construction suggested by Mr. Watts was the more reasonable and His Honour accordingly adopted it.

Motion dismissed.

Solicitors for Goulter: **Burden, Churchward and Reid,** Blenheim.

Solicitors for Official Assignee and bankrupts: **Watts and Armstrong,** Hamilton.

Smith, J. March 6, 7, 8; April 30, 1929
New Plymouth.

TUNBRIDGE v. TARANAKI PUBLISHING CO., LTD.

Master and Servant—Negligence—Duty of Master to Provide Reasonably Safe Premises—Workman Injured by Fall from Platform—Platform Erected as Bridge Over Pit in Machine Room Used at Date of Accident as Means of Access to Paper Room—Workman Having Alternative Route—Platform Not Intended for Such Purpose—Platform Reasonably Safe for Purpose Intended—No Duty to Make Safe for any other Purpose—Alterations Made Subsequent to Accident Not Evidence of Breach of Duty—Plaintiff Negligent in Encountering Risk with Knowledge of Danger—Consent to Run Risk—Maxim *Volenti non fit injuria* Applied—Matters to be Considered in Determining Whether Maxim Applies.

Action by the plaintiff to recover from the defendant company damages for injuries sustained by him in the course of his employment by falling from a platform while on his way to a lavatory. The platform bridged a slope or pit in a room known as the machine room. From the evidence it appeared that in the premises where the plaintiff worked there were three rooms known as the paper room, the machine room, and the linotype room. The floor of the paper room was level with that of the linotype room, but was 18½ in. above the floor of the machine room. A portion of the floor of the paper room about 8 feet

in width sloped downwards towards the machine room and this slope continued, at a width of about 4 feet, into the floor of the machine room to form a pit about 1 foot 9 inches deep under the printing machine erected in the machine room. This pit was bridged by the wooden platform in question. The platform proceeded from the door of the linotype room, over the machine room and in the direction of the paper room. The end of the platform did not, however, reach the paper room but merely bridged the pit. From the end of the platform to the floor of the paper room was a distance of about 4 feet and the floor of the paper room was five or six inches higher than the end of the platform. The platform was a wooden one, about 7 feet long and about 2 feet 6 inches wide and was slightly springy. It was hinged at the end nearest the linotype room and could be raised or lowered. When lowered it sometimes rested on a benzine box placed on its side. The object of the box was to keep the platform raised above the paper rolls which were placed in the pit under the printing machine. After a paper roll had been used for two days it was sufficiently diminished in size to allow the platform to be lowered on to the machine room floor. The platform had been erected some four or five years. It was used to slide heavy forms of type from the linotype room to the machine room as well as for the passage of the men. The platform depended for its support entirely on its hinges. These were originally fixed by screws, but when the screws became loose, nails bent over were inserted in their stead. At the time of the accident the platform was to some degree wobbly, sufficient to permit of its canting if a workman sprang from it. It was proved that whether resting on the benzine box or on the machine room floor, the platform was also used by most of the workmen to pass to the outside of the building to the lavatory on the far side of the machine room. For five days out of seven, they must have stepped up the height of 18½ in. to the paper room floor either directly or by using the slope itself for an intermediate step. For the remaining two days, most of them sprang the gap of 2 ft. 11½ ins., rising some 6 ins. going out and descending some 6 ins. coming in, and requiring some 4 feet to execute the manoeuvre. There were two other ways to the lavatory. One was to go round the printing machine, and the other was to cross the sloping floor. There was no danger by either route. While the platform was raised all of the workmen going to the back had to adopt the alternative route round the machine. There was no evidence that the plaintiff or any other workman had ever complained to the defendant company before the accident that the platform was dangerous, nor was there any evidence of any previous accident to a workman in the use of the platform. Prior to the accident, the plaintiff's view was that the platform was dangerous, but he had always used it, and when it rested on the benzine box, he stepped or sprang across to the paper room floor. That was, he admitted, the habitual way. On the occasion of the accident the plaintiff was using the platform to spring to the paper room floor and not to descend to the machine room floor.

After the accident a carpenter was engaged to alter the platform and to make it satisfactory. He took up the play at the hinged end; fixed a board at that end for support underneath, in addition to the hinges; added a hinge (making three in all); used screws instead of nails to secure the hinges; and fixed two trestles each one foot high underneath the platform and extending to its full width so that with the platform in a horizontal position the trestles rested one on each side of the slope to the pit.

In the circumstances above stated the plaintiff claimed that his injury was due to the negligence of the defendant company.

Weston for plaintiff.

Cooke and R. H. Quilliam for defendant.

SMITH, J., stated that the plaintiff's claim was that the defendant was negligent in allowing its employees to use the platform with a slight downward slope and without support for its full width, as a bridge over the pit. It was not a claim that the defendant allowed its employees to use the platform in that state as a jumping-off platform to the floor of the paper room. The first question was—what duty did the defendant owe to the plaintiff in respect of the platform? The allegation was that the platform which the plaintiff used by permission was dangerous to use within that permission. The platform was part of the premises. The obligation of a master to his servant in respect of the premises was to use reasonable care to provide safe premises, and to use reasonable care to keep them safe. The duty was, in general, that of an invitor to an invitee. The master did not absolutely warrant safety. The duty to provide proper premises could not, His Honour thought, be delegated, but the duty of subsequent inspection and care might be. That was the rule with regard to plant: **Toronto Power Company v. Paskwan,** (1915) A.C. 734. His Honour thought it was also the rule with regard to premises. The plaintiff's attack was therefore upon the construction of the platform as part of the premises for which the defendant was responsible and for which the responsibility could not be delegated to a foreman.

The plaintiff naturally relied upon the alterations and said that they proved his claim. His Honour did not think so. The plaintiff's express claim was limited to the use of the platform as a bridge over the pit. No other use ought to be implied against the defendant. The platform was not long enough to bridge anything but the pit. For five days out of seven, it rested directly on the machine room floor. It was, in short, not a passage to the far shore of the paper room, but to the near shore of the machine room. The alterations were effected to provide against a tip when the workmen chose to jump to the paper room floor. That involved a new construction. Thereafter the platform could not be lowered to the machine room floor, and the formes of type could not be slid down as before. The defendant having paid for this alteration could not be heard to say thereafter that the platform was not to be used for jumping-off purposes; but because the defendant adapted its premises to the impulses of its workers, it did not follow that the defendant was foolish before. *Cf.* the observations of **Bramwell, B.,** in **Hart v. Lancashire and York Railway Co.,** 21 L.T. (N.S.) 261. In the present case, it was the workers who were foolish in using the platform not for the purpose for which it was adapted and authorised, but for a purpose for which it was not adapted and not authorised. His Honour found that the platform was reasonably safe for its authorised purpose. It must have been used many thousands of times within the last four or five years for that purpose without accident, and without complaint. The plaintiff himself made no complaint at the time of the accident, or for nine months thereafter, that the platform was dangerous. His Honour concluded that at the time of the accident the benzine box was properly fixed for the purpose of enabling the platform to act as a bridge over the pit, that there was no concealed trap of any kind and that the platform could have been negotiated safely to the floor of the machine room by any person walking with ordinary circumspection. Such a person could then quite safely have ascended the slope to the paper room floor, or stepped up 18½ ins. to that floor. The plaintiff did not use the platform for any such purpose, and the defendant owed him, at that time, no duty to see that the platform was reasonably safe for any other purpose. It followed that the defendant was guilty of no breach of duty towards the plaintiff and was not negligent.

His Honour said that there were two other grounds upon which he thought the plaintiff must fail: (1) Contributory negligence. For that purpose, His Honour assumed that the defendant was guilty of negligence in not providing a platform sufficiently safe at all times as a jumping-off platform for the paper room floor. The plaintiff stated, and His Honour must accept his evidence as against himself, that he always considered the platform to be dangerous. Notwithstanding that, he always used it, and always took a long step or jumped. He could, His Honour found, have used one or other of the two alternative routes. It would have been no real inconvenience to do so. When the platform was raised, another route had to be used. In those circumstances, the plaintiff's knowledge of the danger established the existence of contributory negligence on the part of the plaintiff: **Salmond on Torts,** 7th Edn., 61, 5 (b), the text of which was approved by McCardie, J., in **Baker v. James,** (1921) 2 K.B. 674, 684. *Cf.* **Canadian Pacific Railway Co. v. Frechette,** (1915) A.C. 871. (2) *Volenti non fit injuria.* The principle of that maxim in its strict operation negatived the existence of negligence on the part of the defendant. "The duty," said Bowen, L.J., in delivering the leading judgment in **Thomas v. Quartermaine,** 18 Q.B.D. 685, 695, "of the occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognisant of the full extent of the danger, and voluntarily run the risk." The question in each instance was one of fact: **Smith v. Baker,** (1891) A.C. 325, overruling **Thomas v. Quartermaine** in so far as that case decided that the question was one of law. There must be not merely perception of the existence of danger, but also comprehension of the risk. Accordingly, the maxim did not apply unless it was found as a fact, that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, expressly or impliedly agreed to incur it: **Canadian Pacific Railway Co. v. Frechette** (*cit. sup.*); **Letang v. Ottawa Electric Railway Co.,** (1926), A.C. 725. On the one hand, the employees generally regarded the platform, when resting on the benzine box, as suitable for use as a jumping-off

platform. On the other hand, the plaintiff (whose evidence His Honour must accept as against himself), although he followed the usual habit for a period of four or five years, always regarded the platform as wobbly and dangerous. The risk involved was the risk of falling, but he made no use of the safe alternative routes. He made no complaint, and no one else made any complaint. Yet he retained his view that the platform was always dangerous when resting on the box, and nevertheless used it. In those circumstances, His Honour found: (1) that the plaintiff clearly knew and appreciated the nature and character of the risk that he ran, and (2) that he voluntarily incurred it. "If," said Lord Atkinson, delivering the judgment of the Judicial Committee in **Canadian Pacific Railway Co. v. Frechette** (*cit. sup.*) at page 880, "a person, with full knowledge and appreciation of the risk and danger attending a certain act, voluntarily does that act, it must be assumed that he voluntarily incurred the attendant risk and danger, and the maxim *volenti non fit injuria* applies."

The following authorities showed varying circumstances in which a plaintiff had been held to be *volens* within the operation of the maxim. All of them operated together in the present case: (a) Encountering a known risk over a long period of time: **Membery v. Great Western Railway Co.,** 14 A.C. 179, 186; **Bellambi Coal Co. v. Murray,** 9 C.L.R. 568. (b) Alternative routes: **Bolch v. Smith,** 7 H. & N. 736, 746 (alternative routes to a lavatory). In **Letang's Case** (*cit. sup.*), the Privy Council said (p. 729) that in the circumstances of that case it was at least doubtful whether the existence of alternative routes would disentitle the plaintiff to the legal rights of an invitee, but they found it unnecessary to decide the question, as on the facts the other routes were more dangerous. Their Lordships did not rule out the importance of alternative routes, and the circumstances of that case were very different from the present, e.g., in that case, there was no habitual user of the steps by a servant, as there was in the present case of the platform. Alternative routes went to negative compulsion. If there was evidence of compulsion, as in **Yarmouth v. France,** 19 Q.B.D. 647, the plaintiff might not be *volens*. (c) Knowledge of the likelihood of injury: **Canadian Pacific Railway Co. v. Frechette** (*cit. sup.*) at p. 881. (d) No complaints: **Bellambi Coal Co. v. Murray,** 9 C.L.R. 568, 596.

Mr. Weston ingeniously suggested that as the plaintiff was not aware of the fact that he had an action at Common Law, if injured, he could not be regarded as *volens*. But the maxim required only a free and clear agreement to take the risk of the danger. The plaintiff's legal remedies were not the danger but the solution for the danger when actionable at his suit. Whether it was actionable or not in relation to the maxim, depended on the existence or otherwise of the agreement to take the risk of the danger itself and of nothing else.

Action dismissed.

Solicitors for plaintiff: **Weston and Billing,** New Plymouth.

Solicitors for defendant: **Chapman, Tripp, Cooke and Watson,** Wellington.

Smith, J. May 8; 31, 1929. Dunedin.

WINSLEY BROTHERS v. WOODFIELD IMPORTING CO.

Sale of Goods—Implied Condition that Goods of Merchantable Quality—Sale of New Machine to be Imported from Abroad "Ex Wharf Oamaru"—Sale by Description—Machine on Arrival Found to be Damaged—Refusal by Buyer to Take Delivery—Test of Merchantable Quality Whether Machine Reasonably Capable of Doing Work for which New Machines of that kind Designed—Machine as Delivered Not Capable of Doing Such Work Though Damage to Machine Capable of Repair at Small Cost—Machine Not of Merchantable Quality—Magistrate's Finding of Merchantable Quality Not Binding on Supreme Court when Wrong Test Applied—Sale of Goods Act, 1908, Sections 13 (1), 16.

Appeal on law and fact from the decision of the Magistrate at Dunedin, in an action wherein the respondents (as plaintiffs) claimed to recover from the appellants (as defendants) the price of a thicknessing machine sold by the respondents to the appellants under a contract which provided for the sale of a thicknessing machine for the price of £90, all charges to be paid ex wharf Oamaru; terms, cash on delivery. The machine which was to be used for planing boards to an even thickness was to be imported from abroad. It weighed about a ton. When working, the planing blades, according to the specifications, revolved at a speed of 4,900 revolutions per minute. A shield which could be raised or lowered by a set-screw prevented the shavings from flying upwards. The machine arrived in New Zealand in October, 1928; when first examined, it appeared that the bolts holding the heavy machine to the packing case had pulled through the case. The result was that the machine and parts thereof were loose in the case. When the machine was delivered to the appellants on 5th November, 1928, they found further that, on opening the case, the machine and parts thereof had been improperly packed, with the result that the shield had been broken and that a bolt holding the set-screw had been sheared off. The appellants accordingly refused to take delivery of the machine on the ground that the machine was not of merchantable quality. At the hearing before the Magistrate, the respondents' evidence showed that the shield had two cracks in it several inches long, but that these did not show right through; also that a bolt evidently holding the set-screw had been sheared off. It was admitted that this shearing might have been caused by jolting in the case. It was also admitted that if the machine had had a severe shaking, other parts of the machine might have been strained, and that the spindle might have suffered injury, but these were said to be very improbable. The actual result was that the planing blades, when turned by hand at a speed of about 20 revolutions to the minute, clicked against the shield. It was also shown that the cost of supplying a new shield casting would be £1, and if the shield were oxywelded and a new set-screw supplied, the cost would be 7s. 6d. The Magistrate in an oral judgment held that the machine was of merchantable quality, in that there was nothing wrong with the mechanical parts, that the crack in the shield did not affect a vital part of the machine, and that it was of a trifling nature, and gave judgment for the plaintiff.

H. E. Barrowclough for appellants.

A. C. Stephens for respondents.

SMITH, J., said that the contract was not one for the sale of an ascertained machine but one for the sale of an unascertained machine by description. It was not in dispute that the machine was bought by description from a dealer in machines of that description. It followed that the operation of the maxim *caveat emptor* was limited by the implied condition that the goods must be of merchantable quality: Section 16 (b) of the Sale of Goods Act, 1908. The meaning of merchantable quality had been the subject of some discussion. In **Bristol Tramways Co. v. Fiat Motors,** (1910) 2 K.B. 831, where motor omnibuses were in question, Farwell, L.J., said (at page 841) that the phrase was used as meaning that the article was of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he bought for his own use or to sell again. That view was adopted by Cooper, J., in **MacEwan and Co. Ltd. v. Ashwin,** (1916) N.Z.L.R. 1028, where the article in question was a cream-separator; and by Sim, J., in **Burns v. John Chambers and Son, Ltd.,** (1921) N.Z.L.R. 916, where the article was a milking machine. In **MacEwan and Co. Ltd. v. Ashwin,** (*cit. sup.*) at p. 1037, Cooper, J., stated that he had directed the jury in that case that "merchantable quality" in reference to such an article as a cream-separator, meant that the separator was reasonably capable of performing the work for which it was designed. On the other hand, Salmond, J., in his remarkable judgment in **Taylor v. Combined Buyers Limited,** (1924) N.Z.L.R. 627, at p. 644, submitted the term to a detailed analysis, and he criticised the definition of Farwell, L.J. Salmond, J., at p. 645 said: "Goods sold by description are merchantable in the legal sense when they are of such quality as to be saleable under that description to a buyer who has full and accurate knowledge of that quality and who is buying for the ordinary and normal purposes for which goods are bought under that description in the market." In criticising the view of the Lord Justice, Salmond, J., said: "If, however, by 'performance of his offer' is here meant performance of his contract, the definition seems open to the comment that a reasonable man acting reasonably will accept the goods if he is legally bound to accept them as being in accordance with the contract; and therefore the hypothetical conduct of such a buyer cannot be used as a test of whether that condition is fulfilled or not. If, on the other hand, 'performance of his offer' means acceptance of an offer made by the seller, a reasonable man will only accept if the goods are fit for the particular purpose for which he requires them; but this, as already indicated, is not the true test of merchantable quality." His Honour dealt at some length with Salmond, J.'s criticism of the view of Farwell, L.J., and said that

in his opinion the tests proposed by Farwell, L.J., and by Salmond, J., would lead to the same result. The reasonable man acting reasonably after a full examination and under all the circumstances of the case would reach the same conclusion as to the merchantable quality of the particular goods in question as the reasonable buyer who had a full and accurate knowledge of the quality of those particular goods and who was considering that quality from the point of view of a person buying for the ordinary purposes for which goods of that description were bought in the market. In either case, the reasonable person would have regard to the state and condition of the particular goods as compared with the state and condition of normal goods of that description.

Tests such as those must be expressed in very general terms in order that they might be applicable to all classes of goods. But where definite defects existed in a particular type of goods, such as new machines, it might be possible to state a test of merchantable quality which, while within the purview of the general test, might yet be capable of more precise and ready application to the facts of a particular case than was the general test. As His Honour understood the matter, that was what Cooper, J., had in view in **MacEwan and Co. Ltd. v. Ashwin** (*cit. sup.*). His Honour ventured to think that the test Cooper, J., propounded to the jury in that case was a valuable one—viz.: whether the cream-separator there in question was reasonably capable of performing the work for which it was designed. It appeared to His Honour, however, that that test, as stated, was incomplete. It seemed necessary to add to it a reference to the kind of machine purchased, so as to indicate the norm of judgment. That was necessary because the sale was a sale by description. It was necessary to remember also that defects might exist in a new machine which might not render it incapable of doing the work for which it was designed, but which might nevertheless render it unmerchantable. Defects affecting the appearance, though not the working, of a new machine might be of that type. A computing scale, to be used on a counter, delivered with a broken glass dial, would be properly regarded as unmerchantable, although it worked perfectly; compare **International Business Machines Co. Ltd. v. Shcherban,** (1925) 1 D.L.R. 864, 39 English and Empire Digest, 451, note (f). But where a new machine had been bought by description, and on inspection it was found to be subject to defects hindering its operation, a proper test of its merchantable quality might, His Honour thought, be thus expressed: "Is this particular machine, as a new machine of the kind described in the contract, reasonably capable of doing the work for which new machines of that kind are designed?" Assuming a proper examination of the state and condition of the machine, then if the answer was in the negative, the machine would not be saleable as a new machine to a reasonable man who had regard to all the circumstances (per Farwell, L.J.) or to buyers in a market who were buying for the ordinary and normal purposes for which goods of that description were bought in the market (per Salmond, J.). From either point of view the machine would not be of merchantable quality. His Honour thought that the test suggested was the test actually applied by Salmond, J., on the facts in **Taylor v. Combined Buyers Ltd.** (*cit. sup.*) at p. 647. In applying the test proposed to new machines, regard must be had to the following matters: (1) The reasonable buyer must consider whether the "defects" were really defects. If, for example, there were dust and surplus oil or grease on a new machine when delivered, the reasonable buyer might well regard such defects as of no account. *De minimis non curat lex.* Such defects or blemishes might indeed be contemplated by the contractual relationship between the parties. Where, however, the defects were such that the reasonable man would take them into account, they would in general be defects requiring a remedy to enable the machine to operate as machines of that kind were designed to operate; and the cost thereof would be measurable, in the circumstances, at a money value. (2) It was important to know whether the defects were patent or latent at the time of inspection. If the defects were then patent, it was not to be supposed that the buyer's treatment of the new machine had been responsible for the defects. The machine had been in the control of the seller only. Where the defects were latent at the time of the buyer's inspection, and had been revealed only after some use of the machine by the buyer, it was reasonable to suppose that the Court would require proof of substantial defects in order to enable the Court to be satisfied that the defects complained of were defects existing at the time of inspection. That seemed to be a fair construction of the view taken by Salmond, J., in respect of the motor car in question in **Taylor v. Combined Buyers Ltd.** (*cit. sup.*). In such a case, the question would still remain whether the buyer was entitled to reject the machine, or whether by the length of his user he had lost that right and was limited to a claim in damages only. On the other hand, the fact that the property had passed would not of itself prevent rejection. Those matters were dealt with in **Taylor v. Combined Buyers Ltd.** (*cit. sup.*) at pp. 648 to 652. (3) The express terms of the contract between the parties might, in any particular case, modify the right of immediate rejection conferred upon the buyer by reason of a breach of the implied condition of merchantable quality. An agreement to "service" a machine might possibly, upon its true construction, have that effect. (4) The test, as stated, applied only to a new machine subject to a defect or defects interfering with its proper operations. It was inapplicable to a defect touching some other state and condition of a new machine, such as its appearance.

It now remained to apply the test proposed to the facts of the present case. The question must be: "Is this machine, as a new A.T.E. Thicknessing Machine, reasonably capable of doing the work for which new A.T.E. Thicknessing Machines are designed?" No regard was paid in the Magistrates' Court to the point whether new machines of the kind described in the contract might be expected to have the defects of that particular machine. It was obvious, His Honour thought, that they could not, for the planing blades would be destroyed if worked with such defects. Furthermore, it was a proper inference from the respondents' letters that the defects in question could not be expected to exist in new A.T.E. Thicknessing Machines. The respondents' view was that the defects were trivial, and could be easily remedied. The machine was, however, new. The defects were patent at the time of inspection. The buyer immediately rejected the machine and did not use it. The defects could not have been such as pertained to the state and condition of new machines of the kind described in the contract. The result of running the machine as delivered, and as it appeared at the time of inspection, would have been to destroy the planing blades of the machine. Such defects required repair. The cost of repair was measurable in money; and the Magistrate found that cost to be £1. The reasonable buyer would conclude, His Honour thought, that the machine, as a new A.T.E. Thicknessing Machine, was not reasonably capable, as delivered, of performing the work for which new A.T.E. Thicknessing Machines were designed. It was not, then, of merchantable quality. The reasonableness of that conclusion was shown by the fact that if the machine were forced upon the buyer as a machine of merchantable quality, he would, in effect, be obliged to pay £91 for a new machine which he had agreed to buy at £90. That view appeared to be supported by **International Business Machines Co. Ltd. v. Shcherban** (*cit. sup.*).

Mr. Stephens had urged that His Honour was bound by the finding of the Magistrate, as by the finding of a jury, that the machine was of merchantable quality. His Honour did not think so. If the Magistrate had really decided that there was no breach of the condition of merchantable quality, he should have given judgment for the full price of £90. It would be not unfair to say that he had found that the appellants were entitled to damages to the extent of £1 for some breach on the part of the respondents. That breach could only be a breach of the condition of merchantable quality. But the appellants had done nothing to compel them to treat such a breach of condition as a breach of warranty sounding in damages only; and the right of waiving the condition belonged to the appellants and to them alone: Section 13 (1) of the Sale of Goods Act, 1908. If they had elected so to do, they could have brought their own action or counter-claim, and supported it by their own evidence. The Magistrate had not applied the proper test of merchantable quality, and from his judgment it would appear that he had misdirected himself. His Honour was, therefore, not bound to accept his finding.

Appeal allowed.

Solicitors for appellants: **Ramsay, Barrowclough and Haggitt,** Dunedin.

Solicitors for respondents: **Mondy, Stephens, Monro and Stephens,** Dunedin.

It is no uncommon thing for experienced counsel inadvertently to address justices or magistrates as: "Your Honour." The other day a young counsel, accustomed apparently to other spheres, reversed this order of things by twice addressing the Court of Appeal as "Your Worships."

Desertion by a Husband.

Effect of Payment of Maintenance on Wife's Right to Divorce.

The interpretation placed upon the decision of Salmond, J., in *Morris v. Morris*, (1920) N.Z.L.R. 706, by the more recent case of *Roulston v. Roulston*, (1928) N.Z.L.R. 562 (see the note on "Desertion" contained in *Sim's Divorce Act*, 4th Edn., at page 16), is a matter of some concern to the practitioner who is asked to advise a wife on the right to divorce on the grounds of desertion particularly so where, apart from questions of maintenance during the period, the necessary elements seem to be present.

Prior to the coming into force of the Divorce and Matrimonial Causes Amendment Act, 1913, the existence of a separation order under the Destitute Persons Act, 1910, was an absolute bar to a wife, who had obtained such an order, subsequently obtaining a divorce on the grounds of desertion, such desertion arising from the making of the order: *Harriman v. Harriman*, (1909) P. 123. Section 6 of the Divorce and Matrimonial Causes Act, 1913, provided that, if a married woman while living separately from her husband was for any period habitually and without just cause left by him without reasonable maintenance, he should be deemed for the purposes of the principal Act to have deserted her wilfully and without just cause or reasonable excuse, whether her separation from her husband took place or continued by mutual consent, or by virtue of a judicial decree or order made under any statute or in any other manner. The effect of this provision was to extend the law in favour of a wife living under such circumstances and to allow her to obtain a divorce.

The interpretations now under discussion seem to regard the Section as a restriction and to make the question of payment or otherwise of maintenance a matter for consideration in cases where, it is submitted, it was never intended to apply.

Smith, J., in his decision in *Roulston v. Roulston*, (*cit. sup.*) at p. 565, says:

> "In *Morris v. Morris*, (1920) N.Z.L.R. 706, Salmond, J., held that the effect of that section" (Section 6 of the Divorce and Matrimonial Causes Amendment Act, 1913) "was that the husband who provides his wife with reasonable maintenance, even though he does so under the legal compulsion of the Destitute Persons Act, cannot be treated as having deserted her."

The logical result of this would be that in every case where a wife claims a divorce on the grounds of desertion, and the desertion was otherwise proved, then the fact that adequate maintenance had been paid to the wife by the husband during the period would be a bar to the wife obtaining her divorce although, if the act of desertion had been that of the wife, the husband would be entitled to succeed in a petition presented by him: *Davie v. Davie*, 15 G.L.R. 205; *Burfield v. Burfield*, (1918) G.L.R. 18. The position thus created is an impossible one as is illustrated by the following examples:

(a) A husband leaves his wife with her consent and goes on an extended holiday. He decides not to return but pays his wife adequate maintenance regularly.

(b) A husband says to his wife: "I will not live with you any longer," and without her consent leaves the matrimonial home and does not return but makes her an adequate allowance.

If the law as laid down in *Roulston v. Roulston* is correct it would seem that in both of these cases the wife could not obtain a divorce.

It is submitted that on the authorities there is no justification for such a rule. A careful examination of the judgment in *Morris v. Morris* shows that no such general rule was laid down in that case. The learned Judge in that case said (pp. 70, 71): "A wife who had by her own act obtained a judicial decree which destroyed the obligation of marital cohabitation was precluded thereby from alleging that her husband's act in remaining apart from her constituted a wilful desertion without just cause. The law on this point, however, has been mofified in favour of the wife by S. 6 of the Divorce and Matrimonial Causes Amendment Act, 1923." (The learned Judge here quotes the provisions of the Section). The lines which then follow:

> "This being so, the petitioner can succeed only if she can show that for the statutory period of three years she has been habitually left by the respondent without reasonable maintenance,"

apply, it is submitted, only to the particular facts of that case and are not intended to lay down any general proposition of law which would be applicable to all cases of desertion.

In England desertion has been a ground for divorce or judicial separation since the Matrimonial Causes Act, 1857, and it was laid down as long ago as 1858 in *Ward v. Ward*, 1 Sw. & Tr. 185, that the party charged with desertion must be proved to have withdrawn from cohabitation contrary to the wish of the petitioner. A similar definition is found in *Reg. v. Leresche*, (1891) 2 Q.B. 418, at p. 420, where it was said by Lopes, L.J., delivering the judgment of the Court of Appeal, that "a husband deserts his wife if he wilfully absents himself from the society of his wife, in spite of her wish." The case of *Macdonald v. Macdonald*, 4 Sw. & Tr. 242, laid down the law that where a husband has abandoned the society of his wife without good cause the fact that after doing so he pays an allowance regularly is no answer to a charge of desertion. In *Jackson v. Jackson*, (1924) P. 19, the essentials of desertion are discussed and no support can there be found for the proposition in *Roulston v. Roulston*. It seems on the other hand to be settled law that the mere payment of maintenance, unless paid and accepted on the condition that the wife will no longer molest the husband, is not bar to a petition on the grounds of desertion: *Buckmaster v. Buckmaster*, L.R. 1 P. & D. 713; *Parkinson v. Parkinson*, L.R. 2 P. & D. 25.

It is generally accepted by the authorities that desertion is committed by the party who by his or her acts brings the cohabitation to an end and that payment of maintenance is only evidence that there was not an intention to desert, but once prove desertion and then payment is immaterial. If this be so it is difficult to see how the payment of adequate maintenance is in itself a bar to a wife's petition in New Zealand on the grounds of desertion, except in cases where the parties are living apart as a result of an order for separation obtained by the wife under the provisions of the

Destitute Persons Act, 1910, and there seems further to be no authority for invoking Section 6 of the Divorce and Matrimonial Causes Amendment Act, 1913—now Section 13 of the Divorce and Matrimonial Causes Act, 1928—in order to lay down a rule *that in all cases there can be no desertion where adequate maintenance is paid.*

R. H. MACKAY.

Taranaki District Law Society.

Second Annual Conference.

Last year the Taranaki District Law Society tried the experiment of holding a Conference of its members and so successful were the proceedings that it was decided to make the function an annual one. The Second Conference was held in New Plymouth on Wednesday, the 12th June, some thirty-five members from all parts of the Taranaki Province attending.

In the morning the practitioners met in conference with representatives of the medical, dental, accounting, architectural, surveying, and engineering professions, and various matters affecting the different professions were discussed. The local Members of Parliament, Messrs. S. G. Smith, H. Dickie, and G. R. Sykes were present, and expressed great pleasure at having the opportunity of obtaining, at first-hand, information on these questions. In the afternoon members of the Law Society met in conference, Mr. G. M. Spence, President of the Society, presiding. Mr. H. F. Johnston (Wellington) delivered an address on "The Importance of the Profession to the Progress of the Empire," and Mr. A. K. North (Hawera) read a paper on "Anomalies of Legislation." At the conclusion of the latter paper the Conference discussed in committee the proposed Solicitors' Guarantee Bill and placed its views before the Members of Parliament.

At the conclusion of the proceedings the members attending the Conference, as the guests of the N.Z. Shipping Company, paid a visit of inspection to the s.s. "Ruapehu" at the port. In the evening a dinner was held at the "White Hart" Hotel. Mr. C. H. Weston proposed the toast of "Our Guests," to which reply was made by the Mayor (Mr. H. V. S. Griffiths), Mr. C. H. Wynyard, and Dr. G. Home. The toast of "Parliament" was proposed by Mr. L. A. Taylor, and Mr. S. G. Smith, M.P., replied. Mr. W. D. Armit, proposed the toast of the "Legal Profession," and Mr. H. F. Johnston (Wellington) responded

---

By the Judges Retirement Act, 1918, Judges of the Supreme Court of New South Wales have to retire when they reach the age of seventy. Mr. Justice Campbell, believing himself nearly to have attained that age, announced his retirement, but on subsequently obtaining a copy of his birth-certificate found that he had already in fact celebrated his seventieth birthday, and had been performing his judicial duties after reaching the age for retirement. It is stated in the *Australian Law Journal* that it is understood that a summons has been taken out to test the validity of a judgment given by Campbell, J., after he had reached the age of seventy.

Lord Halsbury.

His Life and Times.

Permission has been granted to the "NEW ZEALAND LAW JOURNAL" to publish a series of extracts from the Biography of the first Earl of Halsbury, which is shortly to be published.

(Continued from page 172)

FINDING A SEAT.

About this time the great inconvenience of having a Solicitor-General without a seat in the House became urgent, and the Prime Minister (Disraeli) had to come to a decision on the point. So the Lord Chancellor (Cairns) wrote to Hardinge Giffard as follows:—

September 14, 1876.

Confidential.

MY DEAR SOLICITOR-GENERAL,—

A vacancy on the Bench will occur on the promotion of Mr. Justice Blackburn, and I shall be happy, if it is agreeable to you, to submit your name for Her Majesty's approval to fill it.

I do not know whether you will be inclined to relinquish, for the repose and dignity of the Ermine, your prominent position at the Bar, but it is only fair to you that I should, on an occasion like the present, communicate with you frankly as to the relations between the Law Officers of the Crown and the Government.

It has been a matter of much regret and no small inconvenience to the Government that, owing to the difficulty you have found in obtaining a seat in the House of Commons, they have been during the last Session deprived of the advantage of your aid in Parliament. They would deeply regret that the continuance of this state of things should lead to a severance of their official connection with you, but it would be absolutely necessary, if this connection is to continue, that you should be able to meet Parliament at the commencement of the ensuing Session with a seat in the House.

The Prime Minister wishes me to express to you the satisfaction he would feel if both the present Law Officers had seats in the House of Commons, but he is convinced that you will see how indispensable this condition is to the tenure of office.

Believe me, my dear Solicitor-General,

Yours faithfully,

CAIRNS.

Sir Hardinge Giffard's answer.

September 20, 1876.

DEAR LORD CHANCELLOR,—

Your letter dated the 14th has only now been put into my hands. Permit me first to express to the Prime Minister and yourself my sense of the kindly tone of your communication. In anticipation of the difficulty which might arise unless I were provided with a seat in the House of Commons, a seat (I believe a perfectly safe one) has been provided for me. The Writ will be moved for the first day of the Session, and I have myself no doubt of the result of a contest, if a contest there be. Under these circumstances I feel myself justified in declining the great honour your lordship is good enough to offer me, an honour, however, which in my case

would involve the most acute feelings of disappointment, as it would involve the relinquishment of any participation in political life. It still remains my hope that I may be of some use in the House of Commons, and I certainly do feel with the Prime Minister that without a seat in the House my official connection with the Government would not continue.

I remain, dear Lord Chancellor,
Very truly yours,
HARDINGE GIFFARD.

So Sir Hardinge Giffard, like his ancestor at the Battle of Hastings, "preferred the fighting line." And indeed it took some courage, as by refusing a Judgeship he ran some risk of losing any further promotion under "Dizzy's" administration. But his position at the Bar was so unassailable that his confidence was justifiably strong. All the same, if he had lost Launceston it would have been awkward, especially as it happened that the Conservatives went out of office in 1880.

In February, 1877, Giffard was elected member for Launceston, and retained the seat at the General Election of 1880, among the general overthrow of the Conservative party. When he took his seat in the House of Commons he wrote to his friend, Cecil Raikes, to remind him of an old promise to act as one of his sponsors, which promise was duly kept. Indeed they were always friends, but the friendship was cut short by Cecil Raikes' death at the age of 53, in 1891.

Rather an amusing scene took place when Giffard arrived at the table of the House of Commons with his sponsors, and was called upon to produce the return to the writ. For several minutes he searched in vain for the all-important paper, and it did indeed look as if the malign fates had reserved their energies for one last blow, for it could not be found. Giffard desperately sought in pocket after pocket, laying their contents on the table, while the House laughed at his anxious face and shaking hands. But at last the document was found on the bench under the Gallery, where he had been waiting for his summons. His popularity was attested to by the hearty burst of cheering when he at last handed it in, and by the number of friends who crowded round to congratulate him.

THE PENGE MYSTERY.

Another case, which was described as the Penge mystery, became something of a *cause celebre* in 1877. The Attorney-General (Holker) and the Solicitor-General (Giffard) prosecuted for the Treasury. Four people conspired to murder by starvation the wife of one of them, Louis Stanton, who was then living in criminal intercourse with a young woman, Alice Rhodes, and wished to marry her and live on the proceeds of his wife's property. His brother, Patrick Stanton, with his wife and her sister, Alice Rhodes, were all implicated. Louis Stanton first caused his wife to sign a paper making over to him all her property, 3,000*l*, and then deliberately shut her up and starved her. All four were condemned to death.

To pass from these dark scenes of horror and crime to other scenes of treachery or dishonesty, and always to see the seamy side of human nature, must tend in most cases to harden and sour a man's outlook on life. But it never seemed to touch Hardinge Giffard. His naturally sweet and strong nature seemed incapable of harbouring cynical or bitter thoughts. His daughter, Lady Evelyn Giffard, writes of him: "I think my father's character was a confutation of the idea that the Law makes men harsh and suspicious. I never knew him say a hard thing of anyone, or judge anyone unheard. I remember his quoting from a sermon, 'The Almighty did not judge the first of men without hearing first what he had to say for himself.' He did not like to refuse to help any hard case, and, I fear, was often taken in, as he had, of course, no time to make searching enquiries."

THE TURF FRAUDS CASE.

In the same year, 1877, Sir Hardinge took a leading part in what was known as "The Turf Frauds" case. Before Baron Huddleston at the Old Bailey, Harry Benson, William Kerr, Frank Kerr, and Edwin Murray were indicted for forging a warrant for 10,000*l*. Counsel for prosecution: The Solicitor-General, Messrs. Bowen and McConnell. Counsel for prisoners: Messrs. Willis, Q.C., Avory, Sergeant Parry, Crain, Straight, Bisley, and Montagu Williams. The prisoners had induced the Comtesse de Goncourt to enter into a number of betting transactions, by means of a sham "sporting paper" and an alleged "system." The Comtesse was at first successful, and received large cheques drawn upon "The Royal Bank of England," so continued sending remittances as requested. She was then told that, if she wished to keep the money she had already won, she must comply with the requirements of the laws of England, and send another £1,200. She was willing to do this, but, as she had found some difficulty in cashing her cheques, she was obliged to raise money. She therefore consulted her legal advisers in Paris, who at once made enquiries, and found the whole thing was a fraud. The prisoners were all convicted, Benson getting seven years' penal servitude, the two Kerrs and Bale ten years each, and Murray, who was accessory after the fact, 18 months' hard labour.

During the trial it came out that attempts had been made to corrupt some of the prison officials, and plans for an escape were found in Benson's possession. As a result, Chief Inspectors Meiklejohn, Druscovitch and Palmer, and a solicitor named Froggatt, were arrested and charged with conspiracy. It was proved that the detectives had connived at the frauds, and helped Benson and Kerr to evade arrest, and had been handsomely paid for so doing. Also that they had refrained from stopping the bank notes which had been paid to the prisoners, or, if they had already been stopped, they warned the prisoners of the fact. Froggatt was charged with destroying evidence. All the prisoners were convicted, and got two years' hard labour apiece.

Hardinge Giffard was instrumental in bringing these rogues to justice. So many raids had failed that he, then Solicitor-General, decided that high officials at Scotland Yard must be involved. So he sent for the High Commissioner of Police, and with him went to the Chief Magistrate at Bow Street and obtained a warrant, unknown to anybody but these three. Liverpool police were sent for, and, until they arrived, did not know what they had come for. Sir Hardinge Giffard met them personally at Euston Station, and put the warrant into their hands. They were ordered to execute it, and the raid was successful, catching amongst them the Chief Inspectors, as has been said.

(*To be continued.*)

London Letter.

Temple, London,
24th April, 1929.

My dear N.Z.,

The retirement of Lord Shaw of Dunfermline and the consequential Scottish appointments have, for our purposes, a double interest. The most practical is the change in the constitution of your Judicial Committee as well as the change in the constitution of our House of Lords, appellate tribunal. The second interest is more remote and abstract: the illustration of how that stream of promotion, once a man is lucky to be afloat on it, carries him further and further from the struggle of existence and the courts but into quiet and pleasant pools which are anything but backwaters! The Lord Advocate, who becomes our and your new judge of ultimate appeal, is a young and attractive-looking man, of whom I know no more than that I once had the seeing through the House of Commons of a Bill in which he was authoritatively concerned and was then informed, and came verily to believe, what a pleasant and efficient man he was and is. He follows the footsteps of his father, Lord Watson of Thankerton, who also floated upon that stream upon which he had had the hardihood and the judgment and skill to throw himself: Solicitor-General for Scotland, Lord Advocate and Lord of Appeal. Of the new Lord Advocate, formerly Solicitor-General for Scotland, and of the new Solicitor-General for Scotland I know little or nothing at the moment; for us, in the law, Scotland is veritably a foreign country, and indeed I think I have had occasion to point out to you earlier that, as to certain provisions as to procedure and service out of the jurisdiction, Scotland is even more foreign, more remote, than the other countries of the world which are foreign in common parlance, also.

The death of Sir Herbert Austin is too sad to comment upon here, and I ask your leave to make no more reference to it than this, that the tributes paid to his memory on Monday last, at the Old Bailey, where he so long and so arduously worked in official capacity, and by the City Recorder, the Common Serjeant, the Director of Public Prosecutions and the leader of the Bar there practising (not to mention the confirmation of Judge Atherly Jones, K.C., and Sir William Waterlow on behalf of the Court of Aldermen and the City Corporation) contemplate a man of great forensic learning, as you may suppose, and also a man of many friends and their friendships formed as well by ready help on all difficult occasions as by the gaiety of a disposition reluctant to be in the least depressed by continual and increasing pain. You have, alas! had more than your share recently, of sad deprivations among judicial authority; I have just had the privilege of reading your public, professional appreciation of the man whose death was perhaps your most striking loss. We will not further contemplate this aspect of things.

The publication of Lord Birkenhead's speeches, prefaced by a note by Lord Hugh Cecil, will attract your attention. The belligerence of the speaker is interesting to observe in the speeches thus collected: there you see portrayed a feature of the great man and from it you can infer his courage as advocate and, without offence, careerist. There is missing, however, to my mind the humourous atmosphere, less a matter of word and phrase than the general effect of the sally framed by the personal attitude and expression of the man delivering it. Lord Birkenhead, though good on paper, is not found at his best there; he must be seen to be believed, or at least to be appreciated. To read his orations is to miss the footlight element, a prevailing element, though in the best sense, in the man. As well as his ready tongue, his profound learning and his nimble brain, it is his personal magnetism, "got over," that achieves his results. Those of you who have not yet been to England, but shortly propose coming, I venture to advise to read the speeches and form your impression of a man whose actual oration, if he happens to make an interesting one in the House of Lords or on the political platform and you happen to be there to hear him, you will find very much more enjoyable. I can illustrate my point by saying, as contrast, that if you thus made the acquaintance of our admirable honest and idealistic Mr. Baldwin by reading the wonderful things he says, and then came to hear him, you would be singularly disappointed, though not so much disappointed as you might have been a year or two ago, for he improves. The truth of Lord Birkenhead is, of course, his astonishing vitality; physical, as instanced by his adequate (though always well-groomed) head of hair; mental, as made manifest by the working of his mind and tongue as you hear him speak; of morale, as you appreciate from a study of his career and from the realisation of your feeling, upon seeing and hearing him, that there must still be lots more career to come, though what that may be, gone into the City, it is impossible to conceive. His infinite, and admirable, exuberance will, we may be sure, devise a something else and achieve it; and if you hear talk of any bad qualities in him, forget that talk, since, even if it were true, it is no concern of ours and has no bearing upon his public values and services. For my part, having known him by sight from his (professional) youth up, and having seen no deterioration in him but a constant development, I do not believe a word I hear in this regard, and I take care that I hear as little as possible. There is always personal gossip about such "star-performers": sometimes it is wholly false, sometimes it is wholly true, and most often it is half false and half true. I have never collated, in my mind, exactly what is said to the personal detriment of the Earl of Birkenhead, any more than I did so in the case of F. E. Smith; I only know that an eminent Judge of the High Court, Oxford colleague of his and family acquaintance of mine and a single-minded man of all the domestic virtues, entertains the highest opinion of him both as to his abilities and his aforesaid vitality.

The divergence of view of the Court of Appeal, Lords Justices Greer and Russell (Lord Justice Scrutton dissenting), upon the subject of votes attributable to the residence of directors upon their Company's premises—*Frost v. Caslon*; *Frost v. Wilkins*, decided early this week—is amusing in its context, but not necessary to be reported here in detail. It represents, or will on many a political platform come to represent, the battle of capitalism against labour, in that it may be made to indicate a ruse on capital's part to weight the balance of democracy by getting more than a fair share of its voice, in politics, for wealth. The case turned upon the occupation of "business premises"; and you will readily understand the points made on both sides, when the premises were, for business purposes and primarily at any rate, the company's and not the director's.

The less recent case, *Carr v. Carr and Goldup*, is of a general interest from the point of view of those concerned in the administration, or the obtaining for clients, of justice. The case was, in origin, an undefended divorce suit, promoted under the poor persons' provisions and procedure. Hill, J., observing a suspicious reference in the correspondence to the petitioner's complacency or even sympathy in contemplation of the respondent's prospective adultery, felt himself unable to decree; the assistance of the Court of Appeal was invited, investigations made upon the basis of the observations of Hill, J., having proved to be to the advantage of the petitioner; and the Court of Appeal, praying in aid the consideration, enquiry and supervision of the King's Proctor, remitted to Hill, J., for retrial upon a basis free of the suspicion which he had had to entertain. Now, there is no point of law and little point of fact in all this; but the instance serves to show how a poor person may avoid injustice under the merciful provisions of the day; and great interest attaches to, or great enlightenment is afforded by, the utterances of Hill, J., when the case came before him on the second occasion. Not before had been so appreciable the difficulties of a tribunal having to deal with a matter upon evidence given in chief only; nor before had been realisable the assistance which a Court derives from the process of cross-examination of a witness by the opponents of the case in support of which he testified. The whole matter is something of a lesson to advocates who, at one time or another, may find themselves briefed to present a case to which no answer is made but as to which there is more than a formal need for the Court to be satisfied. The obvious deductions, from the process of the case and from the observations made during the course of it, is that counsel, upon being instructed in such a case, should put himself in the position of an unwilling, or at least a disinterested, judge and have himself, in that capacity, satisfied before he lets himself be taken into court upon the case.

The least recent of all my cases, *Sasha Ltd. v. Stoenesco* has a technical and, to all of us in the profession who have ever reached that first eminence when the professional photographer thinks it worth while to photograph us in case we may go higher and our picture have a press value, a personal interest. Is the ownership of the copyright in a photograph in the photographer or in the sitter? This is not a new question, nor is it capbale of an answer of a general overriding nature. It depends upon the circumstances; in the circumstances, here, Mackinnon, J., found for the plaintiff. Was the plaintiff the photographer or the sitter, you ask? Think again, Sir, I pray you. Invest though we may our company with all the *persona* and privileges of the individual, I hardly think the most advanced legal thought conceives a company capable of being photographed for press purposes.

So much for the law and things legal. It is to me a significant sign, that the lawyer is now with increasing frequency becoming the object of kindly and even laudatory references in the press and in public, whereas the stockbroker comes to be the villain of the piece and the victim of odious expression. That means, to me, that the latter is drawing upon the private purse of the public in lieu of the former!

Yours ever,

INNER TEMPLAR.

Australian Notes.

(By Wilfred Blacket, K.C.)

The New South Wales Bill to amend the Matrimonial Causes Acts passed by the Legislative Council, and subsequently agreed to by the Assembly with amendments, remained at that stage when the Session ended. It provides for several very important changes in jurisdiction and procedure and in particular enables any three Judges of the Supreme Court by rules of Court to delegate to the Registrar power to do such things and "transact such business and to exercise such authority and jurisdiction as is now done, transacted or exercised by the Court except in respect of the hearing of suits (in which an appearance is entered) or in respect of matters relating to the liberty of the subject," with power to the Registrar to refer any matter to the Court, and with power to the Court to direct any matter decided by the Registrar to be reargued before the Court. Obviously the intention of the clause as it originally stood was to cast upon the Registrar the duty of hearing cases in which no appearance had been entered, but in the Assembly the words included in parenthesis were struck out and we shall have to wait until September to know "whether the words proposed to be omitted shall stand part of the Clause," but even if the will of the Assembly prevails, the Registrar may be clothed with very important judicial powers.

Another very important amendment is in Clause 2 of the Bill which provides: "The Court may make any order as to the costs of any proceedings . . . . which it deems just, and except in the case of proceedings on appeal may order payment of costs as between solicitor and client . . . . The Court may by consent of all parties appearing at the hearing before the Court assess the costs of any proceedings, and in the case of interlocutory proceedings may do so without the consent of the parties and the costs so assessed shall be recoverable from the person ordered to pay the same in the same manner as if they had been duly taxed and certified by the taxing officer."

Under the Acts to be amended, orders for payment of alimony and maintenance are enforceable by attachment only, but this Bill provides that in cases where there is inability, through lack of means, to proceed by attachment, proceedings may be taken in the Police Court and empowers the Justices to deal with the matter in all respects as though it were a complaint under the Deserted Wives and Children Act—even to the extent of casting the defaulter into the dungeon for such case made and provided. One other amendment provides for a jury of four in lieu of the jury of twelve as now required in cases where damages are claimed against a co-respondent.

Miss Olive Pearce had an agreement with her employer, W. H. Gardner, of Petersham, hairdresser, that if she attended to the hair of any of her, or anyone else's girl friends after 1 p.m., closing time on Saturday, that she would put one-half of the proceeds into the cash register, and invest the balance on ponies or otherwise as she thought fit. The Union Secretary caught her putting a permanent wave into some deplorably flat hair at 3.30 p.m. on one Saturday. The Court held that Olive was an employee and that there had been a breach of

the award. It is to be hoped that the wave will be as permanent as the penalty for no one ever troubles about paying up any penalty in the Industrial Court. A penalty imposed upon employees is simply the expression of a pious hope; a penalty imposed upon employers is a matter to be dealt with by the Minister of Justice.

School-teaching is not an industry. The Federated State School Teachers—who are always anxious to learn—found out that fact when they listened to the majority wisdom of the High Court. The decision of the majority of the learned Judges, Knox, C.J., Duffy, Rich and Starke, JJ., contains this passage: "They are not connected directly with the production or distribution of wealth, and there is no co-operation of capital and labour in any relevant sense, for a great public scheme of education is forced upon the communities of the States by law." Isaacs, J., dissented. He said that "the contention of the respondents sounds like an echo from the dark ages of industrial and political economy. It further neglects the fundamental character of industrial dispute as a distinct phenomenon of modern society." Surely His Honour spoke without his usual accuracy when he describes an "industrial dispute" as a "phenomenon." Is it not rather the natural and inevitable result of industrial legislation when applied to an industry. The learned Judge is also reported to have said of and concerning the contention of the respondents: "It not merely ignores the constant currents of life around us, which is the real danger of deciding questions of this nature, but it also forgets the memorable industrial organisation of the nations not for the production or distribution of material wealth but for service, national service, as the service of organised industry must always be." *C'est magnifique*—and no one, except the other four Judges, would venture to say it is not the law.

The Industrial Commission, after jolting over many ruts on the road to fixation of the basic wage for a man and one wife, has now settled down to arduous work The walrus, it will be remembered, wanted to chat about "shoes and ships and sealing wax and cabbages and kings": the Commission's enquiry has an equally wide range. It has been informed upon sufficient evidence that a bricklayer must wear a four-shilling silk necktie in working hours. Other evidence proves that the wife of a worker pays £5 6s. a year for face powder at 4s. 6d. a box. The boxes costing 1s. 6d. a box are as, it is alleged, only suitable for use by other women. Tweed suits for workers must be made to order at a cost of £9 9s. It is within the knowledge of the public that "ready-to-wear suits" are sold at 60s. to 80s., but these are probably snapped up by Supreme Court Judges who can shop early.

In England there is more or less strictly observed rule of old origin that the words of a living text-writer must not be cited to the Courts as authorities. The following dialogue is reported as having recently occurred in the Court of Appeal:

Counsel: "I now refer, my Lords, to Scrutton on Charter Parties, 12th Edn., p. —."

Scrutton, L.J.: "You are aware that the author of that book is still alive?"

Counsel: "I'm sorry, my Lord."

Rural Intermediate Credit.

Progress to Date.

The following account of the operations to date of the Rural Intermediate Credit Board has been supplied to this Journal by the Commissioner of Rural Intermediate Credit (Mr. J. W. Macdonald, C.M.G.):—

"Now that the system of rural finance which was instituted by the Act has been put into practical operation, it will be of interest to readers, and to country practitioners, in particular, to learn what progress has been made with the scheme.

"In terms of Section 14 of the Act, the Dominion has been divided into sixteen districts, in which district boards have been established, with headquarters in the following towns: Whangarei, Auckland, Hamilton, Gisborne, Napier, New Plymouth, Wanganui, Palmerston North, Masterton, Blenheim, Nelson, Greymouth, Christchurch, Timaru, Dunedin, and Invercargill. Officers of the Board, under the designation of 'District Intermediate Credit Supervisor,' have been appointed at each of these towns; and in addition, for the more convenient conduct of the Board's business in certain of the districts, additional District Intermediate Credit Supervisors have been appointed at Waipukurau, Dannevirke, Hawera, and Wellington.

"In deciding upon the personnel of the district boards the central Board has aimed at making them as representative as possible, and, as a general rule, the constitution of the district boards is as follows:—

(a) The District Intermediate Credit Supervisor stationed at the headquarters of the district, as chairman of the district board:
(b) A representative of a Government Department with such special knowledge of farming matters as to render his services of particular value to the district board; the Lands and Survey, Valuation and Agriculture Departments are represented on the district boards:
(c) A stock and station agents' representative nominated by the local stock auctioneers and agents' association:
(d) and (e) Two prominent farmers resident in the district, selected as far as possible so that all farming interests in the district are represented.

"The calibre of the district boards is uniformly high, and the announcement of the personnel evoked favourable comment in regard to the qualifications of the members appointed. It is a matter for general satisfaction that persons of such prominence in their respective spheres of activity should be willing to make their services available in the interests of the farming community. The personnel of the district boards is a guarantee that in the granting of loans all relevant factors will receive due consideration, and that the interests both of investors in the Board's debentures and of borrowers will be properly studied. In addition to the specific functions with which they are entrusted under the Act, the Boards are in a position to render valuable advice on problems of rural finance not only to the central Board but also to all classes of borrowers.

"The Act authorises the Rural Intermediate Credit Board to invest its funds in any of the following ways:—

(a) By advances to farmers as members of a special class of limited liability company, termed 'co-operative rural intermediate credit associations' (Part II of the Act);

(b) By advances to farmers individually, the loans being additionally secured by the partial or entire guarantee of a company or private individual (Part III of the Act);

(c) By loans to farmers' co-operative organizations (Part IV of the Act);

(d) By discounting farmers' promissory notes or bills of exchange (Section 15 of the Act, and paragraph 46 of the Rural Intermediate Credit Regulations of the 21st December, 1927).

"It should be noted that the total advances which a farmer may obtain from the Board, whether he applies through an association or direct, or obtains accommodation through a promissory note or bill of exchange presented to the Board for discounting, may not exceed the sum of £1,000; and, in the case of loans to farmers as distinct from loans to co-operative organisations, the loan must be applied for one or more of certain specified purposes set out in Sections 48 and 60 of the Act.

"The securities taken by the Board are mainly chattels securities being mortgages of live and dead stock, implements, crops, produce, and the like with, in suitable cases, collateral securities over land, and, in the case of loans to individual farmers under Part III of the Act, guarantees by approved persons or companies for not less than 20 per cent. of the original amount of the loan, or, where deemed necessary, for a larger percentage. Where a loan is granted to a member of an association the advance is made by the Board to the association and the security from the farmer-borrower is taken in the association's name. The Board is suitably secured in each case by a charge over the association's assets and the investments made by the association out of the funds advanced by the Board.

"In view of the formalities to be complied with in the formation of associations established under Part II of the Act, the bulk of the earlier loans granted by the Board were made direct to individual farmers, with a collateral guarantee, under Part III of the Act.

"Meanwhile, active steps were taken to form associations in various districts, with the result that twenty-one associations have already been registered under the Companies Act. The names of these associations are: Northern Wairoa (Dargaville); Helensville; Waiuku; Hamilton; Otorohanga; Te Awamutu; Te Aroha; Hauraki (Paeroa); Morrinsville; Te Kuiti; Taumarunui; North Taranaki (New Plymouth); Kaimata (Inglewood); South Taranaki (Hawera); Waimarino (Raetihi); Oroua (Feilding); Horowhenua (Levin); Wairarapa (Masterton); Tapanui; Central Southland (Wright's Bush); Mataura.

"An encouraging feature in connection with these associations is the fact that many prominent farmers, who do not propose to avail themselves of the borrowing provisions of the Act, have joined the associations in order to assist in their formation and to see that they receive a good start.

"A considerable amount of money has also been made available for farmers under the discounting powers conferred on the Board by the Act. The great majority of the promissory notes discounted have been indorsed by Dairy Companies to enable suppliers to purchase manures and seeds or other seasonal requirements. As a rule the Company protects itself against its contingent liability as indorser by deductions from the milk cheques of the supplier whose note is discounted, and takes up the note from the Board before due date. Where a company is doing extensive discounting business, it can utilise the funds available for the deductions from its suppliers' milk cheques for the purpose of taking up selected promissory notes before due date; and the Board allows the company rebates of interest, provided the company distributes the rebates equitably among the suppliers whose notes have been discounted.

"In the conduct of its lending business the central Board has kept steadily in view the consideration that the funds at its disposal will ultimately depend upon the sale of debentures to the public. Although the Rural Intermediate Credit Act authorises an advance from the Consolidated Fund of £400,000, to enable the Board to commence lending operations immediately, one-third of that sum has to be placed to a special fund for the redemption of debentures and so cannot be used for lending purposes. Apart from the Treasury advance, the Board relies entirely upon funds raised by debentures, which will mainly be secured on the stock mortgages taken by it from its borrowers. It should be mentioned, however, that the Rural Intermediate Credit Act provides that the claims of debenture-holders against the Board have priority over that of the Crown in respect of the advances from the Consolidated Fund. In addition, the debentures are constituted a floating charge over all reserves and other assets of the Board.

"While there are thus substantial assets as security for debenture-holders over and above the mortgages held by the Board in respect of its loans, it has been the policy of the Board to insist on adequate margins of security for all loans guaranteed by it. This has given rise to suggestions in some quarters that the Board has adopted an unduly high standard of security; but it is felt by the Board that the farming community as a whole will benefit by its policy, which is to obtain and keep the confidence of the investing public, with a resultant steady flow of money into rural investments made by the Board.

"The Board realises also that the fact that its debentures are created trust investments casts upon it an added responsibility to see that its standard of security is maintained at a high level.

"The Board has hitherto been able to obtain the requisite funds to meet applications for loans without finding it necessary to go on the public market, as, in addition to the amounts received from the Treasury under the provisions of the Act, a considerable sum has been provided by investors who have approached the Board with offers to purchase its debentures."

The Chief Justice of Victoria is paid a salary of £3,000 per annum, and puisne Judges of the Supreme Court of that State receive £2,500. It is proposed to increase these salaries by £500 a year.

Legal Literature.

Stone's Justices' Manual.

Sixty-first Edition (1929): By F. B. DINGLE. (pp. cclvix; 1914; clvi: Butterworth & Co. (Publishers) Ltd.: Shaw & Sons, Ltd.)

It is doubtful whether the utility of *Stone* is generally recognised by practitioners in this country, and possibly the title of the work is to a large extent responsible for its being overlooked. It deals, of course, with all matters which fall to be determined in England by justices, and so numerous and varied are such matters that it becomes a work from which information can be readily gleaned on numerous subjects not dealt with as a connected whole in any other legal treatise. Merely to enumerate the separate topics treated would occupy considerable space but it may be said, generally, that it deals with every offence punishable summarily in England. No doubt the wording of the English Statutes and Rules in any given case "made and provided" may differ slightly from the New Zealand Acts or Rules; but it is by a comparison of the English legislation and the decisions interpreting it that very valuable assistance is so frequently obtained. Take for example, the chapters on animals, apprentices, assault, bastardy, births and deaths, building societies, by-laws, children, clubs, coin, compounding offences, dangerous drugs, disorderly houses, false pretences, felony, friendly societies, gaming and betting-houses, guardianship of infants, highways, husband and wife, intoxicating liquor laws, lottery, merchant shipping, money-lenders, obscene books, etc., offences against the person, pawnbrokers, public health, shops, Sunday, Town Clauses Act, vagrants, weights and measures, women and girls—to mention only a very few of the different titles—and an idea, though necessarily an inadequate one, of the vast scope of *Stone*, with its 1,900 pages of closely-printed text is obtained.

To those whose practices take them into the Police Court and who are unacquainted with *Stone* this reviewer without the slightest hesitation recommends it; those who use it will know that this recommendation is unnecessary.

Anson's Principles of the English Law of Contract.

Seventeenth Edition: By J. C. MILES, Kt., M.A., B.C.L., and J.L. BRIERLY, M.A., B.C.L. (pp. xl; 446; 15: Oxford University Press).

Anson's Law of Contract is, of course, primarily intended as a work for students. Nevertheless such a reputation for accuracy and lucidity has it now acquired that many practitioners have come to regard it almost as a *vade mecum*, as a perusal of the outward appearance of the volume on the shelves of any Supreme Court Library will testify. This latest edition is in entirely new hands for the editor of the last five editions, Sir Maurice Gwyer, finds himself prevented by the duties of the office of Solicitor to the Treasury, to which he has been appointed, from again undertaking the editorship; but the new editors come with the qualification of having already published, almost as a supplement to *Anson*, a case book on the law of contract. Naturally the revision has been considerable and many important alterations have been made. The subject of part performance has been differently treated, and on the whole more satisfactorily treated. The topics of infants' contracts, mistake, restraint of trade, severability of illegal contracts, acquisition of rights under contracts with third persons, assignment of liabilities (where one would have expected some discussion of the assignability of part of a debt), discharge by agreement, conditions and warranties under the Sale of Goods Act, and *quantum meruit*, are others where considerable change has been made in the text in order to bring it into line with recent decisions.

Leake, *Chitty*, *Pollock*, and *Addison* (if this last ever comes to be modernised) will of course always remain the standard works of reference for the practitioner, but as a book, as it were, of first instance, there will always be a place in any legal library for *Anson*.

Correspondence.

The Editor,
"N.Z. Law Journal."

Sir,

Legal Education.

It seemed to me that the case in relation to Legal Education presented to the recent Conference was thus: The Hon. the Attorney-General pleaded that the day for clerkships and articles was past and gone and that college-bred lawyers were the order of the day in up-to-date countries. Professor Adamson followed with a very thoughtful paper on the benefits derivable from the same university course recommended by the Attorney-General.

What I am concerned to enquire about at the moment is "What is the son of the country practitioner going to do if he desire to become a solicitor?" Distasteful though it may be to country lawyers, I believe that the barrister can be properly equipped for his work only by attendance at a university, and I believe that so far as they are concerned, the time will yet come when all our barristers will go through the university and not merely take an extra-mural course. From time immemorial the aspirant for forensic honours has left home and kindred and gone to the Court towns, there has read in chambers, eaten the prescribed number of dinners, been admitted and then has started to practise in the Courts. So far as barristers are concerned, I can see no reason, therefore, why they should not all become university graduates.

But what of the solicitors? From time immemorial these have commenced their careers by licking stamps and posting letters. There was nothing wrong with the system of articles—the product was a well-equipped law agent, a doer, as they say in Scotland. What niche in the suggested reforms is he hereafter to fill? Will he be required to go to a university town, too, or will the universities conduct glorified correspondence classes? Is it true to say that the system of articles is irrevocably relegated to the past?

I confess that the need to embark upon some system of legal education is clamant; but I see no reason yet why those who propose to follow the solicitor side should be compelled to go to a university town.—I am, etc.,

LL.B.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"The lawyer has been a great guardian of personal and public liberty."

—Sir T. W. H. Inskip, K.C.

Vol. V. Tuesday, July 23, 1929 No. 11.

Exemption from Military Service.

The refusal of the Magistrate's Court in Auckland to grant exemption from military service to two medical students has led to a great deal of attention being given by the daily Press, Parliament, and Church authorities to the case of the conscientious objector. It is a question whether it is not a misnomer to call one who applies for exemption from military service on the ground that such service is contrary to his religious belief a "conscientious objector." In England "conscientious objection to the undertaking of combatant service" was by Section 2 (1) (d) of the Military Service Act of 1916 ground for a certificate of exemption, and in our Military Service Acts somewhat similar provisions appeared. The terms, however, of Section 65 of the New Zealand Defence Act of 1912 are substantially different from those of the English Act, exemption under our Statute being granted, not because of a conscientious objection to combatant service, but because the Magistrate is satisfied that the service is contrary to the applicant's religious belief.

No doubt the task of a Magistrate in these cases is difficult. Nevertheless there are many cases in which the state of a man's mind has to be ascertained by a Magistrate. *Mens rea* is always an ingredient of crime, and it has been well stated that the state of a man's mind is as much a question of fact as the state of his pocket. The difficulty of the enquiry therefore is not good ground for adopting an interpretation of the Statute which means departure from the ordinary meaning of the words employed. It is not beyond question that Magisterial decisions have not erred in this respect. The Statute itself says plainly "the ground of exemption is applicant's religious belief." The interpretation given by Magistrates generally is, we believe, that the ground for exemption must be the belief of the religious system to which the applicant belongs.

The case in which this interpretation to the Statute, which is being followed, was given was *In re Burrell*, 9 Magistrates' Court Reports 23, a decision of the late Mr. S. E. McCarthy, S.M. In that case the applicant was a Christadelphian and it appears that in 1899 members of that society petitioned Parliament praying to be exempted from military service on the ground of religious belief. In their petition it was alleged that the Christadelphians had always been "opposed conscientiously to the bearing of arms, whether for offensive or defensive purposes, on the ground that the Bible (which they believe to be the word of God) commands them not to kill, not even to be angry with their fellow men without a cause; not to resist evil, to love their enemies, to bless them that curse them, to do good to them that hate them and persecute them, and to do unto all men as they would all men should do unto them." The ecclesiastical guide put in, which contained a statement of the doctrines forming the Christadelphian basis of fellowship, did not contain any positive statement as to abstention from military training and service, and the Magistrate found that the allegations in the petition went somewhat beyond the doctrine set out in the guide. There was, nevertheless, plenty of material from which a reasonable inference against righteousness of combatant service could be inferred. The Magistrate, however, came to the conclusion that religious belief within the meaning of the Act was not, in his opinion, the mere belief of the individual but of the religious system to which he belonged, adding that, if the former were the case, then each individual could construct a belief for himself so that it would be impossible to test his *bona fides* as the subsection contemplated. In conclusion he found: "As the religious body to which the applicant belongs does not in terms condemn military training and service as part of its religious system, I am unable to grant the application which is refused."

Another reported case is *In re Caird*, 8 Magistrates Court Reports 133, a decision of Mr. Cruickshank, S.M. In that case the applicant was a rationalist and a humanist, and the learned Magistrate came to the conclusion that, as the applicant had no religious belief at all, any objections he might have to military service, good or bad, were, at any rate, not religious, and consequently no ground for exemption. The Magistrate referred to Willes, J., in *Baxter v. Langley*, 38 L.J.M.C. 5, for a definition of religion. That learned Judge said: "What is 'religion'? Is it not what a man honestly believes in and approves of and thinks it his duty to inculcate on others, whether with regard to this world or the next? A belief in any system of retribution by an over-ruling power? It must, I think, include the principle of gratitude to an active power who can confer blessings." Relying on this definition the Magistrate refused to regard rationalism and agnosticism or any negative antitheistic views as the kinds of religions meant by the Act. There is no indication in this judgment that if the applicant had professed a positive religion and his manner of life supported his professions, the Magistrate would have refused to credit him with a religious belief sufficient to sustain an objection to service.

It is believed that some Magistrates prefer the view that it is their duty to enquire into the religious belief of the applicant and not to restrict him to the primary beliefs of the Church to which he nominally belongs. Their view is that it is not impossible to ascertain the truth of the applicant's professions. It has been held in England that when a witness claims the right to affirm, instead of being sworn, on the ground that he has no religious belief or that the taking of an oath is contrary to his religious belief, it is for the Judge to satisfy himself that the witness comes within the condition stated in the Section of the Oaths Act relating to religious belief. If an enquiry as to religious belief can be held in such cases, it does not follow that it can be held where the existence of a principle of belief as specified in our Defence Act is the subject of enquiry. At the same time, before amendments are made it would be well to obtain from Magistrates generally a considered view of the proper interpretation of the Statute and their ability to make the tests necessary or to be made in any amended legislation.

Supreme Court.

Adams, J. April 15, 19; June 10, 1929.
Dunedin.

ATTORNEY-GENERAL v. DUNEDIN ARCADE CO. LTD.

Street—Dedication—Way Created by Lessee as Arcade—Owner Not in Occupation Except for Fractional Part of Day Between Surrender of Lease and Granting of New Lease—Intention to Dedicate Question of Fact—No Presumption of Dedication From User by Public as Against Owner—User of Way by Public as of Right Not Established—Evidence Consistent with Mere Permission or License.

Action by the Attorney-General at the relation of the Mayor Councillors and Citizens of the City of Dunedin against the registered proprietors of a parcel of land, being Sections 61, 70 and part Section 69, Block VII Dunedin, for a declaration that there existed over part of such land a public highway approximately 50 links in width extending from High Street to Maclaggan Street and known as the Royal Arcade. The plaintiff also claimed an injunction restraining the defendant from obstructing the alleged highway. The sections referred to formed a rectangular strip of land 330 feet in depth between the two public streets abovementioned. It was admitted that there could be no valid dedication after 1st January, 1887, when the Municipal Corporations Act, 1886 came into operation, and evidence was given to establish dedication before that date. The evidence showed that in 1861 Daniel Campbell executed a lease to Henry Farley of Section 70 and parts of Sections 61 and 69 for a term of 14 years from 1st October, 1861. On the execution of the lease Farley laid off a way through the demised land from High Street to Maclaggan Street and erected lean-to wooden buildings fronting the way on both sides throughout its length. The buildings were flimsy and were divided by partitions into upwards of 50 small shops each with a depth of 13 feet 6 inches. The way between the shops could not have been more than 11 feet in width from shop front to shop front and was formed of boards supported by wooden piles. The shops and the way were obviously temporary structures. On 5th March, 1862, Farley offered for sale by auction sub-leases of the shops for terms of four years at a fixed rental, and all the sub-leases, with the exception of four which were reserved, were sold to purchasers who entered into possession and carried on business. On 11th April, 1864, a lease of a further portion of Section 61 was granted by memorandum endorsed on the original lease, to Farley, and on 27th September, 1864, a lease of the remaining portion of Section 61 was given. All these leases expired on 1st October, 1875, so that from September, 1864 the whole of Sections 61 and 70 was held by Farley under leases from Campbell for terms expiring on 1st October, 1875. On 17th February, 1868, a deed surrendering these leases was executed. The deed, after reciting that the parties had agreed that the land included in the existing leases should be surrendered to enable Campbell "immediately to grant a new lease thereof" to Farley for the term of 21 years from 1st July, 1866, witnessed that such land was surrendered "to the intent that the residue of the several terms might merge in the immediate reversion in fee simple . . . and that Campbell might be enabled immediately to grant a new lease thereof." The new lease to Farley was executed on the same day and took effect immediately after the surrender but without any appreciable interval of time. The term of that lease was 21 years, computed from 1st July, 1866. In that lease the way was described as "a private street called Fleet Street." The land had always, except for a short period in 1868 before the last lease to Farley was executed, been mortgaged by the owner. The evidence tending to prove and disprove dedication appears sufficiently from the report of the judgment.

Barrowclough for plaintiff.
Hay with him **Fairmaid** for defendant.

ADAMS, J., said that the point was taken by counsel for the defendant that during the whole period from 1856 to 1873, except for a short time in 1868 during which the last lease to Farley was executed, the fee simple of the land was vested in mortgagees. A mortgagor who had conveyed the fee simple to his mortgagee could not dedicate any part of the land without the consent of the mortgagee: **President of the Shire of Narracan v. Leviston,** 3 C.L.R. 846; but if there had been an effective dedication before the last mortgage was given, the mortgagee would have taken subject to the dedication. That was so even under the Land Transfer Act: **Martin v. Cameron,** 12 N.Z.L.R. 769. That the question whether the competent person or persons for the time being intended to dedicate the way as alleged was one of pure fact was finally settled by **Folkestone Corporation v. Brockman,** (1914) A.C. 338. The intention of the owner to dedicate must be a real intention: **Macpherson v. Scottish Rights of Way and Recreation Society Ltd.,** 13 A.C. 744. The plaintiff's main submission was that the evidence of user by the public from 1866 to 1875 was sufficient to found a presumption of dedication which it lay upon the defendant to rebut. Assuming for the present that that submission was correct, His Honour had first to consider the state of the title at the material times. The defendant had shown that at all times from the execution of the first lease in 1861 to the expiration of the last term in 1887 the owner of the fee simple was continuously out of possession and was not at any time entitled to possession of any part of the demised land. It was also shown that the lease of 1868 was executed in pursuance of a contract on the faith of which the existing leases were surrendered. Had there been no such contract or new lease the then existing leases would have continued to run until 1st October, 1875, and in that case also Campbell would have had no right of entry or interference. What, then, was the principle to be applied in such cases? His Honour referred to **R. v. Barr,** 4 Camp. 16; **R. v. East Mark (Inhabitants),** 11 Q.B. 877; **Powers v. Bathurst,** 49 L.J. Ch. 294 **Farquhar v. Newbury Rural Council,** (1908) 2 Ch. 586, (1909) 1 Ch. 12; **London County Council v. Hughes,** 75 J.P. 239; **16 Halsbury,** pars. 47, 48, note "a," p. 35, note "l," p. 36, and said that in his opinion the authorities showed that where the land over which a public highway was claimed had been continuously under lease no presumption from user by the public could be made against an owner who was in fact out of possession and control. To justify such presumption it must be shown that there was a period during which the owner could have taken some action to exclude the public. The question whether the owner could have taken any such action was a practical question of fact to be decided on the evidence in accordance with reason and common sense. In the circumstances of the present case the most that could be said was that in 1868, for the fractional instant of time between the execution of the surrender and the execution of the new lease under a pre-existing contract, the owner, was in the eye of the law, seised of the fee. His Honour held, therefore, that during the period from 1861 to the expiry of Farley's lease in October, 1887, the owner of the fee for the time being was never in possession or control of the land, and that any presumption of dedication on the part of the owner or successive owners which might in other circumstances have arisen had been rebutted by the evidence as to title.

His Honour thought also that the plaintiff's case failed on the facts as to user by the public of right. There was very little evidence as to the traffic in the Arcade prior to October, 1866. Evidence was given that in 1861 the way was used by some school children going home from school and one witness stated he used it when going to the shops on business. There was scarcely any evidence that the Arcade was used as a way for vehicles. Upon that evidence it was obviously impossible to say that at any time before the completion of the first block of two storey buildings in October, 1866, there had been any user of the way by the public. The way was then widened and divided into two footpaths each of 12 ft., and a carriage way of 9 ft. in width. Both footpaths and roadway were constructed of wood on piles. In the article published in the Otago Daily Times of 18th June, 1866, the property was called "Farley's Arcade." In the article in the same newspaper on 20th October, 1866, the way was called "Fleet Street" and was said to be divided into two footpaths and a stoutly battened carriage way. Looking at the evidence as a whole, His Honour was strongly impressed with the view that it was more in favour of permission or license than of an intention to dedicate. The original way was formed of wooden boards supported by rough timber piles over a fairly steep sloping site. The first shops were described as shanties or stalls. Up to October, 1875, the way was in a state of transition. The newspaper report of the case **Farley v. Riley** showed that in 1864 the defendant and other tenants of the shops were in the habit of placing boxes, baskets, and goods outside their shops for a distance of 4 or 5 feet until it was almost impossible for passengers to get through. A witness also gave evidence that from 1864 to 1868 some of the shops had their goods disposed on the fairway. The way was only 11 ft. in width, and that practice must have obstructed the greater part of it. The first tenants claimed the right to put their goods out and that the verandahs under which the goods were placed were part of their shops. The practice was continued after the way was widened and had been so continued until the present day with variations as to space. The tenants

enjoyed the right to so obstruct the way during their tenancies, but the inference against dedication would be equally strong if the enjoyment was by permission only. Some of the witnesses said that persons using the way sometimes had to walk sideways to get in, and sometimes they had to squeeze through. It was also proved that from 1875 onwards concerts were held in the alleged highway and on those occasions the way would be almost entirely obstructed. The evidence on that aspect of the case left no doubt in His Honour's mind that during the whole of its history the way was seriously obstructed by the tenants to the knowledge and with the permission of the lessees. It was in effect used as an extension of the shops for the purpose of displaying and selling goods. Such obstructions would have been an intolerable nuisance on a highway.

The claim was that the way was in fact a highway from 1866, and that starting point was no doubt taken for the obvious reason that there was practically no evidence of public user for any purpose before the completion of the eastern block of brick shops in October of that year. The Otago Municipal Corporations Ordinance 1865 was assented to by the Governor, in August, 1865. Section 56 of that Ordinance provided that "the streets and roads fixed at the original setting out of the City of Dunedin . . . and such streets and roads as have since been opened and dedicated to the public or surrendered to and accepted by the Corporation as a public street or which may hereafter be so opened and dedicated or surrendered and accepted or which may be formed by the Council by virtue hereof shall be deemed for the purposes of this Ordinance public streets." Section 57 provided that the formation repair and ordering of all public streets within the City should be under the management and direction of the Council and be executed under the inspection and direction of the Surveyor. Part XI (Sections 184 to 338 inclusive) of the Municipal Corporations Act, 1876, was extended to the City by Proclamation on 2nd August, 1877. Section 184 of that Act defined "street" as "the whole of any public highway within the borough," and by Section 185 all streets within the borough with the soil and materials thereof were vested in and placed under the control of the Corporation. If, therefore, the way through the Arcade became a highway in 1866, it would be subject to those successive enactments, and finally subject to the provisions of the Municipal Corporations Act, 1920. Moreover, from 1865 onwards the control of the way and the duty of maintenance and repair would have been vested in the Corporation. Yet throughout that period of upwards of sixty years not one farthing had been expended upon it in formation, maintenance, repair, lighting or other matters connected with the care of public streets. The only work done by the Corporation was in 1876, when a water main was put through. The evidence did not satisfy His Honour that that was done at the expense of the Corporation. No entry of such payment had been discovered. The lessee, owners, and tenants for the time being had been left in complete control and had from time to time altered and maintained the way, increased and diminished its width, placed gates and other obstructions across the entrances, built and maintained over it a roof, gallery, and organ loft; obstructed the surface of the way with portable and permanent stands for the purposes of their business, and employed a beadle to maintain order, without a murmur of complaint from the Corporation or from the public. Moreover when the carriage way was destroyed and access for vehicular traffic was finally stopped no protest was made. The public and the Corporation were content. Instead of proceeding against the lessee as a wrongdoer, as one would have expected if the present claim was well founded, the Corporation continued the footpaths and water channels across the entrances in High Street and Maclaggan Street thus effectually preventing the use of any part of the way for horse or carriage traffic. The Corporation then turned its attention to a project to form a public street from High Street to Maclaggan Street parallel to, and only a chain or two to the west of, the Arcade. Further, on 4th September, 1928, the Corporation took a poll of the ratepayers on the question whether a loan should be raised to purchase the Arcade property. It seemed to His Honour that the evidentiary effect of those facts was very strong, if not conclusive, in favour of the defendant's contention. In a somewhat similar case, **Holloway v. Egham Urban District Council,** 72 J.P. 433, the same view was taken by Neville, J. Moreover there was considerable evidence that the way was known to be private property. The whole of the evidence was consistent with the view that the public user had been by the permission or license of the persons for the time being in possession, and in that view only was the inaction of the public and of the Corporation satisfactorily explained. On the other hand, it was inconsistent with an intention to dedicate or user by the public as of right. His Honour here referred to the passage in Wills, J.'s direction to the jury in **Eyre v. New Forest Highway Board,** 56 J.P. 517, which was adopted by Astbury, J., in **Shearburn v. Chertsey Rural District Council,** 78 J.P. 289. The result was that the plaintiff had failed to establish any dedication.

Action dismissed.

Solicitors for plaintiff: **Ramsay, Barrowclough and Haggitt,** Dunedin.

Solicitors for defendant: **Sievwright, James and Nicholl,** Dunedin.

Blair, J. March 22; June 22, 1929.
Auckland.

IN RE HILLS.

Bankruptcy—Discharge—Motion for a Declaration That Bankrupt's Public Examination Passed—Public Examination Commenced and Several Transactions Questioned But Investigation Not Able to be Completed Without Expense Owing to Way in which Accounts Kept—Examination Adjourned *sine die*—Lapse of Over Two Years Without Any Further Questions Being Put—Creditors Not Entitled to Hold Examination Unfinished for Indefinite Time Without Indicating Matters on Which Information Required—Duty of Bankrupt to Supply Proper Information at his Own Expense—Course to be Adopted—Bankruptcy Act, 1908, Section 124 (7).

Motion for a declaration under Section 124 (7) of the Bankruptcy Act, 1908, that the above-named bankrupt's "affairs have been sufficiently investigated and that his examination is finished," and motion for the bankrupt's discharge. Section 125 of the Bankruptcy Act, 1908, prevents an order for discharge until the bankrupt has passed his public examination and the argument was accordingly limited to the first motion. The bankrupt's public examination had begun on 3rd March, 1926; it lasted all day and was then adjourned to 27th August, 1926, and continued for the whole of that day. It was then adjourned *sine die* on terms that 7 days' notice be given to the opponents of the bankrupt of his intention to move for an order that he had passed his examination. The bankrupt was a land speculator and suggestions were made against many of his dealings and against certain other transactions in the name of his wife. In his examination many questions were asked as to various transactions in various parts of the North Island. Owing to his bookkeeping methods it would be necessary to incur very great expense to check these questioned transactions. Two-and-a-half years had elapsed since the examination was adjourned and no further move had been made by the objectors nor had they suggested or propounded any further questions.

A. H. Johnstone in support of motion.
Cooney to oppose.

BLAIR, J., said that it was suggested that had the bankrupt kept his accounts properly the expense of checking the questioned transactions would be unnecessary. Counsel for the objectors said that as the necessity for that expense was due to bankrupt himself, any want of detail or inability to supply a fully satisfactory answer was the fault of the bankrupt himself and it was his business to go to the expense of making investigations necessary fully to check the whole of his transactions. On the bankrupt's part it was urged that he had answered all questions put to him and was prepared to answer any more they liked to put. He claimed that his answers were full and complete answers. It was also stated that if any indication was given as to the precise matters upon which further information was required that would be supplied or obtained if available. His Honour agreed with the contention of the objectors that if by reason of the default of the bankrupt information which ought to be available were not available, the bankrupt could not be said to have passed his examination till he supplied that information. If the obtaining of that information involved expense, then it was for the bankrupt to bear that expense, or suffer the disability of not being able to pass the public examination. But if the position were, as suggested for the bankrupt, that no further questions were desired to be put, then it was not open to the objectors to continue to hold unfinished the public examination. It was clear that no further questions had been suggested in the last two-and-a-half years which had elapsed since the public examination was adjourned. There was something also in the bankrupt's claim that he could not be left unquestioned, and met with a claim that

he had not passed his examination. It appeared to His Honour that the proper course to take to bring matters to a head would be for the opponents to indicate generally the nature of the matters or accounts which they required the bankrupt to supply. If they did that and the bankrupt were unable or unwilling to go to the expense of obtaining that information, and it was information proper to be supplied, then the non-completion of the examination would be established as due to bankrupt's default and he had nothing to complain of. If upon the other hand the opponents' solicitors did not indicate generally the nature of the matters or accounts which they required, the bankrupt would be in a position to say that there were no more questions to be asked, and might fairly ask that his public examination be declared passed. His Honour declared, therefore, that if the opponents' solicitors did not, on or before 31st July next, supply the above general details to the bankrupt, or his solicitor, His Honour thought that it must be taken that there were no further questions to be asked and it would be for the Judge who presided at the examination, and who knew how the bankrupt answered the questions put to him, to say whether he would make the declaration asked for. If the bankrupt, having been supplied with such general details of additional matters or accounts required, failed to supply them, whether on the ground of expense or otherwise, it was clear that the bankrupt could not be entitled to the declaration asked for.

Solicitors for bankrupt: **Stanton, Johnstone and Spence,** Auckland.

Solicitor for opponents: **H. O. Cooney,** Te Puke.

Blair, J. June 10; 21, 1929.
Auckland.

NEIL v. ROGERSON.

Mortgage—Overdue—Mortgagee Unable to be Found—Not Known Whether Alive or Dead—Mortgagor Desirous of Discharging Mortgage—Proper Course Application by Public Trustee for Order Under Section 87 of Public Trust Office Act, 1908—No Power to Make Such Order on Originating Summons—Amount of Interest Payable to Discharge Mortgage—Mortgage Not Providing for Payment of Interest—Interest Payable After Due Date Either as Damages for Detention of Mortgage Debt or Pursuant to Equitable Rule that Money Bears Interest After Date of Payment—Six per cent. Allowed from Due Date Until Amount Deposited in Bank to Meet Mortgagees' Claims—Thereafter Interest Earned Allowed—Public Trust Office Act, 1908, Section 87—Property Law Act, 1908, Section 75.

Originating summons to determine in what manner a certain mortgage long overdue, could be cleared off the title and what interest should be paid in respect of the same, the mortgagee being a person who could not be found and of whom it was not known whether she were alive or dead. Upon the motion for directions as to service of the originating summons the Public Trustee was directed to represent the mortgagee. The plaintiff, Dr. Neil, on 24th August, 1923, purchased for £3,000 a property in Grey Street, Auckland, the title to which was under the Deeds System and was subject to a mortgage. The mortgage was executed on 11th February, 1904, by a Mr. and Mrs. Thorn in favour of one A. J. Gallagher of Londonderry, Ireland, spinster, to secure the payment of £300 on 1st February, 1910, without interest. Dr. Neil bought the property free of encumbrances, but as the mortgagee Miss Gallagher could not be found and it was not known whether she was dead or absent from New Zealand, or whether she was actually an existing person, Dr. Neil took the title without the mortgage being discharged, and a sum of £350 was deposited in the Auckland Savings Bank in the joint names of the defendant Mr. H. M. Rogerson and another solicitor Mr. C. Z. Clayton, to meet the claims of the mortgagee when the same should arise. Mr. Clayton had since died, but Mr. Rogerson was prepared to abide by the order of the Court as to the disposal of the monies. The £350 was still at the date of commencement of the proceedings in the Savings Bank where it had been earning interest since its deposit in 1923. On 23rd August, 1923, Mrs. Thorn made a declaration that Miss Gallagher, the mortgagee, was her daughter by a former marriage, that the mortgage was intended as a gift to her daughter and that no interest had been paid. She also declared that the daughter had died and that she believed herself to be sole next-of-kin. On 20th July, 1927, Mr. Thorn made a declaration before a notary in Ireland that his wife, Mrs. Thorn, died in Dublin on 4th November, 1926, and that the mortgagee had never existed and no interest had been paid. He declared that his wife had assumed the name of Miss Gallagher to protect the amount she had advanced towards the purchase of the property.

Stillwell for plaintiff.
Terry for defendant.
A. H. Johnstone for Public Trustee.

BLAIR, J., said that he could not pay any attention to the hearsay statements in Mr. Thorn's declaration. Moreover both declarations were by interested parties and it would require more than death-bed statements to satisfy His Honour as to Mrs. Thorn's claim to the monies. His Honour entirely disregarded Mr. Thorn's last statement and also disregarded Mrs. Thorn's declaration. His Honour stated that he must assume until the contrary was properly established, either that Miss Gallagher was alive, or that if she were dead she left a will or next-of-kin competent to claim. Section 75 of the Property Law Act, 1908, permitted a mortgagor whose mortgagee was absent from New Zealand or was dead to pay the Public Trustee the whole amount due under the mortgage and obtain the equivalent of a discharge from the mortgagee himself. That course had not been adopted at the time because it was not possible to find out anything about the mortgagee. But at that time there was a declaration by the mortgagee's mother that she (the mortgagee) was dead, and there should have been no difficulty, therefore, in invoking Section 75. There was of course the difficulty as to ascertaining the amount due by the mortgagors, but at the worst it could have been assumed that the utmost that could have been demanded would be interest at the rate of 8 per cent., the maximum legal rate, for the period from the due date of the mortgage up to the date of payment. Owing, however, to the doubt raised as to whether the mortgagee was ever in existence it was not asked that Section 75 be invoked. It was suggested that the case could be met by an order under Section 87 of the Public Trust Office Act, 1908. That Section provided the machinery for the Public Trustee to be appointed to take possession and administer property when it was not known who the owner was, or whether the owner were alive or dead. Somebody owned the mortgage, but who the owner was was in doubt. It was clearly a case where Section 87 could be invoked. It appeared to His Honour, however, that as an order was required for the purpose of clearing the title and making a good title there would be some difficulty in turning an originating summons, framed to have certain questions answered, into an application by the Public Trustee under Section 87. It was suggested that Rule 550 met the case, but His Honour doubted whether that rule went far enough. An order made under Section 87 would have to specify which of the powers in Section 87 were to be exercised by the Public Trustee. Section 91 provided for the due registration of documents duly executed by the Public Trustee, and in order to exercise those powers the Public Trustee would have to produce to the Registrar a Court order duly made. There was not before the Court any application by the Public Trustee for an order under Section 87, although question 2 in the summons asked whether an order should be made under Section 87. His Honour did not think it would be proper to attempt to make such an order on the present application. The case was, however, one where upon due application by the Public Trustee an order should be made under Section 87. That would enable the Public Trustee to solve Dr. Neil's difficulties, and would enable the Public Trustee to make enquiries as to the existence of Miss Gallagher, or her next-of-kin, and would enable him also to collect the whole or such portion of the moneys in the bank as belonged to Miss Gallagher.

The main question in the summons was as to the correct amount payable by the mortgagor to the mortgagee in order to get a release of the mortgage. No question arose as to the principal money. That was payable on 1st February, 1910, and was still payable. The dispute arose as to interest. His Honour must assume that Miss Gallagher lent £300 for 6 years without interest, and at the end of the 6 years the amount would be immediately payable. What then was the position of a mortgagee, who lent money on such terms and at the end of the period made no request for payment and had not even yet made any such request? Having assumed, as His Honour must, that she lent £300 His Honour must continue to assume that she knew that she lent it, and knew the due date. But she lived in Ireland and might have died before the due date. There might be somewhere in Ireland her next-of-kin, entitled to the money and ignorant of their rights. His Honour could not assume against her at the present stage that she was alive and had forgotten about the loan, nor could His Honour assume that she

was a careless improvident person who took no care of her moneys. It was the duty of a debtor to seek out his creditor. His Honour must assume in Miss Gallagher's favour that there might be a good reason why nothing had been heard of her since the due date of the mortgage. When the Public Trustee was appointed the trustee of her property as an absentee or unknown person, it would be the Public Trustee's duty, when required to discharge a mortgage belonging to that unknown person, to first obtain payment of all moneys owing on that mortgage. That would have been his duty if Section 75 of the Property Law Act, 1908, had been invoked, and His Honour could not conceive that he had any lower duty if he were appointed under Section 87 of the Public Trust Office Act, 1908. What then was the amount of interest payable by the mortgagor to the mortgagee, for the period which had elapsed since the due date of the mortgage? All parties agreed that the principle was as stated in **21 Halsbury's Laws of England,** p. 116, par. 209, that there was no implied contract for the continuance of interest at the same rate or at any rate, after the due date of the mortgage. Interest in such cases was given not as interest payable under the contract but as damages for the detention of the debt. It was suggested that, as no interest was payable under the mortgage and no claim had ever been made by Miss Gallagher, she had suffered no damage by non-payment of interest. If she were before the Court the precise position could be ascertained. Although an order had been made that she be represented by the Public Trustee he had had no opportunity of making due enquiry as to whether Miss Gallagher or her next-of-kin were in existence, and His Honour, therefore, could not presume as against her anything unfavourable to her. The fact that no interest was payable under the mortgage carried the matter no further when considering the question as to whether a loss had been sustained by non-payment of interest on the due date. And although the position might be an unfortunate one for Dr. Neil nevertheless he acquired the property subject to that mortgage and he could not stand in any better position than the original mortgagors. His Honour referred to the judgment of Romer, L.J., in **In re Drax, Saville v. Drax,** 72 L.J. Ch. 508, 509. It was true that the mortgage in the present case provided that the principal was payable on 1st February, 1910, without interest, so that up to that date it was clear that no interest was payable, but from that date interest should be payable unless the circumstances were so strong as to rebut the rule. Up to the time when the money was deposited in the bank there did not seem to His Honour to be any circumstances that His Honour could look at as negativing the equitable rule unless His Honour made presumptions against Miss Gallagher, which it did not appear to His Honour that he was entitled to make. At the time that the money was deposited in the bank some efforts were made to find the mortgagee and her claim certainly would have been satisfied had she been found. Seeing that interest was payable, whether it be payable by virtue of the equitable rule enunciated by Lord Romer or on the basis of damages to the mortgagees, the measure of compensation was the same. Non-payment of money was compensated for by the payment of the interest it would have earned had it been paid on due date. In 1920 interest rates were lower than they were at the present time. Alpers, J., in **In re Douglas,** (1926) G.L.R. 19, allowed 6 per cent. as reasonable interest on unpaid legacies due to executors. Reed, J., in **In re Barnes,** (1926) G.L.R. 64, also fixed 6 per cent. as reasonable interest on unpaid legacies. His Honour thought that 6 per cent. was reasonable under all the circumstances in the present case and His Honour fixed that rate as reasonable whether interest were payable as interest or by way of damages.

In view of the fact that the principal moneys and a sum to meet a claim for interest was specially deposited for the mortgagee to claim it His Honour thought that it was proper that as from the date of deposit of those moneys the actual bank interest earned on those moneys should be sufficient to satisfy any claim for interest or damages after that date. In stating the above His Honour had not overlooked the fact that the interest earned on the £50 paid would really be interest on interest. His Honour accordingly held that the mortgagee was entitled to interest on the principal moneys secured by the mortgage at the rate of 6 per cent. per annum (simple interest) from the 1st February, 1910, to 18th September, 1923, and thereafter the mortgagee was entitled to the whole of the interest earned on the £350 paid into the bank. As against the mortgagee's claim for interest and principal credit was to be given to the mortgagor for the £350 paid on 18th September, 1923. His Honour directed that the case was a proper one for the Public Trustee to make application for an order to exercise all necessary powers under Part III of the Public Trust Office Act, 1908, but that such an order could not be made in the present proceedings. Mr. Rogerson was authorised and directed to pay the whole of the monies under his control to the Public Trustee after the Public Trustee had been duly appointed.

Solicitors for the plaintiff: **Dawson and Stilwell,** Auckland.
Solicitors for the defendant: **Nicholson, Gribbin, Rogerson and Nicholson,** Auckland.
Solicitors for the Public Trustee: **Stanton, Johnstone, and Spence,** Auckland.

Smith, J. May 22; June 13, 1929. Dunedin.

LIGHTFOOT v. HUGH AND G. K. NEILL LTD.

Shops and Offices—Hours for Closing of Shops—Automatic Vending Machine—Machine Attached to Telegraph Pole in Public Street at Distance from Owner's Shop—Photographic Films Sold from Machine After Closing Hours—Machine Not a "Shop"—"Building or Place" in Which Goods Kept, Exposed, or Offered for Sale—*Ejusdem generis* Rule Applied—"Place" Including only Areas Capable of Physical Occupation by Occupier—Provisions of Act Relating to "Hawkers and Other Persons" Selling Goods by Retail Otherwise than in a Shop Applicable Only to Itinerant Traders—Shops and Offices Act, 1921-22, Sections 2, 36.

Appeal on point of law from the decision of Mr. H. W. Bundle, S.M., at Dunedin. Upon the hearing before the Magistrate, it was proved or admitted that the respondent carried on business at a shop at the corner of St. Andrew and George Streets, in Dunedin, as an optician and photographic supplier.

The respondent was the owner or lessee of an automatic machine fixed on a telegraph pole in a public street at or near the Stock Exchange Building, Princes Street, Dunedin, and at a distance of half a mile or more from its said shop at the corner of St. Andrew and George Streets. The machine was so constructed that it would deliver photographic films of two sizes on the insertion of coins for the appropriate amounts. The public had access to it at all hours of the day or night. On 6th March, 1929, at 7.25 p.m., a time when the respondent's shop was required by the Shops and Offices Act, 1921-1922, to be closed, films were obtained from the machine by purchasers who had inserted the necessary coins therein. The respondent's shop at the corner of St. Andrew and George Streets was at the time closed, but the machine was available, and was intended by the respondent to be then available, for the purchase of films by members of the public. The respondent was charged in respect of the automatic machine upon an information alleging that being the occupier of a shop within the meaning of the Shops and Offices Act, 1921-1922, it did fail to close its shop at 6 p.m. on 6th March, 1929. The Magistrate held that the facts were insufficient to support the information, and accordingly dismissed it. This appeal was brought from that determination.

Adams for appellant.
Anderson for respondent.

SMITH, J., said that the Act appeared to be designed principally to protect shop assistants in respect of their employment, and to that end provided for the regulation of three kinds of trading: (1) trading in shops; (2) trading by hawkers or other persons by retail otherwise than in shops (Section 36), and (3) the sale after hours, within a district, of all goods comprised in a particular trade (Section 33). Mr. Adams contended: (1) that an automatic machine was itself a shop, and (2) if not, then that the respondent was an "other person" trading by retail otherwise than in a shop.

As to the first contention, the material part of the definition of "shop" contained in Section 2 of the Act was in the following terms: "Shop means any building or place in which goods are kept, exposed, or offered for sale, or in which any part of the business of a shop is conducted." Mr. Adams contended that an automatic machine was a place in which goods were kept, exposed, or offered for sale. Each portion of the definition of "shop" depended upon the meaning of the words "building or place in which." In His Honour's opinion, the word "place" should be construed according to the *ejusdem generis* rule. That rule was no doubt to be applied with caution, but where a genus or category was specified in a statute, and it was followed by a general word or words of ambiguous import, then the *ejusdem generis* rule might be applied as a useful "working canon" to enable the Court to arrive at the meaning of a par-

ticular enactment: **Tillmanns and Co. v. S.S. Knutsford Ltd.**, (1908) 2 K.B. 385, (1908) A.C. 406; **Attorney-General v. Brown**, (1920) 1 K.B. 773; **Magnhild (S.S.) v. McIntyre Bros. and Co.**, (1920) 3 K.B. 321. The word "building" indicated, in His Honour's opinion, the genus or category of "place." In its ordinary acceptance, the word "building," used as a noun, signified a structure which was capable of personal physical occupation. The word "place" ought, His Honour thought, to bear a similar meaning, otherwise the word "building" would have no definite meaning. That view was strengthened by a consideration of the other provisions of the Act. The latter part of the definition of "shop" supported it by including and excluding only buildings or places which were all capable of personal physical occupation. Again, every shop was regarded by the Act as having an occupier who was responsible for the observation of the provisions of the Act—Section 55. An occupier was defined (*inter alia*) as being a person occupying any building, enclosure or place used or intended to be used as a shop or office. An office was defined as meaning a "building" but not as an "enclosure or place." In respect, therefore, of the occupation of a shop, "enclosure" and "place" would seem to bear similar meanings. The "place" must be, His Honour thought, defined or limited in area, and must be capable of physical occupation at least by the occupier. The Act, of course, went further, and contemplated that a building or place constituting a shop was capable of physical occupation by shop assistants and customers. As to that, reference might be made to the definition of "shop assistant," to Section 5, as amended by Section 7 of the Amending Act of 1927, Section 9 (b) and (c), Section 10, Section 12, Section 28, Section 30, Section 50, Section 58, Section 62 (e), and Section 72 (i) (c). As, however, the Act contemplated that a building or place might be a shop if it had only an occupier without assistants, His Honour did not go further than to say that in his opinion the "building" referred to in the definition of "shop" must be a structure that was at least capable of physical occupation by an occupier and that the "place" must be a place which was defined or limited in its area, and which was capable of physical occupation by an occupier. In every case, the question whether a building or place was a shop must be determined upon a reasonable view of the facts. The present appeal was on a point of law only. On the facts, it was clear from the Magistrate's judgment that he did not regard the automatic machine in question, fixed to a telegraph pole in a public street half a mile away from the respondent's shop in George Street, as a building or place capable of physical occupation by an occupier. If the facts were before His Honour he should agree with that view. That finding was sufficient to dispose of the first contention that the respondent's machine was itself a shop.

Mr. Adams next contended that if the machine were not a shop, Section 36 referring to "hawkers and other persons who carry on business by selling or offering goods for sale by retail otherwise than in a shop" applied. His Honour was of opinion that the *ejusdem generis* rule previously referred to should be applied to determine the meaning of that Section. The word "hawker" indicated the genus of itinerant trader. A person who sold goods to the public by means of an automatic machine erected in a fixed position was not, in His Honour's opinion, an itinerant trader, and consequently he was not within the provisions of Section 36.

Appeal dismissed.

Solicitors for appellant: **Adams Brothers**, Dunedin.
Solicitors for respondent: **Statham, Brent and Anderson**, Dunedin.

Kennedy, J. June 7: 13, 1929.
Auckland.

IN RE LAURENSON.

Licensing—Prohibition Order—Person Charged with Being Found Drunk in a Public Place and with Assault—Plea of Guilty to Both Charges—Prohibition Order Made on Charge of Assault in Addition to Conviction and Fine—No Jurisdiction to Make Such Order—Plea of Guilty and Silence of Counsel when Order Made Not Equivalent to a Personal Application for Order—Conviction Severable—Amended by Omitting Part as to Prohibition Order—Power of Court to Order Justices to Pay Costs—In Circumstances Justices Not Ordered to Pay Costs—Licensing Act, 1908, Section 212—Justices of the Peace Act, 1927, Section 328—Inferior Courts Procedure Act, 1909, Section 7.

Motion for a writ of *certiorari* to quash that part of a conviction which provided for the issue of a prohibition order. On 5th April, 1929, John Laurenson was charged at the Magistrates' Court at Whakatane before the two presiding Justices, with (a) being found drunk in a public place, to wit the main road to Te Teko, on 30th March, 1929, and with (b) assaulting one Edward Jackson at Te Teko on 30th March, 1929. Laurenson appeared and pleaded guilty to both charges; he was convicted and discharged on the charge of drunkenness, and on the charge of assault he was convicted and fined £5, and in addition a prohibition order was made against him.

Fleming in support.

Hubble to oppose.

KENNEDY, J., said that the cases in which a prohibition order might be made were set out in the Licensing Act, 1908, Section 212. Such orders might be made either with or without consent. They might be made with consent on a personal application to a Magistrate for the issue of the same. They might be made, without consent, in two cases, namely first where it was made to appear in open Court that any person, by excessive drinking of liquor, misspent, wasted or lessened his estate, or greatly injured his health, or endangered or interrupted the peace and happiness of his family, and secondly where any person had been three times convicted of drunkenness within six months. In the last case the order might be made by a Magistrate without the necessity of a formal application. It was clear that none of the circumstances which would give the Justices jurisdiction to issue a prohibition order existed in the present case. No personal application was made by Laurenson and his silence or the silence of his counsel when the Justices, as part of the punishment for the drunkenness or for the assault, intimated that a prohibition order would issue, was not equivalent to a personal application by Laurenson. Nor by the mere plea of guilty to a charge of drunkenness, was it made to appear in open Court that Laurenson was, by excessive drinking, misspending, wasting or lessening his estate, or greatly injuring his health, or endangering or interrupting the peace and happiness of his family. It was stated in an affidavit that the conviction for drunkenness mentioned was the first conviction of any kind against Laurenson. It followed that the Justices acted without jurisdiction in issuing the prohibition order. They had no more right, under the circumstances, to issue a prohibition order than they had to order punishment in excess of the statutory maximum. They exceeded their powers and it was irrelevant to consider whether they were actuated by the high motive of doing what, in their opinion, was best for Laurenson, or whether they awarded, as they say, a lesser punishment because they issued a prohibition order. That part of the conviction which provided for the issue of a prohibition order was, therefore, bad. It was, however, severable from the residue and the conviction would under the powers conferred by Section 7 of the Inferior Courts Procedure Act, 1909, be amended by striking out the words "and prohibition order issued for twelve months." In the result the prohibition order was quashed.

Counsel for Laurenson had subsequent to the hearing, notwithstanding the pleas of guilty, applied to the Justices to rehear the charge of drunkenness and to cancel the prohibition order. The Justices then amended the record of the convictions by deleting the prohibition order from the conviction for drunkenness and by adding the prohibition order to the conviction for assault. That by itself would be a slender foundation for an inference that the Justices, under colour of correcting a mistake in the record of the conviction, had improperly manipulated the alteration to preserve the prohibition order. The affidavits filed, however, excluded that sinister suggestion and established that the convictions, as first entered, did not correctly record the punishments announced in Court by the Justices. When the Justices intimated their willingness to re-hear both charges, counsel for Laurenson withdrew his application for a re-hearing. In the Supreme Court counsel for the Justices admitted that the prohibition order was made without jurisdiction, but opposed an order for costs. His Honour did not accept the contention that Section 328 of the Justices of the Peace Act, 1927, excluded the power of the Court in the present case to order costs to be paid by the Justices adjudicating (see **In re Mulvaney**, (1928) N.Z.L.R. 129), but having regard to the circumstances set out in the present judgment and to other circumstances mentioned in the affidavits, His Honour did not think that the present case was one in which such an order should be made.

Solicitors for Laurenson: **E. Armstrong**, Whakatane.
Solicitors for Justices: **Meredith, Hubble & Ward**, Auckland.

Kennedy, J. May 24, 27; 31, 1929. Auckland.

GREEN v. NEW LYNN TOWN BOARD AND FORREST.

Municipal Corporation—Drainage—Trespass—Town Board Constructing Drains on Private Land Without Proper Notice to Owner or Occupier and Without Obtaining Permission of Owner or Occupier to Drains Constructed Above Ground—General Notice in Newspaper of Intention to Construct Drains Not Sufficient—Subsequent Suggestions by Owner as to Work to be Carried Out to Minimise Inconvenience Resulting from Operations of Board—Suggestions Carried Out—No Estoppel or Waiver—Portion of Land Subsequently Taken Under Public Works Act—Basis of Assessment of Damages—Municipal Corporations Act, 1920, Section 219; Public Works Act, 1928, Sections 34, 80; Town Boards Act, 1908, Section 33.

Action claiming damages for trespass and an injunction restraining the defendants from further trespass and a mandatory injunction requiring them to remove a sewer constructed by them upon the plaintiff's land. The defendant Forrest, a contractor to the defendant Town Board, constructed for the defendant Board a sewer, partly underground and partly overground, on the plaintiff's land. The plaintiff complained that the entry upon his land to construct such sewer, the operations of the workmen thereon, and the continuance of the sewer upon his land were a trespass. The Town Board had not complied with the conditions set out in the Eighth Schedule to the Municipal Corporations Act, 1920. No formal notice had been given to the owner or occupier personally of its intention to construct such drains, although a general notice of its intention to construct drains had been inserted in the local newspaper. A letter was also sent to the plaintiff by the defendant Board intimating that in the course of a few days it would be excavating upon the plaintiff's property in connection with its sewerage construction contract. The permission of the owner or occupier to the construction of the drain above ground had not been obtained. The defendants endeavoured to show that the plaintiff had by his conduct waived compliance with the statutory requirements. Evidence was given that on one occasion when the plaintiff had called at the office of the defendant Board on other business a drainage plan was produced to him, though the sewer as subsequently constructed was not exactly in accordance with such plan. It was also claimed that the plaintiff was estopped by his conduct from claiming damages for trespass in that after the works was commenced he had made certain suggestions to, and approved certain of the operations of, the contractors, designed to minimise the inconvenience and damage flowing from the works done.

Fleming for plaintiff.

Haddow for defendants.

KENNEDY, J., said that the Town Board (which had since the writ was issued become a Borough) had all the power conferred on Borough Councils by Divisions V and VI of the Municipal Corporations Act, 1920: Town Boards Act, 1908, Section 33. It might accordingly cause to be constructed upon or over the streets and public places within the Town District all drains from time to time shown on its drainage map, and until the preparation of such map all such drains as the Board might from time to time think needful for the efficient drainage of the Town District. It was, however, not entitled to construct any drain through or upon any private land unless it had first complied with the conditions in the Eighth Schedule to the Municipal Corporations Act, 1920. The Municipal Corporations Act, 1920, Section 219, moreover, provided that it should not be lawful for a Town Board to make any drains upon or under any private lands or buildings other than an underground covered drain unless permission in writing of the owners had been first obtained. The Town Board did not comply with the conditions so set out in the Eighth Schedule to the Municipal Corporations Act, 1920, and particularly with the condition as to notice to the owner and occupier. The drain, so constructed on the plaintiff's land, was, as to part, other than an underground covered drain, i.e., it was a drain above ground, and the Town Board did not, before constructing it upon the plaintiff's land obtain the plaintiff's permission in writing as required by the Statute. The Town Board had, however, on 21st October, 1927, inserted in a newspaper circulating in the Town District a general notice of its intention to construct drains. Such an advertisement was not compliance with the provisions of the Eighth Schedule to the Municipal Corporations Act, 1920, of notice to the owner and occupier, for the notice in writing there referred to should be personally served: **Toronto Corporation v. Russell,** (1908) A.C. 493.

It was contended on behalf of the defendants that the plaintiff had waived compliance with the requirements of notice and also the requirement of his permission in writing. Waiver was the abandonment of a right and it might be either express or implied from conduct. A person entitled to the benefit of any statutory provision might waive it, and allow the transaction to proceed as though the provision did not exist. Where the right was a right of action, an express waiver depended on the same consideration as a release. If it were a mere statement of an intention not to insist upon the right it was not effectual unless made with consideration. But where there was consideration the statement amounted to a promise and operated as a release: 13 **Halsbury's Laws of England,** 165. In November, 1927, during a conversation between the plaintiff and the Town Board engineer, when the plaintiff had called at the office of the Town Board on other business, the engineer referred to a drainage plan produced. His Honour was satisfied that, although the plan was produced, the plaintiff was not made aware of the exact nature of the drainage work to be done on his section. But even if he had been so made aware, nothing that he did or failed to do amounted to a waiver by him of compliance by the Town Board with the statutory requirements, which he had a right to assume would be complied with. He was not informed then, nor had he any reason to think, that the Town Board proposed to disregard those statutory requirements. It could not fairly be inferred, from his conversation, that he consented to the Town Board proceeding as if the statutory requirements had been complied with. Moreover, the sewer through the plaintiff's land was not constructed in the manner intended by the Town Board at the time the conversation referred to took place. The sewer actually constructed was from one to two feet higher than the drain shown on the plan of levels prepared. If the sewer had been constructed, as shown in the levels first prepared, it would have been, for the most part, under and not above ground. The letter sent by the contractors intimating that in the course of a few days they would be excavating in connection with their sewerage construction contract upon the plaintiff's property would not avail the Town Board. Such letter was not the notice required by the statute, nor did it obviate the necessity for permission in writing. When therefore, the contractors to the Town Board entered on the plaintiff's land and commenced and continued the construction of the sewer, the statutory requirements as to notice and as to permission in writing had not been complied with nor had they been waived by the plaintiff. The entry was illegal and not pursuant to, but in excess of, the powers conferred on the Town Board. The original entry was a trespass and so was the continuance in possession during the greater part of the time taken to construct the sewer, and the construction of the sewer. A cause of action, on entry, accrued to the plaintiff, and that cause of action was not, in His Honour's opinion, released by plaintiff's subsequent conduct. Nor was the plaintiff estopped by what subsequently occurred from asserting his rights of action for trespass to his land. There was some conflict as to the attitude of the plaintiff from a short time after the entry upon the plaintiff's land until July, 1928. The plaintiff gave evidence that he objected to what was being done, (although he no doubt then believed the Town Board had power to do what it purported to do) but made certain suggestions designed to minimise the inconvenience and damage resulting from the operations of the contractors, while a witness for the defendants indicated that the plaintiff's attitude was from the first one of friendliness, that he pointed out work to be done and generally consented to the operations. On the whole His Honour was disposed to accept the plaintiff's evidence on this point as more accurately disclosing his attitude, and to find that he did not consent but made only the best of what he deemed a bad job. His Honour found it difficult to believe that one whose attitude to the Town Board was so consistently one of complaint, should in the circumstances have consented to and approved of the Town Board's operations. After the work had advanced, certain small drains, roughly at right angles to the main sewer-drain, were cut, either at the plaintiff's suggestion or with his consent, to diminish what the plaintiff conceived to be the damage to his property resulting from the construction of the sewer. That particular work the plaintiff might not treat as a trespass, but he could claim compensation under the Public Works Act, 1928, for damage resulting therefrom (if any) as for an injurious affection of his land. In arriving at the damages awarded in the present action no allowance would be made in respect thereof.

The writ in the present action was issued on 20th September, 1928. On 2nd May, 1929, the defendant Town Board took for drainage purposes, as on 11th May, 1929, a strip of land running through the plaintiff's section and comprising the land upon which the sewer had been constructed. An amended statement of defence was then filed by defendant pleading that the plaintiff's only remedy was under the Public Works Act, 1928. Leave of the Court to file such amended statement of defence was not obtained although the defence had arisen subsequent to the issue of the writ. At the trial no objection had been taken to the filing of that amended statement of defence and His Honour was informed that the plaintiff consented thereto. It was admitted accordingly that the plaintiff could not, subsequent to 11th May, 1929, claim an injunction and that the damages recoverable in the present action, were necessarily reduced. His Honour had accordingly to assess the damages suffered by the plaintiff over and above what might at the date of the hearing of this action be claimable by him for the taking of the land actually taken, (land over and above what such taking legalised: Public Works Act, 1928, Sections 34 and 80) and for the injurious affection (if any) of his remaining land by the user of the sewer upon the land taken and by the cutting of the four small drains above referred to at right-angles to the main sewer. His Honour was invited by counsel for the defendant Town Board to treat the case as one of a mere technical trespass calling for nominal damages only. More than nominal damage was suffered by the plaintiff and His Honour could not regard the action of the Town Board in commencing, and continuing with, the construction of an overground sewer on a man's land, and trespassing on land other than that ultimately taken under the Public Works Act, 1928, without compliance with the statutory requirements as a trifling matter. Nor could the Court overlook the fact that, even after complaint was made, the Town Board proceeded in a leisurely manner to deal with the complaint. His Honour accordingly assessed the damages properly claimable in this action at £25. Evidence was tendered of the plaintiff's loss of time, subsequent to the trespass, in instructing engineers and solicitors but that formed no part of the damage suffered by the trespass, and, the allowance made for preparation for trial, was intended to be in respect of costs so incurred. His Honour certified that the action was a proper one to bring in the Supreme Court.

Solicitors for plaintiff: **McVeagh and Fleming,** Auckland.
Solicitors for defendants: **Haddow and Haddow,** Auckland.

WINSLEY BROS. v. WOODFIELD IMPORTING CO.

In the report of this case *ante* p. 183, the following alteration should be made: Substitute for the words commencing "In such a" in the fifth line from the foot of the first column on p. 184, to the word "rejection" in the first line at the top of the succeeding column, the following: "In such a case, the question would still remain whether the buyer was entitled to reject the machine, or whether by acceptance or by the length of his user he had lost that right, and was limited to a claim in damages only. On the other hand the fact that the property would have passed but for the breach of condition would not of itself prevent rejection."

Discovery Against the Crown.

"The rule of discovery, as recognised by our Courts, is that the Crown is entitled to discovery against the subject, in accordance with the ordinary rule regulating discovery; but the suppliant is not entitled to discovery against the Crown and must be content with such discovery as the Crown may be disposed to give. Every practitioner who has had experience of conducting proceedings against the Crown is aware that this discretion is sometimes used unmercifully against the party making complaint, and he would be a bold man who would assert that the 'public interest' does not sometimes signify, in this connexion, no more than the interest of the Crown in winning the case."—J. W. Gordon, K.C., in the "Law Quarterly Review."

Crime and Morality.

With Special Relation to Reports of Probation Officers.

(By W. E. Leicester, LL.B.)

When the history of criminal law in this Dominion comes to be written, it will be interesting to see whether the Probation Officer is classified as a civil servant, a psychiatrist, or a Court official with the power but without the authority of a police Magistrate. At one stage this legal chameleon (who is regarded as a much greater prodigy than nature ever intended him to be) kept himself strictly to the observance of his statutory powers, but more recently, affected no doubt by his surroundings, he appears to have developed into an advocate, a pleader of lost causes, and a philosopher looking upon the world with the sort of joyless pessimism that has made Dean Inge a theological best-seller. It is not a matter of surprise, therefore, that certain members of the judiciary view with the cold eye of disdain the persuasive influences of the Probation Officer and treat his recommendations as being little more than suggestions made by one who possesses no special qualifications to judge the real merits of the case. What else can be expected when the Probation Officer deals with questions of amounts and periods of time involved, the gravity of the offence and the like, which relate, after all, to the legal aspect of the matter? In the result, counsel who breasts the barrier with a recommendation to probation may find the course distinctly hardgoing and finish with his client sentenced to a lengthy term of reformative detention. Unhappily, the converse rarely applies—although in some quarters a different opinion is held—and a recommendation against the granting of probation does not mean that the prisoner is restored, subject to payment of the costs of the prosecution, to his tear-bespattered relatives. About the present position there is, in fact, too much *quod* and too little *quo*.

During the last few years, I have read, with or without the permission of the Court and invariably at the last moment, a great many of these reports and I have often been amazed at the reasoning that seeks to satisfy the understanding and direct the judgment of those who have to administer justice. That the reports are written with an honesty of purpose, I do not question. It is their effect that I challenge. Hearsay evidence, which is inadmissible at the trial can scarcely, when presented in its worst form and derived from the most dubious sources, become admissible upon conviction. True enough that it would be impossible to ask the Probation Officer to confine the information which he gives to the Court to his own knowledge and observation, and Section 5 of the Offenders Probation Act, 1920, seems to contemplate a more extensive investigation when it provides:

"(1) It shall be the duty of a Probation Officer, when so required by the Court—
(a) To make enquiries as to the character and personal history of any person accused or convicted of an offence, and as to such other matters in relation to such person as the Court may direct, and to report fully thereon to the Court in writing; and
(b) To keep a full record of such enquiries and of the results thereof.

(2) It shall be the special duty of the Probation Officer, if satisfied in any case that the best interests of the public and of the offender would be served by the release of the offender on probation, to recommend to the Court that he be so released."

But in actual practice one frequently finds that the Probation Officer has made certain enquiries from the Police and remained apparently satisfied with this. The police for their part may have cause to think ill of an accused person for reasons alien altogether to the offence with which he is charged. Accordingly, the report sent in to the Court consists in such instances partly of those investigations and partly of reflections on the accused's past history, his mode of living and the impression that the offence makes on the public—the correctness of all of which deductions depends less on the accuracy of the information obtained than on the personal outlook of the Probation Officer who analyses the information in his report. The question was recently considered in England by the Royal Commission set up as a result of the Savidge case, and the following recommendation made :

"It has been represented to us that the statements as to character given by the Police are not always confined to facts which they have ascertained, but sometimes include impressions or opinions which they have formed as to the accused's manner of life or the character of his associates. We think that the Police should only depose to facts within their knowledge, and should refrain from expressing opinions which may be incapable of proof or disproof."

At one time, the Ecclesiastical Courts exercised a wide dominion over the morals of the people. They were the instrument through which the State acted in the enforcement of obedience to the laws of God. In 1847 Archdeacon Hale published criminal precedents which illustrate the nature of this jurisdiction and consist of a collection of extracts from the Act Books of six Ecclesiastical Courts between the years 1475 and 1640. The offences, which are numerous, comprise adultery, procuration, incontinency, incest, defamation, sorcery, witchcraft, behaviour in church, neglect to attend church, swearing, profaning the Sabbath, blasphemy, drunkenness, haunting taverns, heretical opinions, profaning the church, usury, ploughing up the church path. In the Archdeacon of London's Court between November 27th, 1638, and November 28th, 1640, there were thirty sittings and 2,500 causes entered. "It is not difficult," says Holdsworth, "to see why the Parliament in 1640 abolished the Ecclesiastical Courts. A system which enabled the officers of inferior courts to enquire into the most private affairs of life upon any information was already out of date." The ordinary Ecclesiastical Courts were, of course, restored in 1661, and in the process of time their jurisdiction has completely altered. It is necessarily so, because it does not follow that the morality of one man is the morality of another. The morals of two nations separated by a boundary line may be essentially separate and different. According to the Report of the 1925 Labour Delegation, the brothel in Tsarist Russia was a State-recognised institution, formally opened when new by the police officer and hallowed by a religious ceremony in the course of which the premises were blessed by a Russian orthodox priest. In Berlin and many other cities of Europe, it is registered and supervised by the *Sittenpolizei*, a Police Department dealing with the control of public morals. In this country the brothel, like the bookmaker, is neither registered nor hallowed.

That our Courts to-day should be asked to exercise, directly or indirectly, the functions of the old Ecclesiastical Courts is improper and unwarranted. The infusion of morals into criminal law can lead only to doubt and uncertainty. Some would say that it is immoral to admit to probation one who embezzles thousands, while another is sentenced to imprisonment with hard labour for pillaging a tin of sardines. Here, morality appears to be on the side of the stronger. The law itself may be immoral—for example, when it permits the Statute of Limitations to be pleaded to avoid an existing debt. Why, it may be argued, should a prisoner be recommended to probation because he is a widower with nine children, when in fact he has killed his wife by his insistence upon her annual childbearing? If a syphilitic man can marry an inexperienced girl and without legal penalty beget a brood of half-wits (which the tax-payers have to keep), why should the presence of gonorrheal infection be suggested as a ground for refusing probation? The profiteer in a staple commodity gets a knighthood, but the man who steals a loaf of bread may get a month. A short time ago, the Court of Criminal Appeal was called upon to consider the sentence imposed upon an old man of 72 for the sacrilegious theft of eightpence. He had received five years.

If in our conception of criminal punishment, we have outgrown the stage when the retribution inflicted on the offender was regarded as the natural sop to the injured, then it is clearly inconsistent to punish a wrongdoer for moral derelictions unconnected with the charge that brings him before the Court. Law in its essence rests upon the relations between the individual and the society of which he is a member : the communion between the individual and his conscience is outside the scope of law so long as there is no transgression of the established law. It is no business of the law to enforce morality, however important it may be that every law should have a moral as well as a legal sanction. There is not, and never could be, any positive universal standard of ethical conduct. Most men are moral, not because of some innate preference for doing the right rather than the wrong thing, but because it is highly inconvenient to have to bear the consequences of unconventional behaviour. We have long abandoned the Greek notion that men can be made good by statute and have adopted the individualistic view that different men can lead good lives in different ways. Obedience to the law does not make a man good although it may prevent him from being bad. Its merit is negative, showing how to avoid vice, not how to find virtue. "It is the sub-vicious," says Samuel Butler, "who best understand virtue. Let the virtuous stick to describing vice, which they can do well enough."

It will be remembered that the fourth count in the indictment against Socrates charged him with being in the habit of quoting mischievous passages from Homer and Hesiod to the prejudice of public morality. The Court consisted of 501 judges, who voted against him by 285 to 216. He urged that the penalty to be imposed should be a life pension granted by the State, but this suggestion was waved aside as being both frivolous and vexatious. He was sentenced to death. Nowadays, probation would have been considered; but on his past reputation and utterances the chances are distinctly in favour of his doing time.

New Zealand Law Society.

Proceedings of the Council.

The second meeting of the year of the Council of the New Zealand Law Society was held in Wellington on Friday, 5th July, 1929. Mr. A. Gray, K.C., President of the Society, was in the chair. The following gentlemen were in attendance as the representatives of the District Law Societies, namely :—

Auckland (represented by)		Messrs. F. L. G. West, A. H. Johnstone, and J. B. Johnston (Proxy for Mr. R. McVeagh)
Canterbury	,,	Mr. M. J. Gresson
Gisborne	,,	Mr. C. A. L. Treadwell
Hamilton	,,	Mr. F. A. Swarbrick
Hawke's Bay	,,	Mr. H. B. Lusk
Marlborough	,,	Mr. H. F. O'Leary (Proxy)
Nelson	,,	Mr. C. R. Fell
Otago	,,	Messrs. W. R. Brugh, H. L. Cook, and R. H. Webb
Southland	,,	Mr. G. G. G. Watson
Taranaki	,,	Mr. G. M. Spence
Wanganui	,,	Mr. W. A. Izard
Westland	,,	Mr. A. M. Cousins
Wellington	,,	Messrs. A. Gray, K.C., C. H. Treadwell, and C. G. White

Various matters of interest to the profession were considered, some being of a more or less confidential nature. Among other subjects the following were dealt with :

Judges' Salaries and Pensions.

The question was revived relating to the inadequacy of the present salaries and pensions of the Supreme Court Judges. The President mentioned that the matter had recently been brought under the notice of the Attorney-General, who had promised to place the matter before the Government for careful attention. In a discussion of the subject the view was expressed that there was real need for urging a review of the salaries paid to the Judges, and particularly of the rate of superannuation allowance paid to a Judge upon retirement. The matter was left to the President to discuss with the Attorney-General when a favourable opportunity offers.

Appointments of Deputy Official Assignees in Bankruptcy.

The Council considered representations made to it concerning the policy of the Department of Justice in appointing officers employed in the Public Service of the Dominion to the positions of Deputy Official Assignees, it being contended that such appointments are not in the best interests of the creditors, as the winding-up of a bankrupt estate frequently involves the exercise of considerable business knowledge, and that, however well such officers may be able to perform the duties pertaining to their own particular offices, it does not follow that they possess the necessary qualifications to wind up and realise, to the best advantage, the business affairs of a bankrupt. The matter was accordingly brought, through the Attorney-General, under the notice of the Minister of Justice, who informed the Council that its views would receive every consideration when any further appointments were being made.

Conveyancing Scale, 1928, Paragraph (6) p. 14: Costs of Leases.

The report of a committee which had been set up to consider this part of the scale of conveyancing charges, which had previously been referred to District Law Societies for their comments, was discussed. The Council resolved to adopt the recommendations of the Committee, that the existing scale of charges for Leases be altered as follows :—

" Delete clause (a) and substitute the following :

(a) For ordinary lease or an agreement to grant a lease for a term exceeding twelve months (including engrossment of counterpart and obtaining execution by lessee where lessee employs no separate solicitor) :

	£	s.	d.
Where the rent does not exceed £50	3	3	0
For every extra £50 or fraction of £50 of rental up to £200	1	1	0
For every extra £50 or fraction of £50 of rental over £200 up to £1,000	0	10	6
For every extra £50 or fraction of £50 of rental over £1,000.. ..	0	5	3

Special covenants and conditions shall be charged for extra.

" Clause (b). Delete this clause."

Legal Conference.

A letter was read from the President of the Auckland District Law Society extending on behalf of his Council an invitation to hold the next Legal Conference at Auckland during Easter, 1930.

The Council unanimously resolved to accept the invitation.

Appointment of Mr. M. Myers, K.C., as Chief Justice of New Zealand.

The Council unanimously passed a resolution recording its appreciation of the appointment of Mr. Myers, K.C., to the office of Chief Justice of New Zealand, and congratulating him on his appointment.

Lord Tenterden.

" It was his great work on the ' Law of Merchant Shipping ' which secured Lord Tenterden a judgeship. Until he wrote that book Abbott, as he then was, had never been a pronounced success. His father, a barber of Canterbury, apprenticed him to his own trade, but later as he had ' no genius for the profession ' sent him to Oxford. Neither at Oxford nor at the Bar did he distinguish himself. According to Lord Campbell, on the rare occasions when he had to address a jury he showed ' marvellous ineptitude ' for the task. Yet, although he had never applied for silk, and had never been in the House of Commons, he became Lord Chief Justice of England—and all this on his merits and because he had written one good book. The life of Lord Tenterden should and does greatly encourage the legal author to pursue, with undying hope, his otherwise unremunerative and colossal labours. —" Outlaw," in the *Law Journal.*

Lord Halsbury.

His Life and Times.

Permission has been granted to the " New Zealand Law Journal *" to publish a series of extracts from the Biography of the first Earl of Halsbury, which is shortly to be published.*

(*Continued from page 187*)

Dissolution.

In the course of 1885, the Gladstone Ministry, sharply criticised in Parliament and the country on foreign affairs, especially Egypt and the Sudan, had fallen a prey to Cabinet discussions on home policy. A motion of the Conservative Opposition on a clause in the Budget, led suddenly and unexpectedly to the defeat of the Government—partly through the votes of the Irish, and partly through Liberal abstentions. Gladstone insisted that a Budget defeat involved resignation, and the Queen sent for Lord Salisbury, the Conservative leader in the Lords. Lord Salisbury's task might have been easier if he could have made an immediate appeal to the country, but the recent passage of the Franchise Bill, and more particularly of the accompanying Seats Bill, which the Conservatives themselves had pressed for, now raised a Constitutional problem. In this crisis, Lord Salisbury consulted Sir Hardinge Giffard, who advised that the passing of the Seats Bill had made an immediate dissolution legally impossible, and Gladstone himself had to admit that Giffard was right. Lord Salisbury was thus in the trying position of having to hold office for several months with a minority in the House of Commons, but, after obtaining a general guarantee of Opposition support, he undertook the thankless task, and, it may be added, carried it through with a skill which gave great satisfaction to the Queen and augured well for the future.

Lord Salisbury's telegram to the Queen on June 14 says: "An unforseen difficulty on another matter has arisen which may be serious. Sir Hardinge Giffard advises that passing of Seats Bill has made dissolution legally impossible."

Two days after this, the Queen entered in her Journal: "Dissolution being impossible, and Lord Salisbury's party being in a minority, it would be impossible to wind up the session . . . . without obtaining from Mr. Gladstone a promise of support . . . . I wrote this and forwarded it to Mr. Gladstone. Received an answer from Mr. Gladstone after dinner, doubting impossibility of dissolution (which, however, he afterwards found was the case)."

So Gladstone had to agree that Giffard was right.

Two days before this the Queen had entered in her Journal: "and Lord Salisbury really did not know who to appoint as Lord Chancellor. He thought he must consult Lord Selborne." (Lord Selborne was the out-going Chancellor, whose son had married Lord Salisbury's daughter).

Lord Chancellor.

Not many days later, the world learned that the Prime Minister's choice had fallen on Sir Hardinge Giffard. The new Chancellor took the title of Baron Halsbury of Halsbury, in the parish of Parkham, Devon, which, as we have seen, was one of the former seats of his family

On June 14, 1885, Sir Hardinge Giffard had some anxious hours before his appointment as Lord Chancellor was finally confirmed. He had returned all his briefs, and already sent his friend Mr. Webster down to take his place at Launceston, when there came the hitch, and sudden and unexpected difficulties threatened to overwhelm the new Ministry before it was born. But, although so much was at stake, Sir Hardinge's invincible cheerfulness never failed, and his good-humoured and confident aspect, and festive white waistcoat, encouraged the sinking hearts of his friends, and the supporters of Lord Salisbury's policy, as they crowded round him in the House of Commons to congratulate or condole, as the Fates might ordain. The hearty cheers with which they greeted the final decision bore testimony both to Sir Hardinge's personal popularity and appreciation of his courageous acceptance of whatever destiny might be in store for him.

At first the appointment came rather as a surprise to the public and the legal profession, but almost at once it was recognised as sound, and the new Chancellor was soon to justify the confidence placed in him. In the House of Commons his direct and definite opinions had rather alarmed some of the more timid spirits in the leadership, and Disraeli had not often given him the opportunity of expressing them, but, when he got into the House of Lords, his strong political judgment was most valuable to his party, and in his high office his clarity of mind and grasp of legal principle, together with his sound common sense, were to distinguish him both as statesman and judge.

The Lord Chancellorship is not only the oldest and most dignified of the great law offices, but holds a position of unexampled power and responsibility. The Lord Chancellor ranks before every other subject, except the Royal Dukes, and the Archbishop of Canterbury. He is the Custodian of the Great Seal of England, and his designation of "Keeper of the King's Conscience," which has come down from mediæval times, is a testimony to his great influence. He has the presentation to between six and seven hundred Crown livings, as well as to twelve canonries. He is the head of the law. He is President of the Chancery Division of the High Court. He is a member of the Judicial Committee of the Privy Council, and presides when the House of Lords is sitting to hear appeals. In fact, he is responsible for the efficient working of the entire judicial system of Great Britain. The Judges of the High Court (other than the Lord Chief Justice) are all appointed on his recommendation, and he is responsible for the nomination of most of the other important offices connected with the administration of justice, such as the Registrarships, Masterships of the Court of Chancery, Masterships in Lunacy, Taxing Masterships, etc. He sits upon a historic bench, called the Woolsack, which is placed immediately opposite the throne, and which, by a legal fiction, is not regarded as being within the actual precincts of the House itself.

At the time that he was appointed Lord Chancellor, Giffard was busy in the Courts, and, as had so often happened in his life, the opening came at a fortunate moment. Sir John Holker, who would have been his most formidable rival, had died, and there seemed nobody with stronger claims to high office than himself.

William Brett, Viscount Esher, Master of the Rolls, had a good many supporters, and for a time the issue seemed doubtful between them. But Giffard had fought several contested elections, and had done yeoman work for the party, both in and out of Parliament. Brett had been Solicitor-General for twelve months only, and had then accepted a puisne Judgeship, so his services did not outweigh Giffard's whose appointment was an exceedingly popular one. The Carlton Club supported Giffard to a man. The genius for friendship, which had been so marked all his life, stood him in good stead now. Even those who had doubted his capacity for supporting this high honour with the weight and dignity it needed soon found that he was more than equal to it, and that he was always *primus inter pares* even among men of such eminence as Lords Selborne, Watson, Bramwell, Blackburn, Herschell, Davey, Bowen, and Macnaghten.

Part of an article in *The Graphic* about this time says: "When in 1850 Mr. Hardinge Giffard received his call to the Bar in the Benchers' Room at the Inner Temple, he would have been a rash man who would have singled him out from his fellows as the one who would sit on the Woolsack. There was nothing to indicate a career of such distinction, for neither at Oxford, nor as a law student, had he given any evidence of the ability which had marked Roundell Palmer, for instance, for high places in the law. But the keen observer might have seen something in the towering forehead, resolute mouth, and keen eyes of the young man from Merton, which might well carry him far beyond his colleagues."

The elevation to the Woolsack meant, of course, farewell to his old constituents, to whom he addressed the following letter:—

GENTLEMEN,

Her Majesty having been graciously pleased to entrust me with the custody of the Great Seal, it becomes my duty to say farewell as your representative in the House of Commons.

I find it hard to express my grateful sense of the unvarying kindness which has been extended to me during the period which has elapsed since I was first elected for your borough, down to the present time, not only from those whose views upon political questions were in harmony with my own, but also from very pronounced political opponents, from whom I received most generous and forbearing treatment.

While expressing to you all my heartfelt gratitude for your kindness, permit me to express a hope that nothing has occurred to make you feel regret at the association of my name with your ancient borough.

Believe me, Your obliged and faithful servant,

HARDINGE STANLEY GIFFARD.

June 24, 1885.

(*To be continued.*)

Court of Arbitration.

The following fixtures have been arranged by the Court of Arbitration:—

Napier: 5th August, 1929, at 10 a.m.

Auckland: 19th August, 1929, at 10 a.m.

Counsel: "The case which I have just cited, your Honour, is particularly good wine, and I propose to deal with it at some length."

MacGregor, J.: "Don't water it down too much, Mr.———."

Appeals to Privy Council.

Condition as to Time for Preparing Record.

Rule 5 of the Rules of 10th January, 1910, providing for appeals to the Privy Council from our Supreme Court and Court of Appeal, reads:

"Leave to appeal under Rule 2 shall only be granted by the Court in the first instance:—

(a) Upon condition of the Appellant, within a period to be fixed by the Court, but not exceeding three months from the date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding five hundred pounds, for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Respondent in the event of the Appellant not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be); and

(b) Upon such other conditions (if any) as to the time or times within which the Appellant shall take the necessary steps for the purpose of procuring the preparation of the Record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose."

On every application for conditional leave to appeal the Court of Appeal always, of course, fixes the time within which security is to be given in accordance with paragraph (a) of the Rule; but it has not in the past been the usual practice for any time to be fixed by the Court within which the appellant shall take the steps mentioned in paragraph (b) of the Rule. An instance, however, of times being fixed under both paragraphs, and of the effect of non-compliance with a condition as to time for preparing the record, is to be found in *Gisborne Harbour Board v. Lysnar*, (1923) N.Z.L.R. 345.

In *H.M. the King v. Power* the Court of Appeal at its present sittings granted conditional leave to appeal to the respondent subject, not only to security being given in the sum of £500 within three months, but also to a condition that the steps under Rule 5 (b) be taken within four months. The Chief Justice suggested that, although it had not in the past been the general practice for a time to be fixed under paragraph (b) of Rule 5, this course should in future be adopted.

Chief Justice Martin in a presidential address recently to the Canadian Bar Association pointed out that with the advance of science new outlets and opportunities for human activity had made for material evil as well as material good. "That good," he said, "cannot be conserved to the people, that evil cannot be warded off without the aid of the law wisely formulated and adequately enforced. The eyes of the people look to the profession of the law for leadership in this. The call of the people is to us for help. They know that the profession is the best qualified to lead and help in the adjustment of suitable law to the new conditions."

London Letter.

Temple, London,
8th May, 1929.

My dear N.Z.,

Considerable excitement obtained here last week, at least among a small but very select number of us, to read of the appointment of your new Chief Justice. On behalf of two of us, more particularly interested and pleased, I was appointed to send off the congratulatory cable on a joint account. I was disappointed to learn, from the Eastern Telegraph Company, that my cable must go that way and that New Zealand is some six hours ahead of us in time, so that my message would lose that much time on the way. "It will get there to-morrow," said the clerk. "What's the good of to-morrow?" said I; "this is a something we want to get over at once." I argued that if he sent the cable round the other way, across America, we should gain time instead of losing it, for the United States are, I know by recent experience, some considerable distance in our rear in the matter of the clock. "If you will only fall in with the scheme," said I to the clerk, "I shall have the felicity of congratulating Myers yesterday . . ." So much for the cable congratulations. We have added our various epistolary. Here is the public. If there is any other known form of congratulation, I shall be glad to be told of it, and we will certainly adopt it. My only regret is that I shall not now live to be "led" by him, as I always hoped might be my lot before he thus passed away from our ken. Will some kind lawyer in New Zealand send me a brief to come over and argue in his Court? If there is no other question with which I might be entrusted, I could at least be trusted to press for a right of audience: which, when he counted up the number of letters I have written to you, none of your Judges could be so hard-hearted as to refuse? However this may all be, I congratulate you and I congratulate him and I condole genuinely with myself; for I don't believe there are any kind lawyers in New Zealand . . . not of the particular sort above required, I mean.

Hayley Morriss occupies the attention of the common law court public at the moment; and although the context of the cases is in many ways unpleasant the interest is legitimate. Horridge, J., is displaying his curious merit as a Judge; I say curious, for you might suppose from his manner he was the unkindest bully of all, but he is in fact, the most to be depended upon for a sound and just (I will not say, always bland) conduct of a trial. That, I think, is all the comment you will require from me upon this subject.

The Magistrates' case, *Rex v. Newport-Salop Justices* (for a report of which see "The London Times" of 24th and 25th April last), has a double interest; first it bears upon the subject of school discipline, and the right to enforce it and the extent to which parents may curtail it, a subject of which most of us know little as parents since we are usually only too glad to leave it to the master to relieve us of this invidious task; second, it deals in an interesting manner with the often-arising question as to the "person aggrieved." This latter point also arose, and perhaps more effectively, in the case reported on the following day: *Sevenoaks Urban District Council v. Twynam.* And, in the last-named case, as the "Justice of the Peace," of May 4th, comments, there is a particularly interesting example of the not-always-remembered observation of Lord Halbury in *Quinn v. Leathem.* "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all." I quote this apt quotation because it is so apt; how I came across it was in a context of a more extreme nature, in that the question raised was whether the reported finding of facts by a Judge, as to a transaction which formed the subject matter of two litigations, was any binding evidence, or any evidence at all, as to the fact of them in the litigation which was not being reported. A.B. was made bankrupt; he resisted the receiving order and carried his resistance to appeal in the High Court. The High Court, dealing with the appeal, pronounced in the judgment upon the facts which caused the bankruptcy. Later A.B. sued for damages for malicious presentation of a bankruptcy petition; the same facts became material a second time. You will not need to be told that the pronouncements of the High Court in the receiving order matter carried the thing no further as to the establishing of the facts, pronounced upon, for the second purpose; but it was interesting to discover by what means the judgments, thus reported, could be made any sort of evidence at all. What happened eventually was that the plaintiff referred to the reports, chapter and verse, in his pleading and alleged that their Lordships, so pronouncing, had told the truth: and the defendant saw fit to admit this was so, and turned his eyes, for salvation, rather to points of law . . . of which, by the way, there are a good half-dozen in every malicious prosecution action, as you remember, or will do well to remember.

The Rating and Valuation Act, 1925, and, to a small extent, its follower of 1928 have suddenly come to the fore, as I told you, many months ago, they would, and have found myself and my unlearned brethren totally unprepared, as I have been telling my brethren and myself for months that they would. Outside London, at any rate, they necessitate a new assessment as at about this time; the new assessments have been made, and are giving dissatisfaction to those same "aggrieved"; the aggrieved, whether by means of objections to draft valuation lists or by way of proposals for the amendment of current valuation lists, are taking the decisions of assessment committees which, in the more serious cases, always amount to a compromise and lead to an appeal! So Rating Appeals, after years of quiescence given to still us into an imprudent oblivion, have suddenly become the fashion again; and we of the Bar, who are only formally concerned with the early procedure which has been formidably altered, and who are mainly concerned with the principles of assessment which remain the same, are daily being caught out by our professional clients! However, that trouble is over now for the most part; we have had enough bumps to awaken us to the necessity of learning the formalities again; and we are past the technicalities, which for some unknown reason so much abound in rating law even in its regenerate form, and are awaiting or conducting argument of the substantial points, which rest upon their old bases. I have a very novel series of cases, as to which I am likely to be one of the first in a wide field; what is the nature and means of calculating, the rent from year

to year which the hypothetical tenant pays, in the case of the English Mansion House which, in these break-up days, could by no possibility be let from year to year at all or be let in any way or for any term at any real rent, since its up-keep is so expensive, and for the owner, who lives there, it is a drain on the pocket rather than a roof over the head! It is going to be a very interesting matter; for the change of the English country-side, in this respect, and of the English method of living under the oppressive conditions of the day, are new phenomena in rating law, and the respondent authorities are, unless I am mistaken, going to be put to some difficulty to defend their drafted, or any, valuation on a rental basis. I have a number of such houses to deal with; as to most of them the owner would, from a financial as opposed to a sentimental point of view, let you the house at no rent at all, or even pay you a small annual consideration to go in and live there, if thus he might save what he is put to to keep the place up. I will let you know the result when a principle is established. Perhaps the matter does not interest you, as you are not blessed, or obsessed, with these handsome anachronisms. That the matter will very considerably interest my tribunal, the Rating Appeal Committee of the Quarter Sessions of the Counties wherein the houses lie, I have no doubt. Most of the members of those committees are themselves estate owners; they will, unless I mistake, allow short shrift to any expert witness who dares to tell them the annual value of such houses by means of the measurements of the rooms and grounds! The bigger the house, these days, the less the value in the market, of course; the whole world, and especially his wife, to-day is after the small, compact house, which pre-war, was for the humble, meek, poor and unpretentious, only.

I should call your attention to the House of Lords' decision in *Hyman v. Hyman* (April 30), which turns upon a covenant, in a deed of separation, that the wife should not sue for further support, alimony or maintenance than in the deed provided; and which decides now finally that so necessary a power in the court, as that to make provision for her on the dissolution of her marriage, must be incident of the power to decree the dissolution and must be beyond the wife's power to deprive herself of it. You will study the report for yourself, for the facts and the niceties of it; I may not tell you, for I am under prohibition to go into such detail in these letters; but I should be a defaulting scribe if I omitted to advise you of the fact of this somewhat important decision.

For the rest, the General Election not only impends, it menaces. In a few days' time there will be no Parliament, and this country will be handed over to the uncontrolable depredations and ravaging of thousands of uncivilised candidates and their supporters, dinning into our ears patently spurious arguments and breaking into our houses with wholly impossible promises and intolerable familiarities. Such is the sheer tyranny of democracy. For my part, I have already started upon a career of speeches, to be continued at least twice every night till the very eve of the election itself on May 30th. I have, as becomes my profession, and to help a friend who is mad enough to want to spend his money, his time and himself in the House of Commons, gone amuck on speeches; have delivered half-a-dozen or more already; threaten another couple of dozen at the least; and know that none of my victims can say me nay. Why on earth they come and listen, I cannot conceive. Once they didn't; and I was left in empty possession of a waggon on a village green, a gawdy picture of the candidate, and sweet, quiet empty space to address. I addressed it for twenty minutes, and I like to think I converted it entirely to my, or my friend's, way of thinking. There were a couple of women, with a child, some thirty yards away to the left, having a gossip after shopping and intrigued as to the curious fact and behaviour of the gentleman on the waggon; there was, at the same distance to the right, a smithy, with the blacksmith and his customer occasionally appearing at the door to remark and wonder upon the same matter; I am certain they must have known by my fervour, that they (with the rest of God's universe) were being addressed, though they were not inquisitive enough to come a little nearer and ascertain why. Have you ever made a speech, a lengthy speech, an impassioned speech, to nobody? No? Then be guided by me and choose, if choose between two evils you must, such a unanimous crowd of unconvincable opponents as I had last night. London and the Law Courts, to-day, seem quite a calm and desirable backwater, compared to the Suffolk country which I am attempting to make hideous with my friend's politics.

Yours ever,

INNER TEMPLAR.

Bench and Bar.

His Honour Mr. Justice Frazer of the Court of Arbitration is at present in Australia for the special purpose of investigating the systems of industrial arbitration in operation in the various States of the Commonwealth and also of making inquiries into the Australian workers' compensation laws. It is anticipated that he will be absent for several weeks, and His Honour Mr. Justice Blair is meanwhile acting as President of the Court of Arbitration.

Mr. C. A. L. Treadwell has been appointed Wellington representative of the Gisborne District Law Society on the Council of the New Zealand Law Society.

The following admissions to the Profession have been made recently at Wellington: solicitors on the roll admitted as barristers—E. A. R. Jones, R. M. Morgan, R. E. Tripe; solicitors—R. H. Bell, G. O. Cooper, H. M. A. Major, H. S. Port, A. Tyndall.

The following have been recently admitted as solicitors at Auckland: R. E. Jones, R. L. Munro, R. A. Potter.

Rules and Regulations.

Public Works Act, 1928: Amendments to Electrical Supply Regulations, 1927. Amendments to Electrical Wiring Regulations, 1927.—Gazette No. 49, 4th July, 929.

Electrical Wiremen's Registration Act, 1925, and Electrical Wiremen's Registration Amendment Act, 1928. General Regulations.—Gazette No. 46, 20th June, 1929.

Bills Before Parliament.

In this column will be summarized, with special reference to any of their provisions affecting the Profession, all Bills from time to time introduced into Parliament, irrespective of their chances of becoming law. The provisions noted are those of the Bills as originally introduced, but in exceptional cases important amendments during their progress through Parliament will also be shown. A general summary of the year's legislation will be published, as in the past, at the end of the Session.

Compulsory Military Service Repeal. (Mr. Jordan). Abolishing militia and cancelling universal obligation to be trained. Repealing Parts IV and VI of Defence Act, 1909.

Imprest Supply. (Rt. Hon. Sir Joseph Ward). Authorising imprest grants not exceeding £2,678,000 out of funds and accounts in First Schedule and not exceeding £314,000 out of accounts in Second Schedule.

Gaming Amendment. (Sir George Hunter). Allowing totalizator investments to be telegraphed to secretary of racing club; S. 28 of principal Act repealed; S. 29 amended.—S. 2. Removing restriction on publication of dividends; S. 30 of principal Act amended by repealing subsections (1), (4) and (6).—S. 3.

Local Authorities Empowering (Relief of Unemployment) Extension. (Rt. Hon. Sir Joseph Ward). Period within which local authorities may borrow money in relief of unemployment extended to 30th June, 1930.

Marriage Amendment. (Mr. Mason). Marriages with deceased wife's niece or deceased husband's nephew valid and issue thereof deemed born in lawful wedlock; Section not to render valid any such marriage where either party has thereafter and before 26th April, 1906, remarried, nor any other such marriage contracted on or after 26th April, 1906, where either party has thereafter before passing of this Act remarried; Section not to deprive any person of property which he may have lawfully inherited, acquired, or become entitled to prior to coming into operation of this Act, or affect any *lis pendens* existing on 26th April, 1906, or on coming into operation of this Act.—S. 2. "Deceased wife's niece" and "deceased husband's nephew" defined.—S. 3. Section 46 of Marriage Act, 1908, repealed.—S. 4.

Workers' Compensation Amendment. (Mr. Howard). Making insurance of employees against accident compulsory and providing for miscellaneous alterations in amount of compensation payable. £1,000 in case of death from injury of any worker leaving total dependents. If incapacity lasts for two days compensation to be payable. During any period of total incapacity weekly payment to the amount equal to average weekly earnings at time of accident. During any period of partial incapacity weekly payment to be amount equal to difference between average weekly earnings before accident and average weekly amount which worker able to earn after accident. Limitation on duration of weekly payments imposed by S. 5 (7) of principal Act removed. Limitation of £1 on reasonable medical and surgical expenses imposed by S. 5 (10) removed. Limitation to £1,000 of amount recoverable in action arising out of negligence of fellow-servant imposed by S. 67 (3) removed. Words "100 per cent." in Second Schedule omitted and "£1,000" substituted.—S. 2. Act not to bind Crown.—S. 3. The Bill also purports to increase from £750 to £1,000 the limitation on the aggregate amount of weekly payments imposed by Section 5 (8); but this has already been done by S. 3 (c) of Amendment Act of 1926.

Local Bills.

Bluff Harbour Reclamation and Leasing and Empowering.
Gisborne Harbour Board Amendment.
New Plymouth Borough Council Empowering.

Private Bills.

Associated Churches of Christ Church Property.
Christ College Canterbury.
Wellington Bishopric Endowment Trust (Church of England).
Wellington City Mission.

Forensic Fables.

THE DEAF REPORTER, THE DILIGENT YOUNG COUNSEL, AND THE GLORIOUS WIN.

There was Once an Old Gentleman who Practised as a Special Pleader in the Early Part of the Eighteenth Century. Being Very Deaf and Extremely Stupid, he Thought he would Take to Reporting. His Reports, by Reason of his Above-Mentioned Disabilities, were Shockingly Bad. As his Contemporaries Knew that the Old Gentleman Heard One Half of the Case and

Reported the Other, they Paid No Attention to his Efforts. When the Deaf Reporter had Produced One Volume he Passed Away, much Regretted by his Laundress, to whom (according to Some) he was Secretly Married. Two Hundred Years Rolled by, and a Diligent Young Counsel, who was Accustomed to Go to the Root of Things, Unearthed the Forgotten Volume. To his Joy he Discovered therein an Authority which Exactly Fitted the Difficult Case he had to Argue on the Morrow in the County Court. The Startling Proposition Contained in the Head-Note was Due to the Fact that the Deaf Reporter had Omitted the Word "Not" when Taking Down the Observations of Mr. Justice Punt in the Court of Common Pleas. The Diligent Young Counsel Waited till the County Court Judge Showed Signs of Wobbling and then Loosed Off his Splendid Find. The County Court Judge, who was Anxious to Catch his Train, was in no Critical Mood. Thus the Diligent Young Counsel had a Glorious Win and Sowed the Seeds of a Large and Lucrative Practice.

Moral: *Si Auctoritatem Requiris Circumspice.*

Legal Literature.

Richard Burdon Haldane—An Autobiography.

This is the best autobiography this reviewer has yet read. It is of special interest to the lawyer. It is the life story of one of England's greatest Lords Chancellors, "the greatest Secretary of State for War England has ever had," and a sublime philosopher.

The reading of Lord Haldane's life and thoughts should not fail to imbue the reader with a modicum of his great humility. To this reviewer his humility and humaneness give the book an incalculable value. His appreciation of happiness he expressed as follows :—

> "But if we have striven to think and to do work based on thought, then we have at least the sense of having striven with such faculties as we have possessed devoted to the striving. And that is in itself a cause of happiness, going beyond the possession of any definite gain."

Then, remarking how Faust had discussed this truth, Lord Haldane completes the story of his life with these golden words :—

> "So it may turn out in some degree with each of us, whatever our circumstances and our capacities. This creed is one which fits into what is highest in the various forms of religion. "*It is open to all of us—provided we keep ourselves humble in mind and avoid self-seeking and vanity.*"

The cheap sneer of the public, aroused at one sad time in his life to public anger, to Lord Haldane's philosophy could have best been answered in the words of Milton :

> "How charming is divine philosophy not harsh nor crabbed, as dull fools suppose, but musical as is Apollo's lute."

Lord Haldane's capacity to proceed with his life unaffected by the opinion of lesser people was both a comfort to him and a regret to his friends. Had he expressed himself in definite terms against the Germans when the War broke out, instead of allowing a false emphasis to be given by a degraded and hysterical Press to an expression of his made before War was contemplated with reference to the effect on his mind of his education at Gottingen, he would now rest amongst the greatest heroes of the War. Instead of explaining away, and it would have been easy enough for him, his remarks about his "spiritual home" he allowed the Press to inflame the public against him as if he were a spy. There is nothing so besmirching the good name of the Press as was the vile campaign against Lord Haldane at the beginning of the War. It needed but sane reflection to remind them that the efficiency of our "Contemptible Little Army" was due to Lord Haldane's genius for seeing clearly, his organising capacity, and above all his burning desire to serve his Country. Why his political friends remained silent is impossible to understand, for they knew the truth. There was no effective organisation to send an Army abroad till Lord Haldane took over the Secretaryship of State for War. On 19th November, 1918, Sir Douglas Haig in writing to Lord Haldane said : "Until you arrived at the War Office no one knew for what purpose our Army existed." Then later in the same letter he adds :

> "I and many soldiers with me are greatly distressed at the ungenerous treatment which you have received during the critical phase in our Country's history ; and I hope the day is not far distant when the invaluable services which you have rendered to our Empire may be adequately recognised."

These remarks should be enough to fill the hearts of Englishmen in general, and English lawyers in particular, with pride.

That Lord Haldane was a great lawyer, a most successful barrister, and one of the most eminent of England's Lords Chancellors is perhaps not well known beyond the ranks of the legal profession. He was born in 1856. He received a comprehensive education, the part of which that appealed most to his mind being obtained in Gottingen. He studied philosophy intensively, but ultimately studied law and at the age of 23 was called to the Bar. At this time his industry was enormous ; he had the enthusiasm or passion for his profession which ensured his success. In the early days of his career at the Bar he was left to argue alone before the Privy Council an important application for the Government of Canada. It was the first of a great number of briefs from that Dominion.

About 1885 he took an active interest in politics. He became a strong supporter of the Liberal Imperialist Party. His career as a politician was an interesting one. His mind did not allow his being trammelled by the planks of his party. When he saw fit, as he did when Lord Balfour introduced his Education Bill in 1902, he voted against his party. His politics to me smacked more of the Conservative than the Radical. He regarded education, public health, and the preservation of the Empire as most important planks in his political platform. He played the leading part in founding the London University. It is impossible to do justice in this review to his national service in organising the English Army before the War, nor would it be just to him to try and give in a few words his part in the Great War. His name should rank with such men as Lord Haig and Lord Reading as having played a major part in that terrible drama. Lord Haig called him "The best Secretary of State for War England has ever had." By his preparations he made victory possible. Posterity will assuredly recognise his greatness, for as Emerson said "Greatness appeals to the future." Those of us who practise at the law and have occasion to study the reports need not be told of his greatness. He was profound. How later he became for the second time Lord Chancellor, but on this occasion in a Labour administration, is an interesting incident in the closing hours of his career. He died at the age of 72, a profound lawyer and a complete philosopher. His life is an inspiration to all.

—C. A. L. Treadwell.

New Books and Publications.

Cyclopaedia of Insurance Law. Complete in eight volumes. By George J. Couch, LL.B., (Cornell), (Lawyers Co. of New York). Price £18.

The Law of the Land. Second Edition. Revised and enlarged by the Author, Sir H. S. Theobald, K.C., M.A. (St. Catherine Press). Price 24/-.

Odgers' Digest of the Law of Libel and Slander. Sixth Edition. By W. Blake Odger, M.A., and Robert Ritson. (Stevens & Sons Ltd.). Price £2/7–.

De-Rating Explained with Practical Examples. By Isaac Dixon, F.S.I. (Shaw & Sons, Ltd.). Price 3/6.

Lord Chief Baron Pollock. By Lord Hanworth, P.C. K.B.E., Master of the Rolls. (Murray). Price 12/-.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"Although it is not necessary for counsel to know what the history of a point is, but to know how it stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the Law."

—Roger North.

Vol. V. Tuesday, August 6, 1929 No. 12.

The Element of Chance.

In *Young v. Britten*, (1928) G.L.R. 134, Mr. Justice Adams held that a person who by advertisement invited the public to use his premises for the purpose of playing progressive euchre for money prizes and charged an admission fee was rightly convicted under Section 36 (1) (b) of the Gaming Act, 1908, of keeping a common gaming-house. In the course of his judgment the learned Judge said: "I conclude from these authorities," *i.e.* the English decisions on the Betting Act, 1853, "that S. 36 of the Gaming Act is to be read literally; that paragraph (b) of subsection (1) is to be read as an independent enactment; that in a prosecution under the provisions of that paragraph it is immaterial whether the game is one of skill, or of mixed skill and chance, or of pure chance; that the test is as stated in *Rex v. Peers*, and *Rex v. Brown*, 86 L.J.K.B. 797, and raises a question of fact." Adams, J., referred to and followed *Dawson v. Sinclair*, (1926) N.Z.L.R. 721, a decision of Skerrett, C.J., in a "roll down" case. In that case the late Chief Justice relied upon *Jenks v. Turpin*, 13 Q.B.D. 505, which is authority for the proposition that it does not matter whether the use of the premises is limited to the subscribers and members of a club and that it is not open to all persons who may be desirous to use the same. In both *Young v. Britten* and *Dawson v. Sinclair* the Judges assumed on a certain interpretation of Section 36 of the Gaming Act that it was unnecessary to decide whether the game played was one of skill or chance.

In *Rex v. O.K. Social and Whist Club Ltd.*, an appeal against a conviction by the Recorder at Liverpool for keeping a common gaming-house, lately before the Court of Appeal in England, the question of the element of chance in a whist drive was directly touched upon and it may be that if the premises in *Young v. Britten* had been open to members of a club only it would have been necessary in that case to determine whether the game played (progressive euchre) was or was not an unlawful game. In *Rex v. O.K. Social and Whist Club Ltd.*, the club where a progressive whist drive took place was not a proprietary club but a members' club limited by guarantee and registered at Somerset House. There was no suggestion that the club was not properly conducted. Counsel argued that the whist as played, the winners in each round remaining together and the losers moving to two different tables, was a game of skill and the following exchange took place between Bench and Bar:—

MR. JUSTICE AVORY: "Two good players might go through the evening getting bad partners. Nothing upsets a good player so much."

MR. BLACKLEDGE: "But nothing pleases a good player so much as to get rid of a bad partner as quickly as possible."

MR. JUSTICE SWIFT: "How can you eliminate chance from any game of cards? Do you suggest that cards were cut and dealt with skill?"

MR. BLACKLEDGE: "There was no evidence of that sort of skill in this case."

Counsel contended that if the conviction were right, every club was in danger of prosecution. The shades of Cavendish, Hoyle, and innumerable departed members of the Portland Club might be expected to resent any suggestion from whatever authority that whist is not a game of skill; but to the proposition that progressive whist, owing to interchange of partners, was not a game of skill they might well agree. The Lord Chief Justice said that the grounds of appeal really raised the question whether the Recorder was wrong in holding that whist as played, "progressive whist where the partners were shuffled as well as the cards," was illegal and whether he was wrong in withdrawing that question from the jury. Mr. Justice Swift, J., by his interjection suggested that shuffling the cards introduces an element of chance just as much as shuffling the partners. In the result the Court held that the Recorder was right in finding that the game of progressive whist, involving as it did at every turn the element of chance, and multiplying and confusing the element of chance by the progression of the partners throughout the evening, was not a game of skill and that it was an unlawful game.

Mr. Justice Adams had then another ground upon which he could have confirmed the conviction in *Young v. Britten*, namely, that progressive euchre is an unlawful game, however great the skill involved in the ordinary game of euchre. If that ground had been taken up it would have been unnecessary for him to have adopted what he called the literal interpretation of Section 36 (1) (b) of the Gaming Act.

Skerrett, C.J., adopted the same interpretation in *Dawson v. Sinclair*, but Salmond, J., in *Dolling v. Bird*, (1924) N.Z.L.R. 545, adopted an interpretation which, it appears, makes it necessary in such cases to determine whether the game being carried on is an unlawful one or not. It would appear that the learned Judge thought that Section 36 struck at the use of a house as a basis for illegal operations, whether betting or playing unlawful games, and that unless the games were unlawful the use of the house would not be an offence against the statute. It is, on the other hand, true that Salmond, J., was in that case dealing only with paragraph (a) of S. 36 (1), and it may well be that his observation, at p. 548:

> "On its true interpretation the purpose and effect of S. 36 is to prohibit betting carried on as a business on premises appropriated for that purpose,"

is to be read as stating only the purpose and effect of paragraph (a), and though the English and New Zealand legislation on the subject is not quite identical it has to be admitted that the view of Skerrett, C.J., and Adams, J., is supported by the English decisions on S. 1 of the Betting Act, 1853. Nevertheless the interpretation of Section 36, as a whole, as a provision against using premises for the purpose of betting has much to recommend it as against an interpretation so wide that the use of premises for the playing of games involving a large amount of skill where prizes are paid to the winners, is an offence.

Court of Appeal.

Herdman, J.
Adams, J.
Blair, J.

July 3; 15, 1929.
Wellington.

FEILDING CLUB (INCPTD.) v. PERRY.

Club—Suspension of Member—"Natural Justice"—Member Notified of Charges Made Against Him and Requested to Attend Meeting of Committee to Show Cause Why He Should Not Be Suspended Under Named Rule—Evidence of Misconduct Given Before Committee at Previous Meeting—Evidence Not Taken in Member's Presence—No Right of Cross-Examination Afforded Member—Member Attending Meeting and Giving Explanation—Explanation Not Accepted By Committee—Member Suspended—Sufficient Opportunity of Making Defence Afforded Member—Rules of Natural Justice Not Violated—No Evidence of Bias or Predetermination of Charge—Refusal of Court to Interfere.

Appeal from the decision of SMITH, J., reported 5 N.Z.L.J. 42.

Gray, K.C., and James for appellant.
Cooper for respondent.

HERDMAN, J., delivering the judgment of himself and ADAMS, J., said that the Feilding Club was a society registered under the provisions of the Incorporated Societies Act, 1908. It possessed no club charter. It was alleged that on 25th June, 1928, the respondent misconducted himself in that he, being a prohibited person, came upon the Club premises under the influence of liquor with a bottle of whisky, that he invited the steward to drink with him, and that he subsequently invited two members of the Club to drink with him. It was admitted that on that date a prohibition order against respondent was current. On 31st August, 1928, the committee made a rule which provided that any member having a prohibition order against him should *ipso facto* cease to be a member of the Club. Their Honours had no doubt that in so legislating the committee had the respondent's case in mind. Believing that it had power under the new rule to act against the respondent the committee on 3rd September, 1928, through the Club secretary, notified him that he had ceased to be a member of the Club. It was clear that the new rule in itself could not give jurisdiction to a Club to rid itself of a member who, before it came into existence, had become a prohibited person. But the behaviour of the member which caused the Magistrate to issue a prohibition order might constitute misconduct proof of which was sufficient to justify a decree of suspension. On 25th October respondent's solicitors wrote to the Club claiming that under the new rule a person prohibited before it came into existence did not, because he was the subject of a prohibition order, lose his membership. With that view the Club's solicitors were apparently in agreement. The Club, however, determined to proceed against the respondent on other grounds. Rule 21 provided that a member who grossly misconducted himself within or without the Club should be answerable to the committee who might at their discretion suspend such member. The rule gave a suspended member a right to appeal to a general meeting of the Club and provided in effect that if, after the lapse of a period of time, no application was made by the suspended member to have his case reviewed by his fellow members, his membership should cease unless the committee otherwise decided. The committee was in possession of evidence of specific misconduct. The minutes of 28th September, 1928, proved that the steward of the Club, when called before the committee, reported that the respondent had brought liquor into the Club and had consumed liquor in his presence, and that later on in the day he was in a state of intoxication on the premises. The last-mentioned statement made by the steward was confirmed by Mr. Harding, a member of the committee of the Club. On 26th October, 1928, at a meeting of the committee the respondent's case was again considered and it was resolved that: "a letter be sent to Perry informing him that he had grossly misconducted himself within the meaning of Rule 21, and that he be requested to attend a meeting of the committee on Friday, 2nd November, at 8 p.m., to show cause why he should not be dealt with under this rule." A notice was accordingly sent on 27th October, 1928, to the respondent stating that it had been alleged that he had grossly misconducted himself in the Club on or about 25th June, 1928, and requesting him to attend a meeting of the committee of the Club on Friday, 2nd November, 1928, at 8 p.m., to show cause why he should not be dealt with under Rule 21. A copy of that Rule was enclosed. On 2nd November, 1928, the respondent attended the special meeting of the committee to explain his misconduct. The committee had before it evidence of the fact that a member of the Club who was the subject of a prohibition order was on a certain date upon the Club premises, that when there he had consumed liquor, that he had offered it to other members, and that he was intoxicated. The respondent was called upon for an explanation but failed to satisfy the committee of his innocence. He was not confronted with the witnesses who testified against him nor was he afforded an opportunity of cross-examining witnesses. The minutes showed that after the respondent had retired from the meeting his case was fully discussed and that after deliberation it was resolved to suspend him. On 6th November a notification that he had been suspended under the rule was transmitted to him. The respondent admitted that before attending the meeting on 2nd November he was well aware of the details of the charges which had been preferred against him.

As to the respondent's allegation of bias against two members of the committee, their Honours had no hesitation in deciding that there was no ground whatever for suggesting that those gentlemen were actuated by any motive other than an honest desire to protect the good name of their Club and the interests of its members. Indeed, it seemed to their Honours that there was nothing in the conduct of the committee as a body, or in the conduct of individual members of the committee, which was inconsistent with an honest desire to protect the interests of the institution which was under their control.

An attempt was made to argue that the committee had prejudged the respondent but the evidence proved that no final determination was arrived at until the respondent had been heard. Individual members of the committee might, no doubt, have formed an opinion about the guilt or otherwise of respondent before the special meeting took place. They knew what the steward had to say and they were aware of what Mr. Harding knew, so it would be impossible to avoid forming some impression about respondent's behaviour before he was heard. Nevertheless, an open mind was kept and no final decision was arrived at until after the respondent had been heard.

For the purpose of illustrating the principles upon which cases of the present kind were decided many authorities were cited during the argument. The mass of judicial authority extant established certain propositions which were relevant to the circumstances of the present case. For instance the authority exercised by the Courts over such a domestic tribunal as a committee of a social club was limited. Such a tribunal could not administer an oath. It could not compel the attendance of witnesses. It was not bound by the rules of evidence. It might act on hearsay evidence and in some cases the members of the tribunal might be both witnesses and judges. See the observations of Maugham, J., in **Maclean v. Workers Union,** 45 T.L.R. 256. But the committee of a club must act in accordance with its rules. In the present case it had, in their Honours' opinion, done so. It must act honestly and in good faith. As to that, there was nothing before their Honours to show that that principle had been disregarded by the committee of the Club. It was laid down by Maugham, J., in the case cited above that, no matter how unfair or how unjust the action of an expelling tribunal might be, if it acted in accordance with its rules and in good faith, the person expelled had no redress. To that their Honours added another rule propounded by Kelly, C.B., in **Wood v. Woad,** L.R. 9 Ex. 196. In speaking of the powers exercised by a committee of a society he said: "But they are bound in the exercise of their functions by the rule expressed in the maxim *audi alteram partem* that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals." The foregoing citations appeared to their Honours to settle the limit to which the Courts would go in interfering with the actions of domestic tribunals.

The respondent in the present case was not condemned unheard. He was given particulars of the charge preferred against him, and he was given every facility for presenting a defence.

He complained that the witnesses who testified against him were not called when he was present and he claimed that he should have been allowed to cross-examine those witnesses. But a committee of a Club did not conduct a formal trial. It must respect its rules and it must see that an accused person was given fair play but it did that, in their Honours' opinion, when it afforded a member accused of misconduct an opportunity of answering a charge the particulars of which had been made known to him. That was the view taken in a South African case, **Johnson v. Jockey Club of South Africa** (1910) W.L.D. 136, noted in 8 English and Empire Digest 510. The plaintiff, a trainer of racehorses, sued the defendant club for £1,000 damages claiming that the stewards of the club had wrongfully caused him to be warned off all courses under their jurisdiction, whereby he lost the benefit of an unexpired license as a trainer and of all claim to benefits from the trainers' and riders' benevolent fund. The plaintiff was subject to the rules and regulations of the Jockey Club and the rules of racing. It was proved that the Jockey Club held an inquiry and that the plaintiff was given an opportunity of meeting a charge the particulars of which he well understood. On the plaintiff's behalf it was contended, as was done in the present case, that he had a right to be present during the whole of the inquiry held by the Jockey Club and that he was entitled to cross-examine witnesses, but Mason, J., who tried the case rejected that argument. He said: "I do not think this argument is tenable. These are rights which apply in a trial in a Court of law but I do not know of any rule that makes them applicable at an inquiry of this nature." A search through cases had failed to reveal any authoritative statement of law which required the Court to interfere because a club member whose conduct had been investigated was denied an opportunity of cross-examining witnesses who testified against him or of listening to witnesses when they gave their evidence. Every case of that kind must of course, be judged in the light of its special circumstances. It was not for their Honours to formulate a set of rules for the guidance of such institutions as the appellant Club, but their Honours were, at any rate, able to say that in the present case, throughout its investigation into the conduct of the respondent, the committee acted properly. In some of the authorities bearing upon the matter their Honours had to decide, reference was made to what were termed "the rules of natural justice." It was said in **Pollock on Torts**, 13th Edn., at p. 129, of that phrase: "The rules of natural justice appear to mean, for this purpose, that a man is not to be removed from office or membership, or otherwise dealt with to his disadvantage, without having fair and sufficient notice of what is alleged against him, and an opportunity of making his defence; and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions be satisfied, a court of justice will not interfere, not even if it thinks the decision was in fact wrong." In their Honours' opinion the conditions prescribed by the learned author in the passage cited had been satisfied by the appellant.

BLAIR, J., said that it was difficult to see that, viewing all the circumstances, the enquiry was wanting in natural justice. His Honour did not think that it would be safe to lay down as a general rule that on an enquiry by the committee of a club into a member's conduct, the accused member, if he denied the charges, must hear the whole evidence and have the right to cross-examine. To lay down such a rule where the tribunal had no power of summoning witnesses would be unwise and impracticable. The Court could interfere with the affairs of a social club only when its conduct of its own affairs transgressed what had been called "natural justice," but which might better be called the fundamental rules of justice. That could not mean that the enquiry must be conducted according to the procedure of a formal Court. It could mean no more than that the accused person, in the circumstances of the case, must be given a fair and reasonable opportunity to answer the charge. And there might be a case where the circumstances were such that the denial of an opportunity to confront some or all of his accusers might be evidence of want of natural justice. But that was clearly not so in the present case.

It was to be remembered that the respondent was not expelled by the committee. All they did or could do under the rules was to suspend him. It was true that suspension after the expiration of forty days might become effective as an expulsion, but that could be prevented by the suspended member calling for a special meeting to remove the suspension. Had he done that the question of his expulsion would have required the votes of two-thirds of the members present at the meeting. There was nothing harsh in those rules, and even if there were, they were the rules of the Club and binding on all members. It appeared to His Honour that the fact that the respondent did not avail himself of his right of trial by his peers touched also the question as to whether or not natural justice was absent. Resort to the Court to enforce the principles of natural justice was necessary only when the tribunal entrusted with the exercise of such a jurisdiction denied it to those entitled to it.

Appeal allowed.

Solicitors for appellant: **Haggitt and Elliott**, Feilding.
Solicitors for respondent: **Cooper, Rapley and Rutherfurd**, Palmerston North.

Herdman, J.
Adams, J.
Smith, J.

July 1, 2; 15, 1928
Wellington.

SAMUEL VAILE & SON LTD. v. JAMES.

Principal and Agent—House Agent—Usage—Agent to Collect Rents from Mortgaged Premises and to Pay Interest Insurance and Rates Thereon During Absence of Principal from New Zealand—Return of Principal to New Zealand—Premises Becoming Vacant—Insurer's Sanction to Non-Occupancy Not Obtained as Required by Policy—Premises Destroyed by Fire—Insurers Denying Liability but Making *ex gratia* Payment of Part Sum Insured to Mortgagee—Principal Claiming Damages from Agent—Alleged Breach of Duty to Notify Insurers Based on Usage—Evidence of Three House Agents as to Their Own Practice Insufficient to Establish Usage—Necessity for Proof of Usage to Obtain Insurer's Sanction or New Policy, and Not Merely of Usage to Notify—Agent's Authority Terminated by Principal's Return to New Zealand—Semble Agent's Only Authority at Relevant Times Thereafter Held on Facts to be to Sell or Exchange Property.

Appeal from judgment of Blair, J., reported 5 N.Z.L.J. 3, in an action brought by the respondent against the appellant and two other defendants in which judgment was given against the appellant for £115 damages for breach of its duty as respondent's agent. The respondent being about to leave Auckland for Australia, where he contemplated remaining for some time, appointed the appellant his agent by a letter dated 21st July, 1925, in the following terms: "I hereby appoint you my agents for my property Lake Road, Ellerslie, during my absence from New Zealand. Please collect rent and pay out interest, insurance and rates when due and forward the balance from time to time to me as requested." At the same time the respondent gave the appellant particulars of the property and of the existing tenancy. The appellant accepted the agency and thus became bound to perform the stipulated duties including such duties as were implied in such contracts. The house on the property was insured with the Standard Insurance Company Ltd., under two policies for £500 and £200, the £500 policy being in the name of the mortgagee. Each policy contained a stipulation that the insurance should cease in the event of the building insured remaining unoccupied for more than thirty consecutive days unless the sanction of the company to its continuance was endorsed on the policy.

The respondent returned to Auckland about 2nd January, 1928, and a few days afterwards told Mr. Gregg, one of the appellant's responsible staff, that "he could carry on as he had been doing." On 19th January he instructed the appellant to offer the property for private sale. On 3rd February the tenant gave notice to terminate his tenancy and the appellant wrote to the respondent: "A telegram from your tenant McLintock notifies us he is vacating your premises on the 8th inst. Shall we re-let or do you think it would sell better unoccupied?" The respondent said he then told Mr. Gregg to try and sell the place or exchange it—to put it in for sale for one week and if not sold to re-let it. The negotiations for sale or exchange continued, the Court of Appeal found, until 26th March, on which date the house which had remained unoccupied from 8th February, was destroyed by fire. The sanction of the insurers to the vacancy was never asked and no endorsement was made on the policy. The insurers declined all liability on the policy but made an *ex gratia* payment of £475 to the mortgagee.

Gray, K.C., and Cooke for appellant.

Leary for respondent.

ADAMS, J., delivering the judgment of the Court, stated that the claim made against the appellant was that it negligently and in breach of its duty as the respondent's agent omitted to inform the insurance company of the fact that the insured building was vacant. Three experienced land and estate agents were examined in support of that claim with the view of establishing a local usage in the business of land and estate agents in Auckland. It appeared that the evidence satisfied the learned Judge that there existed in Auckland a local usage that in every contract of agency in which a land or estate agent undertook to collect the rents of a property with insured buildings thereon, and to pay outgoings including insurances, there was an implied undertaking on the part of the agent that if at any time an insured building on the property became unoccupied he would give notice of that fact to the insurance company concerned. But such a usage was based upon habitual practice. It must be so notorious that every person in the business in which it was current who entered into a contract of the nature affected by it must be taken to have done so with the intention that the usage should form part of the contract. See **10 Halsbury's Laws of England**, 251, 252. Their Honours thought that the evidence in the present case fell far short of that test. The three witnesses upon whose evidence the respondent relied, seemed to have had in their minds cases where the principal was abroad or absent from Auckland. They did not assert a notorious or certain usage, but stated their own practice only, although there must be many such agents in the district over which the alleged usage was said to extend. Moreover, the alleged usage was to give the insurance company notice of the vacancy only, but such notice would of itself accomplish nothing. In order to preserve the insurance it would be necessary to have the sanction of the insurance company to the continuance of the risk endorsed on the policy or, failing that, to obtain a new policy in another office. No one had suggested that there was any such usage.

The respondent said that at the time the appointment was signed he asked the appellant to look after the property generally, and that he understood they were to look after the property in every way, and considered that it was not necessary to put that into the instructions. But the appellant's authority was defined in the document and its responsibility must be determined according to that definition. It purported to be an agency during the respondent's absence from New Zealand and therefore *ex vi termini* came to an end early in January. The appellant was thereafter acting under verbal instructions given by the respondent from time to time. If instructions were given to re-let the property those instructions were withdrawn early in February, and were never renewed. The appellant's only authority after the first week in February was to endeavour to dispose of the property by sale or exchange. No doubt the appellant might have reminded the respondent of the stipulation in the insurance policies, but those policies were never in its possession and the policy for £500 was in the name of the mortgagee. In their Honours' opinion the respondent had failed to establish the alleged duty.

Appeal allowed.

Solicitors for appellant: **Russell, McVeagh, Bagnall and Macky**, Auckland.

Solicitors for respondent: **Bamford, Brown and Leary**, Auckland.

Full Court.

Myers, C.J.
Herdman, J.
Blair, J.
Smith, J.

June 26, 27; July 15, 1929.
Wellington.

AUCKLAND CITY CORPORATION v. DAWSON.

Municipal Corporation—Street Widening—Betterment—Council Acquiring Land on One Side Only of a Street—Claim for Betterment to Land on Other Side of Street Not Directly Opposite Land Taken—Such Land Not "Land Fronting Upon or Having Any Frontage to the Opposite Side of the Street"—"Street" and "Opposite" Ambiguous—More Reasonable Construction Adopted—Words Including Only Land Fronting Upon or Having Frontage to Other Side of Street Directly or Immediately Opposite Land Acquired.—Public Works Act, 1928, Section 79—Municipal Corporations Act, 1908, Sections 171, 193.

Case stated by the President of the Compensation Court under Section 68 of the Public Works Act, 1908, (now Section 78 of the Public Works Act, 1928). The claimant had under its statutory powers, widened part of the length of a narrow street in the City of Auckland, known as High Street, and for that purpose had acquired certain strips of land on the eastern side of High Street between Shortland Street and Chancery Street. The respondent was the owner of a piece of land fronting the western side of High Street not immediately or directly opposite the strips of land so acquired by the claimant for street-widening purposes. Those strips of land were in fact situated on the northern side of Chancery Street, whereas the respondent's land lay some distance to the south of that cross street. In these circumstances the Council claimed that it was entitled by virtue of Section 193 of the Municipal Corporations Act, 1920, to payment from the respondent on account of betterment. The Court was asked by the Compensation Court to determine whether the respondent's said piece of land on the western side of High Street, considered in its relation to the land acquired by the claimant on the eastern side, was "land fronting upon or having any frontage to the opposite side of the street" within the meaning of Section 193.

Stanton for claimant.

O'Leary for respondent.

MYERS, C.J., delivering the judgment of the Court, said that the contention made by the claimant was that the words referred to included all or any lands having any frontage to the street throughout its entire length on the side of the street opposite that on which the lands were taken, assuming that betterment could be shown to have in fact accrued to such lands, while it was contended on behalf of the respondent that those words referred only to lands fronting upon the portion of the street immediately and directly opposite the lands acquired by the City Council for street widening purposes.

The principles governing the construction of a statutory provision of such a kind were too well settled to require statement at length. It was contended by Mr. Stanton that where the language of a statute was clear and unambiguous it must be interpreted in its ordinary sense, even though such interpretation might lead to manifest absurdity or injustice, and that the language of Section 193 (1) was clear and unambiguous. It was properly admitted, however, that if the language was ambiguous and was susceptible of a reasonable and also of an unreasonable interpretation the former must prevail. The only other observation necessary to be made in respect of the question of construction was that Section 193 (1) imposed a charge or liability, and consequently it was necessary for the claimant seeking to enforce the liability to show that the respondent came clearly within the provisions of the Section. If the language was clear and unambiguous and clearly imposed the liability, the Section must be construed accordingly, even though the result might seem unreasonable, anomalous, or unfair. In their Honours' opinion, however, the words of the Section were not clear and unambiguous. The very use of the word "street," without any limitation or description such as was contained in English statutes relating to betterment, in itself seemed to their Honours to create an ambiguity. It was admitted by Mr. Stanton that the statutory meaning of "street," as defined by Section 171, could not be applied to the term as used in Section 193. An illustration given by Mr. O'Leary during the course of the argument indicated the difficulty of attempting to give the words of the Section the interpretation contended for by the claimant. His illustration was the by no means uncommon case in New Zealand cities and boroughs of a continuous highway divided into streets of different names. Mr. Stanton contended—and indeed it seemed that he was forced to go that length—that in such a case each and every owner of land fronting the other side of the continuous length of street would be liable on account of betterment, if any betterment could be shown to accrue.

The Section contemplated two possibilities (a) the widening of a street (whatever "street" might mean) along its entire length, or (b) the widening of a part of the length of a street. If a street (whatever meaning might be given to that word in the Section) were widened along its entire length no difficulty arose. In such a case every person on the one side of the street from whom land was taken for the purpose of street widening

was liable under Section 79 of the Public Works Act, 1928, apart from Section 193 of the Municipal Corporations Act, 1920, to be charged with betterment, subject only to the limitation as defined by the Court in **Ross v. Minister of Public Works,** 32 N.Z. L.R. 1155, that the amount ascertained as deductible for betterment was to be deducted only from sums awarded in respect of claims for injurious affection and not from compensation granted for the land taken. Subject, therefore, to that limitation, whenever a strip of land was taken on one side of the street along its whole length, every person from whom a strip was so taken was caught by the Public Works Act, while every owner of land on the other side of the street was caught by Section 193 of the Municipal Corporations Act, 1920. Where, however, only part of the length of a street was widened a most extraordinary set of anomalies would arise on the claimant's suggested construction of Section 193. Firstly, no person having lands fronting on the side of the street from which land was taken would be liable to be charged betterment except—subject to the limitation laid down in **Ross v. Minister of Public Works** (*cit. sup.*)—the person whose land was actually taken; and it was admitted by Mr. Stanton that almost of necessity the persons whose lands would be most enhanced in value would be the persons in the immediate neighbourhood of the widened portion of the street and on the side of the street from which land for the purpose of widening was taken, yet each and every person owning land on the other side of the street along its entire length, or the continuous length made up by streets of various names, would all be liable under Section 193, if any betterment could be shown. Secondly, where the Council chose to carry out its street widening operations in piecemeal fashion, the same results would follow on each and every occasion of the taking of a further strip or strips. Where the meaning of the words of a section were not clear and such unreasonable consequences resulted from a particular interpretation of the section, the Court should not adopt such interpretation if the language was susceptible of a more reasonable construction. As their Honours had already said, in their opinion the language of the Section was not clear and unambiguous, and the words were susceptible of a more reasonable meaning. A very slight transposition of the words showed in their Honours' view what the Section really meant, and gave a rational meaning to the words without any inconvenience or injustice. If the words "fronting upon or having any frontage to the opposite side of the street" were transposed so as to read "fronting upon or having any frontage to the side of the street opposite," it at once appeared plain that the words referred to the owner of land fronting upon or having any frontage opposite to the lands taken. In their Honours' opinion that was what the Section really meant and was intended to mean.

Their Honours added that apart from any other ambiguity of language in Section 193, the word "opposite" might itself be a word of doubtful import: **Patching v. Dubbins,** 23 L.J. Ch. 45. If the construction contended for by Mr. Stanton had been intended, inasmuch as the first reference was to land on one side of the street, the natural antithesis to use would have been "the owner or the several owners . . . of land fronting upon or having any frontage upon the other" (instead of opposite) "side of the street." Whether or not the use of the word "other" would have made the Section clear and unambiguous it was not necessary for their Honours to determine or consider; but it would have eliminated at least one difficulty that stood in the claimant's way. The difficulty in interpreting the word "street" would still remain.

In their Honours' opinion, as the Act stood, whether the whole street (whatever "street" might actually mean) or part of the length of a street was widened, the liability to charge for betterment was precisely the same, i.e., the persons subject to the charge were those persons who were the owners of land fronting upon or having any frontage to the other side of the street directly or immediately opposite to the lands taken for street widening purposes. The same result was reached by treating the word "street" as meaning (as their Honours thought it did mean) the whole or part of the length of a street. On that view the words "or widens any part of the length of any street" were surplusage. It followed from what their Honours said that the question asked by the Compensation Court must be answered in the negative.

Solicitors for claimant: **Stanton, Johnstone and Spence,** Auckland.

Solicitors for respondents: **Clayton and Mellsop,** Auckland.

MacGregor, J. June 7, 1929.
Wellington.

IN RE FOSTER.

Probate—Remuneration by Executor—Will Providing for Appointment of Third Person in Lieu of Any Executor Renouncing Probate—Events Subsequent to Renunciation Showing that for Benefit of Estate Co-Executor Renouncing Should Accept Probate—Motion for Retraction of Renunciation—Order Made.

Motion for retraction of renunciation of probate. The testator, who died on 18th April, 1929, by his will appointed two of his daughters, of whom Annie Elizabeth Foster was the eldest, together with a solicitor, Mr. A. H. L. Treadwell, executors and trustees of his will. Miss A. E. Foster renounced probate by deed dated 29th April, 1929, and probate was granted to the other two executors. Probate was renounced by her because the remainder of the family, with her, wished the only surviving son of the testator to take her place as trustee. The will provided for such an appointment on any of the executors renouncing. Subsequent events convinced all concerned that it would be better for the administration of the estate that the applicant Miss A. E. Foster should retract her renunciation, and the appointment of the brother be not proceeded with; and the present application was accordingly made.

C. A. L. Treadwell in support.

MacGREGOR, J. (orally) said that he thought that the present case was a proper one to allow the applicant to retract her renunciation. It was for the benefit of the estate and came within the decision of **In the Goods of Stiles,** (1898) P. 12. The order asked for was accordingly made. The applicant could apply for probate of the will with the other executors to whom probate had already been granted.

Solicitors for applicant: **Treadwell and Sons,** Wellington.

Ostler, J. May 27; June 26, 1929.
Wanganui.

REID v. WANGANUI-RANGITIKEI ELECTRIC POWER BOARD.

Contract—Statute of Frauds—Written Contract to Supply Electricity the Consumer Undertaking to Pay Fixed Minimum Sum Annually for Current—Contract Not to be Performed Within the Year—Prior Oral Agreement for Reduction of Annual Payment if Poles Supplied by Consumer—Poles Subsequently Supplied by Consumer—Claim for Reasonable Price of Poles as Goods Sold and Delivered—Attempt to Make Statute of Frauds an Instrument of Fraud.

Appeal on law and fact from a decision of the Stipendiary Magistrate at Wanganui in a claim by appellant against the respondent Board for £119 10s. 0d. for certain poles supplied. The appellant, who was a farmer at Nukumaru, near Wanganui, wished to have a supply of electric energy from the Board, and on 1st November, 1926, the Board wrote informing him that roughly a guarantee of about £75 per annum would be required from him, and that if he was prepared to sign up approximately on that basis the line of the poles would be pegged out and a definite figure would be given. The appellant signed an application agreeing to take electric energy, and in November, 1926, the Board's engineer pegged out the line, and found that 39 poles would be required. On 26th November, 1926, the Board wrote a letter to the appellant advising that its engineer had pegged out the line, and that a guarantee of £72 per annum for 5 years would be required. The letter proceeded as follows: "In the event of your being able to supply a number of poles yourself, a reduction in the guarantee as follows could be made: 14/- per annum for every 35 ft. pole supplied, 6/- per annum for every 26 ft. pole supplied; 25 only 30 ft. poles and 14 26 ft. poles would be needed to complete the line. I would be glad to hear from you if you will entertain this proposition." The appellant made up his mind to supply poles and when the Board's engineer went out to see appellant in March, 1927, a few poles had actually been cut by him. The appellant on that occasion asked what the poles would be worth, and Webb informed him that the Board would allow him for

macrocarpa poles, if first-class, the value of hardwood poles which would otherwise be used, and that the total amount of his guarantee would be reduced accordingly. On 18th January, 1927, the Board took from the appellant a written undertaking to pay to it annually the sum of £72 for 5 years in consideration of the Board supplying electrical energy to his premises. Appellant duly supplied 42 poles for the construction of the line on his place and the supply commenced about 30th June, 1927. During the first year he consumed some £66 worth of current, but he had at no time been asked by the Board to pay the difference between that sum and the amount of the guarantee. On 13th March, 1928, he sent the Board an account for £119 10s. 0d. for poles supplied and upon the Board declining to pay he sued them for this amount. The learned Magistrate gave judgment for the Board, and this appeal was from his decision.

Cunningham for appellant.

Izard for respondent.

OSTLER, J., said that the appellant had sought to maintain that the guarantee or undertaking signed by him on 18th January, 1927, constituted a complete contract; that as the contract was not to be performed within a year it was subject to Section 4 of the Statute of Frauds, and evidence could not be adduced to vary it. He contended that as the poles were supplied after the undertaking was signed they must be paid for at a reasonable price. He relied on the principle illustrated in the well-known cases of **Morris v. Barron and Co.**, (1918) A.C.1, and **British Bennington Ltd. v. N.W. Cachar Tea Co.**, (1923) A.C. 48. But the undertaking of 18th January, 1927, was never intended by either party to be a complete and final contract between them. The offer of the Board was twofold: (1) to construct the line and to supply electrical energy in consideration of a guarantee of £72 per annum, and (2) to reduce that guarantee by so much per annum for each pole supplied by appellant. When appellant signed the guarantee it was intended by both parties to be subject to a condition subsequent that if the appellant supplied the poles the guarantee was to be reduced. The fact which appellant endeavoured to prove in the lower Court was that after the interview with the Board's engineer, in March, 1927, he saw an employee of the Board in May, 1927, and agreed with this employee as to the price he was to receive for the poles. He was unable to produce that employee, and it was proved that no employee had any authority from the Board to purchase poles on its behalf. The learned Magistrate, quite rightly, as His Honour thought, held that no sale to the Board at an agreed price had been proved. In the present appeal the appellant had abandoned that ground and sought to rely entirely on the provisions of the Statute of Frauds. To allow him to do so would be to make the Statute an instrument of fraud. The guarantee was not intended by either party to be a final and complete contract between the parties; it was always intended to be subject to the condition as to the supply of poles, and therefore in His Honour's opinion the point taken was not open to appellant.

Appeal dismissed.

Solicitor for appellant: **P. L. Dickson**, Wanganui.

Solicitors for respondent Board: **Marshall, Izard and Barton**, Wanganui.

Ostler, J. June 7, 8; 25, 1929.
New Plymouth.

McGIVEN v. McGIVEN.

Divorce—Restitution of Conjugal Rights—Wife Leaving Matrimonial Home—Conducting Friendly Correspondence with Husband and Inducing Him to Believe that She Intended to Return—Sudden Demand By Wife that Husband Agree to Separation—Husband Immediately Replying Demanding Her Return—Proceedings for Restitution of Conjugal Rights Commenced Five Days After Demand Calculated to Have Reached Wife—Demand Sufficient—Opportunity for Compliance with Demand Reasonable in Circumstances—Rule 7, Divorce Rules.

Husband's petition for restitution of conjugal rights. It was resisted by the wife, upon the grounds of persistent cruelty on the part of the petitioner which justified her in leaving him. The evidence adduced by respondent fell far short of establishing that the petitioner was guilty of persistent cruelty, and was not such as to justify the Court to exercise its discretion to refuse to grant the decree. The case is not reported on this aspect of the matter. Counsel for the respondent raised in addition the three following defences to the petition: (1) That the letter of demand was not a proper demand within the meaning of Rule 7 of the Divorce Rules. (2) That a reasonable opportunity was not given to respondent to comply with the demand before proceedings were commenced. (3) That petitioner had not proved his sincere desire for respondent's return. The facts upon which these defences were based are sufficiently set out in the report of the judgment.

Brokenshire for petitioner.

Bennett for respondent.

OSTLER, J., said that on 11th January, 1929, the respondent's mother was living with the parties, and respondent was ill and in a state of nervous exhaustion. She had been to a doctor who had strongly advised her to go away for a holiday. Petitioner did not want her to go away and he suggested her going to a seaside cottage in New Plymouth. When he returned from work that evening he found that she had gone with her child and mother. On the table was a note couched in friendly terms telling him that she simply must get away from the town for a while as she could not stand the worry. She told him not to be upset as it was as much for his good as hers, and she said that she would write him later. She purposely refrained from telling him where she was going, and she gave no address to enable him to communicate with her. On 15th January she sent him a letter card from Palmerston North, again couched in friendly terms. She gave him an address in Wellington to which to send letters, but again carefully refrained from giving her own address. The petitioner at once replied to that letter in genuinely affectionate terms. The letter contained no word of reproach against her, but on the contrary breathed a spirit of encouragement and goodwill. On 17th January respondent wrote petitioner another friendly letter, and told him to address letters to the General Post Office, Wellington. The petitioner again replied in most friendly terms. On 25th January respondent's mother again returned to New Plymouth and asked petitioner to hand over respondent's personal belongings. He at once wrote to her a further affectionate letter. The reply that he received was a letter dated the 30th January from the Society for the Protection of Women and Children demanding on behalf of respondent that he agree to a separation. He at once replied to her on 1st February by a letter demanding her return. It was quite true that in parts that letter showed traces of surprise and indignation. His Honour thought that was only natural in the circumstances, and His Honour thought also that in those circumstances it was natural and reasonable that he should demand that his wife return promptly. He asked her to wire when she was coming. The letter did disclose his affection for her, and His Honour was of opinion that it was a reasonable demand within the meaning of the Rules. The petitioner received no reply to his demand. He knew that it would not reach Wellington till 2nd February, and he reasonably assumed that respondent would receive it on 4th February. On 7th February, having received no reply, he consulted his solicitors and gave them instructions to commence proceedings for restitution of conjugal rights. The papers were prepared and he swore the required affidavit on 8th February. The papers were filed on 9th February. Meanwhile on 8th February the respondent had gone to solicitors in Wellington, and had instructed them to write demanding a separation. The question was whether the petitioner had shown that a reasonable opportunity was given to respondent to comply with his demand for her return before he commenced proceedings. In His Honour's opinion in the special circumstances of the case the petitioner had shown that he gave respondent a reasonable opportunity of complying with his demand. When she left him she deceived him into thinking that it was her intention to return. She kept up that deception by the letters she wrote, and then suddenly sprang a surprise on him by demanding a separation. Under those circumstances His Honour thought the petitioner was justified in demanding a prompt reply to his demand. He asked her to wire. He waited four days after he had reasonably assumed she had received his letter, and when he got no reply he reasonably and, as it proved, rightly assumed from her silence that she did not intend to comply with his demand. Although as a general rule the time allowed by petitioner would not, His Honour thought, be considered sufficient, in the circumstances of the present case His Honour thought it was sufficient.

The last defence raised was as to whether petitioner had proved his sincerity. In His Honour's opinion he had. No one could, in His Honour's view, read the petitioner's letters to his wife without seeing that he was genuinely fond of her and anxious for her return.

Decree made against respondent for restitution of conjugal rights.

Solicitors for petitioner: **Standish, Anderson and Brokenshire,** New Plymouth.

Solicitors for respondent: **Roy, Nicholson and Bennett,** New Plymouth.

Blair, J. June 20, 1929.
Auckland.

IN RE SKOKOLIC.

Mental Defectives—Criminal Law—Sentence—Prisoner Represented by Counsel Pleading Guilty to Indictment—Remanded for Sentence—Minister of Justice Directing Removal of Prisoner to Institution to be Detained for a Period for Observation—Prisoner Reported Insane and Returned to Prison on Expiry of Period of Observation—Impossibility of Sentencing Insane Prisoner—Proper Course in Circumstances for Minister to Order Removal of Prisoner to Institution—Crimes Act, 1908, Section 428—Mental Defectives Act, 1911, Sections 37, 38.

Memorandum by His Honour Mr. Justice BLAIR, to the Registrar of the Supreme Court at Auckland. The position was that one, Skokolic, had pleaded guilty to assault causing actual bodily harm and was remanded for sentence, and the Gaol Surgeon's report as to his mental condition was asked for. That report was inconclusive and at the suggestion of counsel for the prisoner His Honour wrote to the Minister of Justice suggesting that an order be made under Section 37 of the Mental Defectives Act, 1911. Skokolic was then a prisoner awaiting sentence. The Minister made an order on 22nd March last for prisoner's detention at Avondale Mental Hospital for a period of 2 months. That period expired on the 22nd May, 1929, and on that date the prisoner was returned by the mental authorities to Mt. Eden Prison where he was still detained. The Prison authorities desired to know, as a matter of urgency, what was to be done about him. The report of the Mental Hospital doctors was that prisoner was insane and fit to be certified. Although the Crown Solicitor held a certificate from the Mental Hospital authorities that the prisoner was insane, he had not yet been formally certified as insane. The question arose as to the proper course to be taken in the circumstances.

BLAIR, J., after stating the facts as above, said that the prisoner was at the time represented by counsel and pleaded guilty. His trial had, therefore, ended and he was a prisoner awaiting sentence. The warrant under which the Gaoler held him was a warrant under Form 35 in the first schedule to the Justices of the Peace Act, 1927, the form used when a prisoner was committed for trial for an indictable offence. Pursuant to Section 157 (2) of the said Act that warrant directed that the prisoner be taken into custody by the Gaoler "and there safely keep him until he is thence delivered by due course of law." Until the Supreme Court sentenced the prisoner or some other course were taken the gaoler's warrant held good.

It was true that in his memorandum to the Minister of Justice, when suggesting the issue of an order under Section 37 of the Mental Defectives Act, 1911, His Honour assumed that the course to be taken if the mental authorities certified him as insane would be that the Court impose sentence in order that the case could be dealt with under Section 38. His Honour had not then considered the proper course to take, but had since done so. His Honour's assumption was based upon the fact that Section 38 used words which made it inapplicable to persons to whom Section 37 applied, and His Honour, therefore, took it that it would be necessary first to impose some sentence on Skokolic before Section 38 could be made applicable. There was, however, more in the matter than that.

The practice in England long prior to the reign of Henry VIII was that if after conviction a criminal became insane, sentence was deferred, the principle being that the prisoner was incapable of advancing "some plea which if sane he could urge in stay of execution": **Kenny on Criminal Law,** 59. In **Theobald on Lunacy,** 254, it was also stated that if after conviction a criminal became insane, the sentence was deferred. Both authors were discussing the question of actually suffering the penalty and not the act of passing sentence. But the principle in one case should equally apply to the other, because before sentencing a prisoner he was called upon to say anything he might desire to say why sentence should not be passed upon him. Such a request to a prisoner was idle if he were insane. Section 428 of the Crimes Act, 1908, imposed a duty on the officer of the Court to give the prisoner that intimation. It was true the Section stated that the omission to do so should have no effect on the validity of the proceedings, but His Honour doubted whether that would save a deliberate omission. And if the intimation were given to a person known to be incapable of appreciating its meaning that would be worse than an omission. It appeared to His Honour, therefore, that the prisoner being in fact insane, although not formally so certified, he must be treated as insane, and that being so it was the duty of the Court to defer sentencing him until he became capable of appreciating what was happening to him.

What then was the proper course to take under the circumstances? If it were not competent for the Court to sentence the prisoner until he became capable of understanding his position, was it possible for him to be dealt with under Section 38 of the Mental Defectives Act, 1911? He had already been dealt with under Section 37 and the period of observation allowed by that Section had elapsed. While so under observation Skokolic was deemed still in the custody of the gaoler under the Magistrates' Court warrant. The gaoler's custody was still subsisting. It was clear that he was a person . . . detained "in any prison . . . under any warrant or order" within Section 38, and were it not for the concluding words of Section 38 (1) the matter would be clear. Those concluding words were that the provision just quoted "does not apply to any person to whom the preceding provisions of this part of this Act apply." The requisites necessary before Section 37 could be invoked were that there should be a person awaiting trial or sentence on a criminal offence as to whom it was expedient that he be placed under observation in any institution. An essential element was that the mental condition of the suspect was in doubt. Nothing was said in Section 37 as to what was to happen as the result of the observation. Having placed the suspect under observation effected no more than obtaining evidence as to his mental condition. The Section so far as Skokolic was concerned had been exhausted, but when the Minister was supplied with the medical report, he could, if it were open to him to do so, say that there was reasonable ground to believe that a person so in confinement was mentally defective and that removal to an institution was desirable, and the Minister could then follow the procedure laid down in Section 38. Was it then open to the Minister to act under Section 38? Before the removal under Section 37 observation was merely expedient. After that observation another course was not only desirable but necessary. If it were not competent for the Minister to act under Section 38 without Skokolic going through the formality of being sentenced, then apparently there was nothing that could be done to get Skokolic placed where his mental condition demanded. The absurdity of such a position disappeared if the concluding words of Section 38 (1) were read as requiring, in the case of persons detained on warrant for trial or sentence, that before the Minister took the steps provided by Section 38 they must first be placed under observation as required by Section 37. It was reasonable to assume that the Legislature would in the case of persons awaiting trial or sentence require that special steps be taken before permitting to be adopted the unusual course of taking away from the Courts the duty of dealing with such a person in due course of law. Section 38 was susceptible of the construction His Honour suggested and as that construction removed the absurdity resulting from the other construction it seemed to His Honour the proper construction to adopt. It not being possible owing to Skokolic's mental condition to bring him up for sentence it appeared to His Honour, for the reasons above stated, that the proper course to take was to proceed under Section 38 of the Mental Defectives Act, 1911.

Lord St. Leonard's father, like the father of Lord Tenterden, was a barber. He is reported to have said of his son, the future Lord Chancellor: "I tried my son Ned in my own profession, but unfortunately he had no genius for it; so I had to send him to Mr. Dural, the conveyancer."

Recent English Cases.

Some of the Year's Decisions of Dominion Interest.

In reviewing, so far as reports are available at the time of writing, the English decisions of Dominion interest decided during the first half of this year, it is necessary to make the observation that the reader must not, owing to considerations of space, expect to find reference to all the important cases; rigid care has been exercised in their selection and, in the main, cases in branches of the law dealt with in an average practice have been preferred to cases dealing with the more specialised branches. Omissions, however, there must necessarily be. It may be as well to draw attention to the possibility of some of the decisions included being reversed on appeal.

BANKRUPTCY.

A bankruptcy notice must by S. 26 (f) of the Bankruptcy Act, 1908, as amended by S. 2 (1) of the Bankruptcy Amendment Act, 1927, be based upon "a final judgment or final order." In *In re a Debtor*, (1929) W.N. 114, the debtor was a co-respondent in a divorce suit and, after decree *nisi*, was ordered to pay some £67, the taxed amount of the petitioner's costs, to the petitioner's solicitors on their undertaking to lodge the sum in Court when received. The solicitors gave the required undertaking, and the decree *nisi* was subsequently made absolute. Later the solicitors issued a bankruptcy notice in respect of the £67, the debtor did not comply with it, and a receiving order was made by the Registrar. The debtor appealed to the Court of Appeal and succeeded, it being held that the order on which the bankruptcy notice was based was not a "final order," for it left undetermined the right of the petitioner, or anyone else, to the sum.

DIVORCE.

Hyman v. Hyman, 45 T.L.R. 444, definitely decides that the power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such dissolution, and that a wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction.

EDUCATION.

Rex v. Newport (Salop) Justices, (1929) W.N. 125, is an interesting decision dealing with a schoolmaster's authority to administer corporal punishment. A school rule prohibited smoking by pupils during the school term whether on the school premises or in public. An information for assault was laid against a master for administering corporal punishment to a pupil who had smoked after school hours not on the school premises but in a public place. The justices dismissed the information and held that the father of a pupil by sending him to the school authorised the schoolmaster to administer reasonable punishment to the boy for breach of a reasonable school rule, and the Divisional Court held that the justices had not taken a wrong view of the law as laid down in *Mansell v. Griffin*, (1908) 1 K.B. 160, 947, and *Cleary v. Booth*, (1893) 1 Q.B. 465. The question was one of fact, namely, whether the schoolmaster had acted within the limits of his authority. Cp. perhaps *Hansen v. Cole*, 9 N.Z.L.R. 272, and *Lowry v. Barlow*, (1921) N.Z.L.R. 316.

GUARANTEE.

In *Midland Motor Showrooms Ltd. v. Newman*, 45 T.L.R. 233, the Court of Appeal held, distinguishing *Croydon Commercial Gas Co. v. Dickinson*, 2 C.P.D. 46, that a surety for the due performance of the payment of the monthly instalments payable under an agreement for the hire and purchase of a motor car was, by an agreement to give time to the hirer for the payment of instalments in arrear, discharged not only from any liability in respect of those instalments, but also from any further liability in respect of the whole contract.

INFANTS.

Pearce v. Brain, (1929) W.N. 157, is an interesting decision arising out of the action of the plaintiff, an infant, in exchanging his motor cycle and side-car for a secondhand motor car belonging to the defendant. The plaintiff drove the car some seventy miles when it broke down owing to a defect in the back axle; he thereupon brought an action claiming to recover from the defendant the motor cycle and side-car on the ground that the contract of exchange was void under S. 1 of the Infants Relief Act, 1874, to which S. 12 of our Infants Act, 1908, corresponds. The Divisional Court held the contract to be void within that Section, but held, applying *Valentini v. Canali*, 24 Q.B.D. 166, that the plaintiff could not recover the motor cycle and side-car.

INTEREST.

Section 28 of Lord Tenterden's Act, 1833 (3 & 4 Will. IV, c. 42), providing for the allowance and recovery of interest in actions to recover debts or sums certain payable at a certain time, is of course, in force in New Zealand. The Privy Council in *Maine and New Brunswick Electrical Power Co. Ltd. v. Hart*, (1929) W.N. 150, following a previous decision of the Judicial Committee in *Juggomohun Ghose v. Manickchund*, 7 Moo. Ind. App. 263, which their Lordships felt to be binding upon them, held under a corresponding provision in the legislation of New Brunswick, that a sum certain is not payable by a written instrument at a time certain if its payment is contingent on events which may never happen, and the amount payable is capable of ascertainment only if and when these events happen, and the time for the happening of these events, if they ever do happen, may be indefinitely postponed. It would appear possible that if their Lordships had been sitting as the House of Lords a different conclusion might have been arrived at. A comparison of this case with the decision of Williams, J., in *Aitchison v. Kaitangata Railway and Coal Co. Ltd.*, 21 N.Z.L.R. 151, will be found interesting.

LIBEL AND SLANDER.

Hobbs v. Tinling and Co. Ltd., 45 T.L.R. 328, where the Court of Appeal so vigorously reversed the Lord Chief Justice, is probably the most sensational decision of the year to date In law it would seem simply to decide that a trial Judge presiding over an action for damages for libel is not justified in allowing the jury to intervene in the defendant's favour during the cross-examination of the plaintiff without directing them to listen to the re-examination of the plaintiff, if any, and the speech of plaintiff's counsel, and that counsel are entitled to see any communication from the jury to the Judge.

MARRIED WOMEN.

The question as to the proper form of judgment against a married woman is sometimes one of difficulty as is shown by the recent difference of opinion in England as to the proper form of judgment in respect of an ante-nuptial debt. *Green v. Weatherill*, (1929) W.N. 140, deals with the proper form of judgment against a married woman who is a defaulting trustee, and decides that, while the proper form of order to compel her to make good a loss occasioned by her breach of trust is that laid down in *Scott v. Morley*, 20 Q.B.D. 120, if no breach of trust is proved and it is simply desired to get from the hands of the defendant property subject to the trust, an order in that form is inappropriate, and an order for attachment might then be made; the ground of the decision is that moneys forming part of the trust are not in truth part of the separate estate of the defendant trustee.

NEGLIGENCE.

Robert Addie and Sons (Collieries) Ltd. v. Dumbreck, (1929) A.C. 358, is a most important decision on this branch of the law, dealing as it does with the duty of an occupier towards child trespassers. A child was killed by being drawn into the mechanism of some machinery to which it had obtained access through a hedge. The machinery was in a private field into which it was easy to enter, and which was, in fact, regularly used for play by young children. The House of Lords held that the appellants were under no liability in respect of the child's death, for the child was a mere trespasser and no duty was owed to him by the appellants.

NUISANCE.

Pontardawe Rural District Council v. Moore-Gwyn, (1929) 1 Ch. 656, is an interesting case on this difficult branch of the law. The defendant was a landowner, and part of his land consisted of a cliff which had rocks near the summit. These rocks appeared to be about to fall owing to natural weakening, and in 1925 the plaintiffs had called the defendant's attention to their condition. In 1928, one of the rocks fell and struck the house of a Mr. Jenkins and damaged it. The Rural District Council and Jenkins brought an action, alleging a public nuisance, and, alternatively, a private duty to Jenkins. But Eve, J., held the defendant not to be liable: an owner of land who was using that land in an ordinary and reasonable manner was not liable in damages for injury sustained by the property of another through natural agency. The case was not one where the defendant had erected or brought upon his land something of an unusual nature which was dangerous in itself, but an attempt to impose on an owner, using his land in a reasonable and ordinary way, liability for damage sustained by the property of another through natural agencies.

RESTRICTIVE COVENANT.

Stevens v. Willing and Co. Ltd., (1929) W.N. 53, was a case where a conveyance contained a covenant that the purchaser, his heirs and assigns, would not "at any time thereafter erect on the said land . . . . any buildings whatsoever"—except as in the conveyance mentioned—and would not without the previous consent in writing of the plaintiffs erect "any other or additional buildings walls or fences on the said land . . . ." The permitted buildings included "dwarf walls or fences." The defendant company, notwithstanding objection from the plaintiffs, erected on the land an advertisement hoarding. Maugham, J., held this hoarding to be a "building" within the meaning of the covenant and, in the circumstances, granted a mandatory injunction for its removal.

SHIPPING AND SEAMEN.

Patterson v. Robinson, (1929) W.N. 107, is a decision of the Divisional Court on the short point that an entry in the log book of any offence of desertion, absence without leave, or against discipline as required by S. 228 of the Merchant Shipping Act, 1894 (S. 139 of our Shipping and Seamen Act, 1908) is not a condition precedent to any proceedings against the offender for the alleged offence, though the Court might under paragraph (d) of the Section refuse in its discretion, to proceed with the case.

WILL.

In re Cockerill: Mackaness v. Percival, (1929) W.N. 101, decides that a condition attached to a devise that the devisee, if he should desire to sell the land within twenty years of the testator's death, should offer it to a named charity at a named price much below the real value of the land, is repugnant and void, its effect being not to restrain the devisee from selling to a particular person, but to prevent him from selling to anybody but a particular person.

In re Peacock, 45 T.L.R. 301, is a decision of Clauson, J., to the effect that a bequest to servants of "one year's wages in addition to any wages owing by me to them," means cash wages only, and does not carry perquisites and allowances, or entitle a servant to anything in respect of his being allowed by the testator to occupy during the testator's life a cottage rent free.

In re Blackwell: Blackwell v. Blackwell, (1929) A.C. 318, will probably be one of the leading cases, if not the leading case, on the subject of secret trusts in wills. The House of Lords here decided that where a testator bequeaths a fund to trustees to be applied for purposes indicated to them, parol evidence may be admitted for the purpose of establishing that a valid trust has been created.

WORKERS COMPENSATION.

Stephen v. Cooper, 45 T.L.R. 413, adds another House of Lords' decision to this branch of the law. An arbitrator's determination that a worker engaged in driving a two-horse mower, who, to fix one of the harness-chains which had become detached, walked along the sloping pole between the two horses instead of dismounting and walking round to the horses' heads, and while doing so fell on the cutting blade of the mower, received his injuries through a peril added by himself, and not through an accident arising out of his employment.

There are sixty-four barristers in the English House of Commons and about eighteen solicitors. Of the members of the Bar, the Conservatives have thirty-seven, the Liberals seventeen, and Labour ten.

"The difference between a silk and a luxury silk is 980 guineas."—Mr. J. D. Cassels, K.C., M.P.

Lord Halsbury.

His Life and Times.

Permission has been granted to the " New Zealand Law Journal *" to publish a series of extracts from the Biography of the first Earl of Halsbury, which is shortly to be published.*

(Continued from page 204)

"The Laws of England."

When he gave up the Great Seal at the age of eighty-two, he might reasonably have taken rest, but when other men might have thought they were old enough to do nothing, his indomitable energy of body and mind impelled him to begin the most important work of his life, and in 1906 he surprised the legal profession, no less than the public, by his decision to direct a scheme for a compilation of the Laws of England. The announcement of the project was heartily welcomed by the Press, and the marvellous energy of the octogenarian ex-Lord Chancellor excited general admiration. *The Tribune* said: "After his strenuous life at the Bar, in the House of Commons, and on the Woolsack, it was not imagined that Lord Halsbury, in his eighty-third year, would enter on a task of such magnitude as that entailed in making a complete statement of the whole Law of England." "Lord Halsbury," said *The Standard*, "crowns an illustrious public and professional career by performing a national service of inestimable value to posterity, and so attaining an additional distinction which neither Eldon nor Thurlow found the opportunity to accomplish."

The general scheme of this great undertaking was planned by Lord Halsbury himself, and, as might be expected of his vigorous and lucid mind, consolidation was to be the keynote of the work, which, in completeness and accuracy, was intended to exceed anything before attempted. Instead of piling case upon case, and statute upon statute, the aim was to be, as far as possible, to deal with every branch of the law, giving a concise yet full and clear statement supported with references to decisions, authorities and statutes, and the work was to be planned on a logical arrangement, and thus be much easier and quicker of reference than a work in which a mass of information was heaped together in a confusing style.

The aim and object of Lord Halsbury's "great and honourable task" was explained by him in the introduction to the work at the beginning of the first volume. "An ideal code," he wrote, "has been contemplated by many law reformers, in which every case which could possibly occur should be provided for, and the determination of it be simply effected by reference to the Code, so universal in its application that no difficulty could be found, but the solution of every legal problem should be at once disclosed. A very small experience, however, of the infinite variety of the incidents of human life will convince us that such an ideal Code is an impossibility, and that the utmost that can be done is to establish some principles by reference to which a question may be decided; but even then the principles must be stated so generally that their very generality may work injustice if rigidly adhered to."

Frederick the Great, like Cicero, complained of the lawyers; and his Code was, as he said himself, to get rid of them. The Code Napoleon, imperfect as it was, and is still alleged to be, was, nevertheless, an immense boon when compared to the confused system of jurisprudence, if jurisprudence it can be called, which prevailed over France. The provinces, differing in their historical origin, in their traditions and in their constitutions, had no system of law common to them all; and rights differed, not only in different provinces, but even in respect of different persons. The Proclamation of 1789, of equality of rights, paved the way for a Code which should be applicable to all persons alike, and in every part of France. In England a Commission was issued in November, 1866, to the following distinguished persons: Lord Cranworth, Sir Hugh Cairns (afterwards Lord Cairns), Lord Westbury, Sir James Wilde (afterwards Lord Penzance), Robert Lowe (afterwards Lord Sherbrooke), Sir William Page-Wood (afterwards Lord Hatherley), Sir George Bowyer, Sir Roundell Palmer (afterwards Lord Selbourne), Sir John Shaw-Lefevre, Sir Thomas Erskine May (afterwards Lord Farnborough), Mr. Daniel, Q.C., Mr. Henry Thring (afterwards Lord Thring), and Sir Francis Reilly. The Commission was to enquire into the exposition of a digest of the law, and the best means of accomplishing the object, and other ways of exhibiting in a compendious and classical form the law as embodied in judicial decisions. After pointing out that the Law of England, as they understood it, comprised the whole Civil Law, in whatever Courts administered, the Criminal Law, the Law relating to the Constitution, the Jurisdiction, and procedure of the Courts, including the Law of Evidence and Constitutional Law, the Commissioners proceeded to point out the extent and variety of the sources from which the existing law is to be ascertained. Speaking of the bulk of the statutes and the amount of judicial decisions, they calculated that the judicial decisions were included in thirteen hundred volumes, exclusive of a hundred and fifty volumes of Irish Reports, and they calculated the number of cases at a hundred thousand. They recomended a Digest, which they defined as a condensed summary of the law as it exists, arranged in systematic order under proper titles and sub-divisions, and divided into definite statements or propositions, which should be supported by references to the sources of the law whence they were severally derived, and might be illustrated by citations of the principal instances in which the rules stated have been discussed or applied. The Commission, after the publication of its first Report on May 13, 1867, appears to have died out. It propounded various treatises to be sent in as specimens of the Digest contemplated; but some litigation ensued with Mr. McLeod, one of the writers selected, and no more has been heard of the Commission since its first Report, but if ever the experiment could have been successfully accomplished, it would have been when such a body of Commissioners was selected to try it.

It had occurred to some minds that an attempt might be made by private enterprise to carry out in its main outlines the scheme which was recommended in the Report of the Commission appointed in 1866, and such an attempt has been made in this work. Different treatises upon various divisions of the law, and by different authors, have been brought together, so that a selected body of writers may expound their several topics, and at the same time refer to such authoritative decisions and enactments as support the propositions

they lay down. A similar system was devised by the late Lord Acton in respect of history, and is being successfully carried out. The result is not a mere encyclopædia, it is not a mere collection of cases, but a number of treatises composed by learned lawyers, supported by the decisions of the great judges who have from time to time adorned the English Bench.

It would have been manifestly impossible for an undertaking of such magnitude, to have been entirely written by Lord Halsbury, at his great age, active though he was; on the other hand, he was not a mere figure-head, for a man of his independence would not have allowed the prestige of his name to have been used by a commercial undertaking for its own purposes. The office, indeed, of editor-in-chief of the work was no sinecure, for not only was the general scheme of the work planned or approved by him, but the names of all contributors were submitted to him for his approval and selection, and he read every title as it passed through the printers' hands, with the result that "the stamp of his personality runs through the whole work," (*Evening News*, Sept. 2, 1910) and the editorial staff, from the managing editor down to the humblest member, were infected by Lord Halsbury's enthusiasm, and loyally determined to maintain the high standard of excellence aimed at by him.

The care with which Lord Halsbury discharged the task of approving and selecting the contributors may be indicated by the following names, taken at random from the list of contributors: Lord Alverstone, Lord Chief Justice of England, Sir William Anson, Mr. Justice Bray, Mr. Balfour Browne, K.C., Sir Gainsford Bruce, Sir Edward Carson, K.C. (afterwards Lord Carson), George Cave, K.C. (afterwards Lord Cave, Lord Chancellor), Sir Mackenzie Chalmers, Sir Edward Clarke, K.C., Arthur Cohen, K. C., Lord Justice Farwell, Lord Haldane, Professor Holdsworth, Sir Rufus Isaacs, K.C. (afterwards Marquis of Reading), Lord Mersey, Sir John Paget, Ernest Pollock, K.C. (afterwards Lord Hanworth, Master of the Rolls), Sir John Simon, K.C., and Mr. Justice Walton.

(*To be continued.*)

Commercial Contracts.

Views of Lord Atkin.

"It is a popular belief, especially prevalent among lawyers," said Lord Atkin in a recent judgment in the House of Lords, "that the efficient business man requires that obligations incurred in business should be expressed in writing in simple, intelligible and unambiguous language. It is a belief encouraged by the saying of business men themselves. But in practice nothing appears to be further from the truth. Business men habitually adventure large sums of money on contracts which, for the purpose of defining legal obligations, are a mere jumble of words. They trust to luck or the good faith of the opposite party, with the comfortable assurance that any adverse result of litigation may be attributed to the hair-splitting of lawyers and the uncertainty of the law."

London Letter.

Temple, London,
22nd May, 1929.

My dear N.Z.,

The present period is alleged to be the Whitsuntide holiday; but of all the allegations I was ever most reluctant to admit or prepared most strenuously to deny, this is the chief. The General Election, of which I have spoken to you before in less real and more genial expectation of it, is now thick upon us, like a heavy thundercloud darkening the whole sky and making the poor human to perspire incessantly beneath its pall and to know no rest. The very electricity of the storm itself is enervating instead of exhilarating: and, over and above the restless endeavour which men of our trade are expected to put forward, gratuitously, at these national crises, much as the good doctors work gratuitously all the while in hospitals, there is an exhausting fury ever obsessing the mind at the deliberate falseness of the opponents' points. It is, indeed, a mercy of the dispensing Providence that we are not able also to perceive and be infuriated by the fallacies of our own political arguments; so that it comes about that the only comfort and invigoration we derive from the process of electioneering is the conviction resulting from the heat of our own declamations.

I do not know what course Elections pursue in New Zealand; but I start from the basis of presuming every man to be innocent until he is proved to be guilty and, on that principle, acquit you of practising our political follies! Your country always seeming to us to be ideal in climate and character, I like to suspect you of Utopian arrangements in this regard: a complete prohibition of canvassing, organising, meeting and, above all, speaking, and a disposition of affairs by which when it becomes necessary to appoint the representatives of the people, the people is left absolutely to itself to make up its mind upon the subject. Am I too optimistic, too credulous as to your virtues and enlightenment? At least let it be, so far as concerns our overworked and underfed brotherhood of the Law, that, in New Zealand, it is not the case that every advocate is at the mercy of every politician, and that it is not possible for the lawyer to avoid political servitude merely by refraining from political ambition.

The Temple broke up in uproar and disorder last week, hastening through its work in Court and Chambers to get away to the hustings. A large number of us are standing for the new parliament . . . . standing on platforms in public halls, on trestle tables in district schools, on waggons in villages, or even on chairs on rustic commons . . . . standing, shouting, gesticulating, in the wild hope of ultimately sitting. I, and my fellows, being juniors and therefore in theory thinkers rather than talkers, are not thus principally involved; and for many weeks, in Hall, we have been deriding our less fortunate but more public-spirited brethren on their impending troubles. But, when the time has itself come, we too are called up: and, among those of my table in Hall and of my particular generation and age, I know in the end of none who is free to pursue his normal life, still less of any who is on holiday this Whitsun.

Nomination day was on Monday last; and it seems that a record number of candidates have taken the field, not deterred by the necessity of paying the deposit and the risk of having that deposit retained, should the depositor not secure the necessary minimum of votes in his battle. Three-cornered contests are everywhere; and in many constituencies you will find the Conservative candidate devoting quite a lot of time and energy to approving his Labour or his Liberal opponent, as the case may be, he really fearing the Liberal or the Labour enemy, again as the case may be, and knowing that the next best thing to winning a vote is to lose it to the opponent whose chances are hopeless! This adds to the unreality of it all. . . .

More law is being discussed, than I ever remember hearing of, at Election time. The Local Government Act, 1929, which I promised never to mention again to you, is well to the front; that and the Safeguarding of Industries expedient being the only controversial issues, if the arguments be stripped of prejudicial matter. It is a curious position, that this Local Government Act, 1929, though perhaps one of the most important statutes of our day and the one destined ultimately to give rise to most argument among the subjects affected by it, is so dull in context that the anti-Government candidates and talkers can make little political use of it, and so complex in structure that the Government men can hardly obtain a hearing for the explanation of it. This monumental work, whether you approve the monument or not, thus tends to be inappreciable if not invisible at the moment when the people should be passing judgment upon it: and the controversy turns upon the wholly irrelevant question, what is the best means of reducing, eliminating unemployment? I say "irrelevant," because it must be obvious to the meanest intelligence that there is no question of any of the three parties refraining from adopting the expedient, whatever it may be, of cure, just so soon as it is discovered: so soon, if ever, as the experts discover means to mitigate this evil, whatever party is in power will of course adopt those means, there being a fortune in the thing for the government which, upon reducing unemployment, automatically increases its financial resources for other business, including the business of future vote-catching. This is the real fallacy of Mr. Lloyd George's Unemployment Campaign: the sole question as to his now-for-the-first-time-disclosed suggestion for removing unemployment, is whether it is practical and likely to succeed, and that is a question which the electors cannot decide and upon which any view they pronounce must be ignored. It is a matter of administration, for administrators: democracy never intended to be its own executive and civil servant, so far as I know; and it is wrongthinking, of which everyone else is as guilty as Mr. Lloyd George though he perhaps is the originator of the confusion, to say that his Unemployment Remedy is a political issue. And so, despite the orator and the pamphleteer, the common sense of the people forces attention back to what is really the political issue; and that is the principles of the Local Government Act, 1929, to a very large extent.

The principle of de-rating is the principle most (I might say, solely) susceptible of treatment, from this Act, on a public platform: the reform of local government, in other directions than the financial, is really unfit for such discussion. And even the principle of de-rating can hardly be pronounced upon with any reason and sense, because of an accidental matter which has occurred to obscure the truth. The great Rating and Valuation Act, 1925 (and its little brother, of the same name, of 1928) re-organised, as you will remember, our whole machinery of assessing and administering the rating business: except in one particular, it left the principle of assessment untouched. Establishing the periodical re-assessment, it causes, at this touchy moment, practically all the ratepayers' assessments to be reviewed, in the name of fairness and equity. It is all well, and very well, on paper: but in practice see what happens. While a man is hearing with his ears the benefit to ensue from lifting part of their rates off productive industries and all of its rates off agriculture, he is seeing with his eyes an alteration, generally for the worse, in his own assessment. He may even be feeling in his pocket to find the money to meet a demand for a bigger rate, owing to his amended assessment. Unless every man and woman in the country was a lawyer and used to thinking out these matters analytically, could human nature refrain from the conclusion that the two things are interconnected: that the derating of the one side causes the re-rating on the other? There is no connection between the two: there can be no connection between the two: the de-rating is hardly in operation yet, and is certainly not alive enough to affect the current assessments or rates. Yet who shall be persuaded there is no connection between the two, given the simple argument that if, of A.B. and C. the rates of A. are remitted altogether, the rates of B. are reduced by 75%, then the rates of C. will surely increase, and given the fact, however independent or origin, that C. does now see his rate actually increasing. . . .

Forgive me writing so much on political, or at best politicolegal lines, but, really, every other aspect of affairs in England is for the moment non-existent. From the manifold speeches I have made, to supporters and to set opponents, I have derived this useful lesson: we all underrate the acuteness of mass intelligence, and we have never yet appreciated (because it lies so latent) the intense and intensive reasoning powers of the ordinary public and the rapidly improving discrimination of those powers, resulting from modern education. If the speeches of the speakers, on all sides, tend to irritate with their futile exaggerations and their ineffable personalities, and if some of the propaganda is so low, in taste and in intelligence, as to be positively nauseating to the legal mind, it is on the other hand most encouraging to see what balance, what moderation, and what ratiocination exists and operates the mind of the British public still.

Yours ever,

INNER TEMPLAR.

Three Days a Law Officer.

In England the offices both of Attorney-General and Solicitor-General are, of course, political, and these law officers do not, as such, last long; their average span of life does not amount to more than two or three years. The shortest on record was that of Sir John Jervis who was Solicitor-General for three days. When Lord John Russell formed his first administration, in 1846, Sir Thomas Wilde resumed his old position as Attorney-General; Jervis became Solicitor-General, his appointment being dated 4th July. Two days later Tindall, C.J., died; Wilde succeeded him and Jervis became Attorney-General.

Australian Notes.

(By Wilfred Blacket, K.C.)

In the Legislative Council of New South Wales, a Bill to amend the Legal Practitioners Act was introduced in December last but had not been advanced beyond the first reading stage when Parliament was prorogued. Its earlier clauses deal with certificated conveyancers and will affect a very limited number of persons, but the remaining clauses deal with matters of very high consequence. It is provided, in effect, that a solicitor or conveyancer shall pay all trust moneys into a trust account in a bank, and that these moneys "shall not be available for the payment of the debts of any other creditor of the solicitor or conveyancer," or be liable to legal process. The solicitor or conveyancer is required to keep account of all moneys so received "in such a manner as to disclose the true position in regard thereto and to enable the account to be conveniently and properly audited." The solicitor shall cause "the account of the moneys to be audited by an approved accountant and as prescribed by regulation." In the absence of any agreement in writing with the client to the contrary, the audit fees are to be paid by the solicitor on the scale provided by regulation. If a solicitor does not employ an auditor the Attorney-General may appoint an approved accountant to audit the account at the expense of the solicitor, but it is not clear how the Attorney-General is to obtain knowledge of the default. Section 47 provides that failure to comply with any provision of the Act may be dealt with by the Court as professional misconduct, but as there is no requirement that an account shall be audited at any particular time there would probably be some difficulty in proving default. The auditor is required to send a report of the result to the Attorney-General. This report may be a certificate that the Act has been complied with, but if this is not the case "the report shall state in what respects the account has not been so kept or is not in order," and the auditor shall state "any matter which appears to him to involve any dishonesty or breach of the Act, or any loss or deficiency of the moneys or any failure to pay or account for the moneys." The proceedings do not seem to proceed any further, for no power is given to the Attorney-General or anyone else to do anything in particular or at all. Full provision is made for the appointment of "approved accountants," and their duties are defined.

At the risk of going beyond my province I want to say that this Bill is a libel upon solicitors. They are liable to be struck off the rolls—deprived of their means of professional livelihood—if they fail in their duty as trustees: no other trustee is liable to such a penalty. This Bill brands them as the only trustees who may fail in their duties. If these provisions for audit are necessary in their case, why not similarily supervise all trustees, whatever their profession or calling, in like manner? The libel on solicitors is emphasised by Section 45 which provides that if the co-trustee of a solicitor is not a solicitor, and if the trust accounts are regularly and properly kept and audited, they shall not be subject to the provisions of the Act. Regular audit of trust accounts would no doubt be an admirable protection to the public; but Parliament will show little knowledge of affairs if it by such a measure as this affirms that solicitors' trust accounts are the only ones that need be audited.

R. v. Kelly, a case now awaiting trial at the Quarter Sessions, is of interest to the legal profession. Kelly was sued by the *Sydney Morning Herald* proprietary for £161, the writ being specially endorsed. He pleaded "never indebted" and filed the affidavit required by the rules of Court. He was then charged with perjury and committed for trial. I cannot recall any similar prosecution although the rule requiring an affidavit in support of such a plea has been in force for nearly forty years. Possibly all the affidavits so filed were true, although in numberless cases the defendant has not given evidence upon the hearing in support of the defence pleaded.

The Feminist Club of Sydney recently proclaimed a list of the hardships that women have to endure under man-made, and therefore badly-made, laws. Prominent on the list was the fact that Judges in sexual criminal cases are in the habit of asking women to leave the Court thereby depriving the prosecutrix of "the support and sympathy of members of their own sex." It really does seem that the Club is not quite in touch with its theme for the women who elbow their way into Criminal Courts when sexually sensational cases are listed do not go there to give sympathy or support to anyone. In truth and in fact they are persons who go to extract entertainment from indecency: to some of them even the Freudian term *voyeur* might be fairly applied. Far from comforting the prosecutrix they are more apt, if allowed to remain in Court, to disconcert her by their giggling and exclamations. Their presence, and that of other onlookers is an embarrassment to the prosecutrix, and worse than all else is the knowledge that the evidence she is compelled to give will be indicated in flaring head-lines on the newspaper posters by the time she gets out of Court. Still, in a way that they did not intend, these Feminists have done good service to the community, for prominent newspapers have taken the grievance alleged as a text and are urging that the procedure in Criminal Courts in cases of the kind should be made similar to that of the Courts hearing cases wherein a complainant is seeking an adjudication of paternity, and an order for expenses of maternity, or of maintenance. Here only the Magistrate, the complainant and the defendant and their legal representatives, an official shorthander, and a policeman, are allowed to be present when the parties are giving evidence, and no others may be in Court when any other witness is called. Free from the terror of publicity the girl tells her story—always a more humiliating tale than a prosecutrix in a Criminal Court has to tell, for in the latter case a girl is defending her honour, while in affiliation proceedings she is confessing her shame.

Mr. Justice Davidson sitting as a Royal Commissioner has reported that Mr. Jarvie, a Member of Parliament, was guilty of offering a bribe to the late Mr. A. Bruntnell, then a Minister of the Crown, and Mr. Jarvie is to be prosecuted accordingly. New Zealand lawyers will regard this happening with some degree of surprise for in *Cock v. Attorney-General*, 28 N.Z.L.R. 405, it was decided that under the Statute of 10 Car. I abolishing the Star Chamber a Royal Commission could not be authorised to inquire into a charge of crime. There has never been a formal decision on the point

in New South Wales, but on at least two occasions the case has been cited to Royal Commissioners who have refused to follow it on the ground that the sections of our Royal Commission Act which may be applied by any Royal Commissioner, if so empowered by the Letters Patent declaring his appointment, constituted an implied repeal of 10 Car. I. Under these sections a witness is compellable to answer incriminating questions. Such answers may not be used against him in any proceedings, and if the Commissioner thinks fit he may give a certificate stating that the witness has made full disclosure of his actions and he is then exempt from any prosecution. This latter provision is in effect treating the witness as King's evidence.

Acting Justice Milner Stephen has been permanently appointed to the Supreme Court Bench in succession to Mr. Justice Lang Campbell; and Mr. J. H. Hammond, K.C., and Mr. A. V. Maxwell, K.C., have obtained Acting-Judgeships. These appointments will be hardly sufficient to supply Supreme Court necessities for Mr. Acting-Justice Ferguson is ill and is temporarily absent from the Bench. Mr. Justice Davidson will be sitting as a Royal Commissioner for some time to come and Chief Justice Street is absent on leave. Very heavy lists of cases in all jurisdictions await trial; the Divorce Court list is of appalling length and will probably need constant sittings by two Judges for many weeks to clear off the arrears.

A very curious question has arisen with regard to Mr. Justice Campbell. Under the New South Wales Act every Supreme Court Judge "shall retire at the age of seventy years." His Honour became of that age in September last, but believing that he was a year younger continued to sit on till the end of the year. Recently he obtained a copy of his registration of birth from Scotland, whence many Campbells come, and discovered and, perhaps unwisely, announced his error. Then a litigant who had met an adverse verdict in a trial *coram* Campbell, J., in November, proceeded upon an application to have the proceedings set aside on the ground that the trial was *coram* a mere person who was not a Judge. The legal advisers of Mr. Justice Campbell seem to have advised him not to produce the copy certificate, and it will probably be necessary to obtain a commission to take evidence in Scotland. Boyce, Attorney-General, says he will pass a validating Act if required, but as Parliament stands prorogued to September there may be some strange happenings meantime.

Discovery Against the Crown.

Lord Dunedin's View.

Lord Dunedin, on the vexed question of discovery against the Crown, advocates the adoption in England of the Scottish system whereby a diligence (the Scotch equivalent of discovery) is granted just as readily against the Crown as against the subject, both subject and Crown being entitled to object on the ground of privilege. When the Crown claims privilege the matter is not settled by the mere *ipse dixit* of the Lord Advocate but the Judge himself sees the document; "for Judges," says Lord Dunedin, "can be trusted, except when they make jokes, to keep their mouths shut."

Bench and Bar.

His Honour Mr. Justice Smith is shortly to take up his permanent headquarters at Auckland. His Honour Mr. Justice Kennedy is transferred to the Otago and Southland Judicial District.

We regret to have to record the death, at the age of seventy-five, of Mr. J. M. Gallaway, a well known and most highly respected member of the profession in Dunedin. The late Mr. Gallaway was born in Edinburgh and came to New Zealand at the age of twenty-four, and in 1882, after being called to the Bar, he became a clerk in the office of the late Mr. J. B. Callan, Senr. In the following year Mr. Gallaway was admitted into partnership. The firm of Callan and Gallaway has always been a well-known one, and has been carried on for some years now by Mr. J. B. Callan, Junr. and Mr. G. Gallaway, sons of the original members. Mr. Gallaway took a keen interest in matters educational and has been a member of the Otago Educational Board and the Otago High Schools Board of Governors. He was a member of the Dunedin Chamber of Commerce for over forty years, and was an ex-President of the Otago Rugby Football Union.

Mr. P. Levi has been re-elected Chairman of the Victoria University College Council for the ensuing year.

Mr. T. A. Murphy, M.A., LL.B., died on the 28th ult., at the age of fifty-four. The late Mr. Murphy was born at Halswell, and was educated at Christchurch Boys' High School and at Canterbury College. He obtained, in 1897, the degrees of M.A., and LL.B., and he was successful also in carrying-off a Senior University Scholarship. For a few years he practised in Christchurch on his own account and in 1900 he entered into partnership with Mr. H. D. Muff, this association continuing up till the time of Mr. Murphy's death. From 1907 until 1921 Mr. Murphy was lecturer in Jurisprudence and Law at Canterbury College. He was for some years assistant editor of the Gazette Law Reports.

Messrs. Tudhope and Adams, of Hamilton, have dissolved partnership. Mr. W. Tudhope is carrying on the practice under his own name, and Mr. H. D. C. Adams has joined the staff of the Public Trust Office.

Mr. T. C. Orr has commenced practice on his own account in Hamilton as a Solicitor.

Recent admissions to the Profession at Auckland include Messrs. A. A. Bodley, and N. H. Good (Solicitors on the Roll admitted as Barristers); Mr. G. H. D. Grant (Solicitor).

Correspondence.

The Editor,
"N.Z. Law Journal."

Sir,

District Courts.

May I suggest that some of the senior members of the profession be invited to express through your columns their opinions as to the wisdom or otherwise of the abolition of the District Courts and as to the desirability of their re-establishment. Few of the younger generation of practitioners know anything about this jurisdiction, but it seems possible that something of the kind might go far towards solving two of the problems involved in the administration of justice to-day, namely, the congestion of work in the Supreme Court and the irksome delay which necessarily attaches to the "Workers' Compensation" jurisdiction of the Court of Arbitration. It is suggested that the time of the Judges of the Supreme Court is too valuable to be taken up to the extent it is with matters of minor importance or mere routine and that the Magistrates' Courts ought to be, as far as possible, courts of *summary* jurisdiction. Is there not room and need for an intermediate court?

I am, etc.,
"JUNIOR."

Invercargill.

Modern Legal Abuses.

"Are we, in 1929, living in the midst of legal abuses and legal anomalies which in fifty years' time will seem as monstrous as the abuses portrayed by Charles Dickens appear to us?" asks "Outlaw" in the *Law Journal*. "I," he says, "will make a bid for the approval of posterity by naming some of them before another law has passed. Here they are: (1) Costs, whereby a plaintiff may obtain judgment for a thousand pounds and costs, of which 1,000*l*., after it is paid, he receives nothing, the whole being absorbed by the additional fees and expenses of his own legal advisers. (2) The costs, delay, and uncertainty caused by the appellate system; a case may go from the Court of first instance to the House of Lords, swinging from side to side at each successive stage, and, in the end, the final loser may have a majority of judges (and those the better) in his favour. (3) The flitting leader and his immense unearned emoluments. (4) The legal fictions in favour of wives. (5) The Rent Acts, whereby he who builds and owns a house is forbidden to dwell therein. (6) Divorce law, where a man must become either a perjurer or a cad. (7) The hanging of women. (8) The ageless efficiency of the Lords of Appeal. (9) Police moralists and Civil Service judges. (10) *Et cetera.*"

"It is the duty of all men to set their faces against the disposition on the part of recent legislation to oust the jurisdiction of the Courts and to substitute other tribunals."—Mr. Justice Eve.

Forensic Fables.

THE ELDERLY JUNIOR WHO HAD NOTHING TO COMPLAIN OF.

An Elderly Junior having Dined Comfortably in his Flat Proceeded to Compare the Present with the Past. Thirty Years Ago, the Elderly Junior Reflected, he had Lived Laborious Days. He had Devilled, Reported, Coached Coloured Pupils, Written for the Papers, Compiled Legal Treatises, and Perspired in County Courts. Then, at Long Last, he had Turned the Corner. His Cases had become Heavy and Numerous. Whereas in his Youth had had been Poorly Paid for his Eloquence in Courts of Inferior Jurisdiction, he was

now Richly Rewarded for Sitting Silent behind Eminent Leaders in the Higher Tribunals. Instead of Mugging Up his Cases himself, he Allowed a Highly Intelligent Fellow of All Saints' to Do that Disagreeable Job for him. That Afternoon, the Elderly Junior Recalled with Satisfaction, he had Attended a Consultation with an Ex-Law Officer. After Twice Remarking "Quite," he had Left for Another Consultation with Another Great Man, at which he Looked Important and Said Nothing. It Comforted him to Think that he would be Unable to be Present at the Hearing of Either Matter, as he would be Very Busy Elsewhere, and that his Absence would Only be Regarded by his Client as Evidence of his Worth. The Elderly Junior Felt that, On the Whole he had Nothing to Complain of. After All, there was Something to be Said for the Profession. The Elderly Junior Took Another Pre-War Whisky, Lit Another Corona, and Resumed his Agreeable Meditations.

MORAL: *Stick to a Stuff-Gown.*

Bills Before Parliament.

Swamp Drainage Amendment. (Captain Rushworth). Annually recurring special rates made by Minister of Lands under S. 2 of Swamp Drainage Amendment Act, 1928, on lands within Kaitaia Drainage Area to be made and levied in part of area as if this Act not passed and in other part of area upon enhanced, and not unimproved, value.—Cl. 2. Following provisions of Act applicable only to latter area.—Cl. 3. Special rate to be uniform amount in pound of enhanced value of all land and not on graduated scale "provided for in S. 4 (2) of Land Drainage Amendment Act, 1928." Cl. 4. Persons mentioned in "S. 3 of Land Drainage Amendment Act, 1928," not to classify lands but to report on enhanced value of lands. Enhanced value means amount by which unimproved value for time being exceeds unimproved value existing immediately before undertaking of the drainage works and which is directly or indirectly due to the execution of the drainage works.—Cl. 5. (There is no Land Drainage Amendment Act, 1928, but presumably by the references in these clauses to that Act the Swamp Drainage Amendment Act, 1928, is intended). Same right of appeal as if Act not passed.—Cl. 6. Annual special rate not to exceed 6 per cent. of enhanced value; portion not exceeding 5 per cent. to be interest and not exceeding 1 per cent. to be sinking fund.—Cl. 7. On sinking fund amounting to total enhanced value for time being of lands no further special rates to be struck.—Cl. 8. General rate authorised by S. 2 (2) of Swamp Drainage Amendment Act, 1928, shall be levied on enhanced or unimproved value as Minister of Lands thinks convenient; but in either case to be uniform sum in pound.—Cl. 9.

Offenders Probation Amendment. (Mr. Mason). Name of first offender or any reference to his occupation or address sufficient to disclose his identity not to be published but on conviction Court may permit publication if of opinion that, owing to nature of offence, disposition of offender, his acting in combination with others in committing offence, or for any other reason whatever, it is desirable in interest of public that the offender should be known.—Ss. 2 & 3. S. 9 of Offenders Probation Act, 1920, repealed. The words "such publication" in the third line of clause 3 require omission if clause is meant to read intelligibly.

Rent Restriction Continuance. (Mr. Fraser). Part I of War Legislation Amendment Act, 1916, and the several amendments thereof, in so far as those amendments are in force, to continue in force until repealed.—Cl. 2. Amendments to First Schedule of Rent Restriction Act, 1926.—Cl. 3. S. 9 of Housing Amendment Act, 1922, amended by adding subsection providing that Court may refuse to make an order in any case, notwithstanding proof of the grounds specified in paragraphs (a), (b), (c), (d), and (e) subsection (1), if Court of opinion that making of order would cause undue hardship to tenant. Magistrate to take into consideration not only the hardship to tenant, but hardship to applicant.—Cl. 4. Children in family not to be ground for refusing tenancy: penalty fine not exceeding £100.—Cl. 5. S. 5 (1) of Finance Act, 1928 (first session 23rd Parliament) repealed; Ss. 4 and 5 of Rent Restriction Continuance Act, 1927, repealed.—Cl. 6.

Rent Restriction Continuance (No. 2). (Hon. Mr. Veitch). Part I of War Legislation Amendment Act, 1916, and amendments thereof now in force, to continue in force until 1st August, 1930. S. 5 of Finance Act, 1928, (first session, 23rd Parliament) repealed.—Cl. 2.

Miner's Phthisis. (Mr. Parry). Providing for pensions to miners incapacitated, or partially incapacitated, by miner's phthisis.—Cl. 3. Conditions precedent to grant of pension.—Cl. 4. Pension to widow and children of deceased miner.—Cl. 5. Applications for pensions.—Cl. 6. Certificate of medical practitioner to accompany application for pension.—Cl. 7. Application of Pensions Act, 1913, for certain purposes.—Cl. 8. Limitation of right to receive pension.—Cl. 9. Goldminers' Relief Fund.—Cl. 10. Power of Governor-General by Order-in-Council to make regulations.—Cl. 11. Payment of pensions out of Consolidated Fund.—Cl. 12. Miner's Phthisis Act, 1915, repealed.—Cl. 13.

Workers Annual Leave. (Mr. Sullivan). Every worker to be given fourteen days' leave on pay after each period of twelve months continuous service.—Cl. 3. Continuity of employment not to be deemed interrupted by certain breaks.—Cl. 4. Method of calculation of remuneration for period of leave.—Cl. 5. Offences by employers.—Cl. 6. Act to be read subject to awards and industrial agreements in certain cases.—Cl. 7. Payment in lieu of leave in certain cases of less than twelve months' employment.—Cl. 8.

Local Bills.

Auckland and Suburban Drainage Amendment.
Christchurch City Reserves Amendment.
Christchurch Electricity and General Empowering.
Lyttelton Harbour Board Reclamation Validation.
Sumner Borough Land Vesting.
Timaru Borough Empowering.

Rules and Regulations.

Dangerous Drugs Act, 1927.—Dangerous Drugs Amendment Regulations, 1929.—Gazette No. 51, 18th July, 1929.

Land for Settlement Act, 1925.—Regulations regarding purchase of settlement land on deferred payments under Part II of Land Laws Amendment Act, 1928.—Gazette No. 51, 18th July, 1929.

New Books and Publications.

Companies Act, 1929, with a Comprehensive Index. Compiled by H. A. C. Sturgess, Librarian of the Middle Temple Library. (Eyre & Spottiswood). Price 12s. 6d.

Survey of International Affairs, 1927. By A. J. Toynbee. (Oxford University Press). Price £1/9/–.

White on Corporations. New Permanent Edition to be kept up to date by Annual Supplement. (Matthew Bender, New York City). Price £13/15/–.

County Court Practice Made Easy. By a Solicitor. (Effingham Wilson). Price 6/–.

Outlines of Criminal Law. Thirteenth Edition. By Courtney Stanhope Kenny. (Cambridge University Press). Price 18/–.

Chapters on Current International Law and the League of Nations. By Sir John Fischer Williams, K.C., C.B.E. (Longmans Green). Price £1/9/–.

Laws of the Gold Coast Colony, 1923. (Five Volumes). By C. G. Smith. (Stevens & Sons, Ltd.). Price £6/6/– (Cloth); £9/5/– (Half-Calf).

Bankruptcy and Winding-Up Cases. Vol. XIII. 1928. By Almer Roper. (Sweet & Maxwell, Ltd.). Price £2

Newport's Income Tax Laws and Practice. Third Edition. (Sweet & Maxwell, Ltd.). Price 12/6.

Garsia's Evidence in a Nutshell. (Sweet & Maxwell, Ltd.) Price 3/6.

Index to the Companies Acts. Eighth Edition. By Cecil W. Turner. (Solicitors Law Stationery Society). Price 12/–.

Law Relating to Medical, Dental and Veterinary Practice. By Fred. Bullock. (Stevens & Sons, Ltd. and Bailliere, Tindall & Cox). Price 15/–.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"The Bar is quite as important in the administration of this country as the Judges are."

—*Lord Sankey.*

Vol. V. Tuesday, August 20, 1929 No. 13.

"Wife-Beating."

In the *Evening Post* of the 13th instant Mr. McCombs, M.P., is reported as asking the Minister for Justice: "Whether, if the law is that a man may beat, ill-treat, and starve his wife, and, provided she can run away and does not do so, the husband cannot be convicted of an offence, he will have the law altered so that the plea that she could have run away from her own home will not defeat the ends of justice?" The Hon. Mr. Wilford, Minister for Justice, is reported as replying: "I have referred the matter to the Solicitor-General, in order that he may report to me as to what in his opinion is the best method of meeting the case referred to." The Minister's answer seems to assume that Mr. McCombs' suspicion that a "wife-beater" is immune from criminal liability, and that the law needs amending, is correct.

The task set the Solicitor-General may not prove an easy one. If his task is to secure that circumstances similar to those of the "Elmsley case" shall be brought within the provision of the Crimes Act invoked in that case, Section 166 will require amendment. That Section provides: "(1) Every one who has charge of any other person unable, by reason either of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, and unable to provide himself with the necessaries of life, is (whether such charge is undertaken by him under any contract, or is imposed upon him by law, or by reason of his unlawful act) under a legal duty to supply that person with the necessaries of life, and is criminally responsible for omitting without lawful excuse to perform such duty if the death of such person is caused, or if his life is endangered, or his health is permanently injured by such omission. (2) Every one is liable to seven years' imprisonment with hard labour who, without lawful excuse, neglects the duty specified in this section so that the life of the person under his charge is endangered or his health permanently injured by such neglect." Sections 167 and 168 contain provisions making the heads of families, and masters, criminally responsible if they fail to provide necessaries to, respectively, children under sixteen who are members of their households or servants or apprentices under that age. Taken altogether Sections 166 to 169 are fairly wide in their scope, and have, so far, we believe, provided sufficient security against the abuse intended to be met. It is doubtful, however, whether such control, if any, as a husband has over his wife by virtue only of the marital relation was ever contemplated as being met by Section 166 A wife would not appear to be, by reason of her status as wife, under the charge of her husband in the sense in which that word is used in the Section, though she may, no doubt, become so, by reason of the circumstances mentioned in the Section.

The position of husband and wife in English law is different from that under the legal systems of other countries. In the region of criminal law there is no reliable authority from a proposition that A's criminal act ceases to be criminal when directed against his wife, although there may possibly be an exception in the case or rape upon the ground that the consent of the wife is present in law. In the region of civil wrong the common law position has always been well defined. Generally speaking no husband can sue his wife for tort, nor can any wife sue her husband for tort. A wife has, however, a right to sue her husband to protect and secure her separate property and a husband, as is well known, is liable for his wife's torts; but while a wife cannot sue her husband on the civil side for personal injury, it would be wrong to assume that wrongs of this description are not penalised by our criminal law.

It appears that the apparent assumption of Mr. McCombs that a man may legally beat his wife will need answering before a remedy is sought. The answer of the Solicitor-General to that question will probably be that the law is not, as feared, in question. The fact that the Crown on the facts before it proceeded under a Section of the Crimes Act under which an essential ingredient of the crime is that the person ill-treated should be unable, by reason either of detention, age, sickness, insanity or any other cause, to withdraw from the charge of the person accused cannot lead to the general conclusion that a man with impunity may beat, ill-treat and starve his wife. It is the duty of a husband to maintain his wife according to his condition in life, or according to his means of supporting her, and if he fails to perform this duty adequate remedies are available to the wife. But there is no substantive provision of law that an assault criminal in regard to a stranger ceases to be criminal when made on a wife, and, indeed, *R. v. Jackson*, (1891) 1 Q.B. 671, laid it down that the right of a husband to administer corporal correction was obsolete. If Section 166, which provides for the case of "everyone who has charge of any other person," was invoked on the assumption that a husband has charge of his wife, it may have been on a misunderstanding of the Section. The Section seems to contemplate two persons normally *sui juris*, one of them in charge of the other, the charge contemplated arising, apparently, from the circumstances outlined in the Section, that is to say, detention, age, sickness or insanity, and not from relationships such as those of husband and wife, or parent and child. Where the charge arises from status such as that of parent and child, master and servant or apprentice, the position is adequately met by Sections 167 and 168.

It seems then that the question whether a man can beat or starve his wife cannot be answered by referring to the "Elmsley case." A wife cannot sue her husband for assault. A husband will be hung if he murders his wife. The answer seems to be that "wife-beating" can, according to the nature of the beating, both be and not be an offence of a criminal nature.

Court of Appeal.

Myers, C.J.
Herdman, J.
Adams, J.
Blair, J.
Smith, J.

June 27; July 15, 1929.
Wellington.

THOMPSON v. WAKAPUAKA DRAINAGE BOARD.

Land Drainage—Drainage Board No Power to Order Occupiers of Land on Banks of Drains Vested in or under Management of Board to Remove Obstructions Likely to Cause Damage to Property in Drainage District—Power to Order Occupier to Remove Obstructions Limited to Drains Other Than Those Vested in or under Management of Board—Duty of Board to Clear and Maintain Drains under its Management—Clause in Statute to be Construed with Reference to Context so as far as Possible to Make Statute or Series of Statutes Relating to a Certain Subjectmatter Consistent—Land Drainage Act, 1908, Sections 25, 50, 61, 62—Land Drainage Amendment Act, 1913, Section 7.

The plaintiff was the occupier of certain lands in the district of the defendant, a Board constituted under the Land Drainage Act, 1908. Within the district of the Board were three drains or watercourses, admittedly under the management of the Board, which in part adjoined and two of which in part intersected the lands occupied by the plaintiff. Ever since its incorporation the Board had kept those drains or watercourses cleared and in proper order, but recently, owing to insufficiency of funds, the Board had notified the plaintiff that it proposed to discontinue wholly or in part, the work of clearing and maintaining in proper order the drains or watercourses referred to, and the Board had further notified the plaintiff that it proposed in purported pursuance of Section 7 of the Land Drainage Amendment Act, 1913, to order the plaintiff and other occupiers of land in the district to remove all obstructions from such drains or watercourses calculated to impede the free flow of water therein. The plaintiff had notified the Board that he intended claiming damages under Section 25 of the Act of 1908 if it failed to keep the drains or watercourses in proper order, and he claimed that the Board had no authority under Section 7 of the amending Act of 1913 to order him to clear obstructions in drains or watercourses which were under the management of the Board. The plaintiff issued an originating summons under the Declaratory Judgments Act, 1908, submitting three questions for determination. These questions were as follows:—"(1) Can the Plaintiff as the occupier of lands in the Drainage District of the Defendant Board adjoining or through which watercourses or drains under the management of the Defendant Board run require the Defendant Board to properly clear and maintain such watercourses or drains in proper order as provided by Section 25 of the Land Drainage Act, 1908, and in the event of the defendant Board making default in so properly cleaning and maintaining such watercourses or drains whereby damage to the plaintiff ensues recover such damage from the defendant Board? (2) Can the defendant Board discontinue wholly or in part the work of clearing and maintaining in proper order the watercourses or drains under its management? (3) Do the provisions of Section 62 of the Land Drainage Act, 1908, as amended by Section 7 of the Land Drainage Act, 1913, apply to watercourses or drains under the management of the defendant Board so that the Board, which is of the opinion that obstructions are likely to cause damage to property in the District, can order the occupiers of the land on the banks of such watercourses or drains to remove therefrom all obstructions calculated to impede the free flow of water therein?"

Smith, J., before whom the summons came in the first instance, ordered the removal of the case into the Court of Appeal for argument.

Fell for plaintiff.

Glasgow for defendant.

MYERS, C.J., delivering the judgment of the Court, said that in order to appreciate the third question it was necessary to set out Section 25 of the Land Drainage Act, 1908, and Section 7 of the amending Act of 1913, which repealed Subsection (1) of Section 62 of the principal Act and substituted new provisions therefor. His Honour read these two sections and added that by Section 60 of the Land Drainage Act, 1908, the term "local authority" included a Drainage Board. If, *quoad* a Drainage Board, Section 7 of the Act of 1913 was to be given its full apparent effect, it was plain that Section 25 of the principal Act and Section 7 of the amending Act were in hopeless conflict, and that the latter section completely nullified, or might completely nullify, the earlier, because its effect would be to throw back upon the occupier or owner of land the Board's own liability under Section 25 and actually to take away the rights conferred upon the occupier and owner by Section 25 and substitute for the Board's own obligation to the occupiers and owners a precisely similar or corresponding obligation on the occupier or owner in favour of the Board itself. It was necessary, therefore, to consider the effect of the later provision in relation to Section 25. In **Sefton-Ashley Drainage Board v. Gorrie,** 29 N.Z.L.R. 383, Sim, J., expressed the opinion that all watercourses (which would include drains) in a drainage district were not necessarily under the management of the Drainage Board; and he held that the question whether any particular watercourse was or was not under the management of the Drainage Board was one of fact to be determined on the circumstances of each case. He held further that Section 25 imposed certain duties upon a Drainage Board with regard to watercourses or drains vested in it or under its management and provided that "in default" the Board should be liable in the manner specified. But towards the end of his judgment (His Honour quoted the passage) the learned Judge said that he could see no reason why Section 62 did not apply to Drainage Boards. In the later case of **Otekaike Drainage Board v. McKay,** (1919) N.Z.L.R. 669, the same learned Judge seemed to think that a Drainage Board had power under Section 50 of the Act of 1908 to impose upon the owner or occupier of land through which a drain passed the duty of cleansing, maintaining and repairing the drain. In **Henry v. Piako County,** 30 N.Z.L.R. 811, which was decided after the **Sefton-Ashley case** (*cit. sup.*) and before **Otekaike Drainage Board v. McKay,** (*cit. sup.*), it was held by Edwards, J., that the Drainage Board of a drainage district had exclusive jurisdiction with regard to all public drains within the land drainage district, and that the then existing enactment corresponding with Section 25 of the Act of 1908 imposed upon every Drainage Board a positive duty as to all drains within the drainage district.

In **Hull and others v. Otaua Drainage Board,** (1927) G.L.R. 61, Skerrett, C.J., had to consider the meaning of Sections 25 and 26 of the Act of 1908, and said (His Honour read the passage) that both those sections were limited to watercourses vested in the Board or under its management and that a drain could not be said to be under the management of a Board unless the Board had exercised some control over the drain, as by repairing, cleansing or regulating its use. The learned Chief Justice's opinion seemed to be in consonance with the view expressed upon a somewhat similar point in **West Norfolk Farmers Manure Co. v. Archdale,** 2 T.L.R. 406, although that case was not referred to in His Honour's judgment.

The questions which their Honours had so far considered came before the Full Supreme Court in **Wood v. Taranaki Electric Power Board,** (1927) N.Z.L.R. 392. In the judgment of the Court in that case, which was delivered by Skerrett, C.J., the following propositions seemed to their Honours to have been enunciated: (1) That the drains within the scope of Section 25 were limited to drains vested in the Board or under its management. (2) That there were, or might be, private or other drains in a drainage district which did not come within the scope of Section 25. (3) That, following on that point **Henry v. Piako County** (*cit. sup.*), a Land Drainage Board within its district had exclusive jurisdiction in respect of all public drains within the district and was liable to the owners or occupiers of any land for damage done thereto in consequence of the disrepair of any such drain or watercourse. (4) That Section 23 of the Act applied only to private drains carrying surface and storm water and had no application to drains which were vested in or under the management of the Board. (5) That Section 50 of the Act, if interpreted as casting upon the land owner the onus of cleansing, maintaining and repairing drains which came within the scope of Section 25, would be to authorise the Board by its own volition by by-law to render nugatory the obligation to repair and maintain expressly cast upon the Board by statute with reference to drains vested in it or under its management. (6) That Section 50 had no application to drains vested in or under the management of the Board. Consequently, therefore, it was in effect held that there were, or might be, other drains within the district than

those which came within the scope of Section 25, and that the operation of Section 50 was limited to the making of by-laws in respect of such other drains. If Section 52 (1) (now Section 7 of the Act of 1913) were to be read relative to Section 25 in the same limited way as Section 50, then clearly the dictum of Sim, J., in **Sefton-Ashley Drainage Board v. Gorrin** (*cit. sup.*) in regard to the effect of Section 62—which dictum after all was *obiter*—could not be regarded as law. Similarly it seemed to their Honours that the decision in **Wood v. Taranaki Electric Power Board** (*cit. sup.*) must be regarded as being in agreement with the views expressed by Skerrett, C.J., in **Hull and others v. Otaua Drainage Board** (*cit. sup.*) as to the meaning of the words "under its management" in Section 25 and in disagreement with the view of Edwards, J., on the same point in **Henry v. Piako County** (*cit. sup.*). It was true that the decision in **Wood and another v. Taranaki Electric Power Board** (*cit. sup.*) though it was the decision of the Full Court, was not binding upon the Court of Appeal, but their Honours respectfully agreed with and adopted the views therein expressed on the questions which their Honours had been so far considering.

If then Section 50 did not apply to drains which came within the scope of Section 25, that was to say drains vested in the Board or under its management, the question arose as to whether or not Section 7 of the Act of 1913, so far as regards a Drainage Board was to be similarly restricted. It was to be observed that Part I of the Act related solely to Drainage Boards, while Part III, which was under the title "Powers of local authorities," commenced, in Section 60, by saying that in that part of the Act if not inconsistent with the context "Local authority" meant a number of different local bodies including a Drainage Board. Every clause of a statute should be construed with reference to the context and the other clauses of the Act so as, as far as possible, to make a consistent enactment of the whole statute, or series of statutes, relating to the subject matter: **Canada Sugar Refining Company v. Regina,** (1898) A.C. 735, 741. Seeing therefore that Section 7 of the Act of 1913 was in hopeless conflict with Section 25, so far as concerned drains and watercourses vested in or under the management of the Board, and that the Board had ample power to deal with other drains under Section 50, it seemed to their Honours that the words "local authority" in Section 7 of the amending Act, if read in accordance with the definition in Section 60 as including a drainage board, were inconsistent with the context and that, therefore, their Honours must if necessary hold that in Section 7 the term "local authority" must be read for the purposes of that section as excluding a Drainage Board. That view of course was quite opposed to the dictum of Sim, J., in **Sefton-Ashley Drainage Board v. Gorrie** (*cit. sup.*) to which their Honours had already referred; but, as had been previously pointed out, that dictum was *obiter*. Cooper, J., in **McKinley v. Whangarei County Council,** 32 N.Z.L.R. 791, (at p. 798) apparently felt very much the same difficulty as their Honours had pointed out. The difficulty was apparently created by the consolidation of the statutes in 1908. Prior thereto the statute in force was the Land Draiange Act, 1904, which repealed the previous principal Act of 1893, and also the Land Drainage Amendment Act, 1894, except Section 9 thereof. Section 9 of the last-mentioned Act as amended in 1898 at the time of the consolidation in 1908, was reproduced in Sections 61 and 62 of the Land Drainage Act, 1908. The first paragraph of Section 9 appeared substantially unaltered in Section 61 of the Act of 1908. But the second paragraph of Section 9 merely gave powers to a Road Board or Town Board where there was any watercourse or drain within the road district or town district or beyond the limits of such district and its obstruction was likely to cause damage to any property in such district. The second paragraph however seemed to their Honours to have been governed by the first, and, therefore, to have applied only to a road district or town district which was not within a drainage district constituted under the Land Drainage Act, 1893, or a river district constituted under the Rivers Act, 1884. It was true that by Section 3 of the Land Drainage Act, 1898, the powers by Section 9 of the Act of 1894 conferred upon a Road Board or Town Board were conferred upon every local authority; and that "local authority" was defined by Section 2 of the 1898 amendment as meaning and including, if not inconsistent with the context, various local authorities of which a Drainage Board was one. But the mere extension of the powers conferred by the second paragraph of Section 9 of the Act of 1894 to additional local authorities did not affect or alter the construction of that section. The difficulty in the Act of 1908 had been created by reproducing Section 9 of the Act of 1894 (and part of Section 3 of the Act of 1894 and part of Section 3 of the Act of 1898) in a divided form, dividing it into two sections, and making it appear *prima facie* that the second was independent of the first. The construction that their Honours placed upon Section 62 (1) or (Section 7 of the Act of 1913) had the same effect as if that Section were read as part of Section 61 and, therefore, as having application only where the "local authority" was not within a "drainage district" or a "river district."

Even, however, if that view were not sound, it could not help the defendant Board because Section 7 of the Act of 1913 must still be read with Section 25 of the principal Act of 1908 with the result that its effect must be limited in precisely the same way as the Full Court held in **Wood v. Taranaki Electric Power Board** (*cit. sup.*) that Section 50 was to be limited. Their Honours, therefore, answered question 3 in the originating summons in the negative.

In the view that their Honours took of the matter, it seemed unnecessary to discuss questions 1 and 2 in any detail. Question 1 was answered in the affirmative, and question 2 in the negative. It was contended by Mr. Glasgow that the Board might discontinue the work of maintenance and clearing of the drain by reason of the provisions of paragraph (g) of Section 17 of the Act of 1908, but their Honours could not accede to that view as paragraph (g) did no more than confer a power in regard to the making, maintenance, alteration, and discontinuance of works, etc., and could not, as it seemed to their Honours, have the effect of empowering the Board to discontinue the doing of something that was made mandatory by Section 25.

Solicitors for plaintiff: **Fell and Harley,** Nelson.

Solicitors for defendant: **Glasgow and Rout,** Nelson.

Myers, C.J.
Adams, J.
Blair, J.
Smith, J.

June 25; July 15, 1929.
Wellington.

H. R. MUNNS & CO. LTD. v. D. LEVIN LTD.

Practice—Bill Writ—Application for Leave to Defend—Sufficiency of Affidavit in Support—Drafts for Goods Sold Accepted by Purchaser but Payment Stopped—No Evidence That Goods Rejected by Purchaser—Only Defence Alleged in Affidavit one of Breach of Warranty in Diminution of Price or Matter of Counterclaim—Quaere Whether Breach of Warranty in Diminution of Price a Defence to Action on Bill of Exchange—No Information in Affidavit as to How Much of Claim Disputed—Affidavit Insufficient—Defendant a "One Man Company"—Debenture over all Assets of Company Held by Main Shareholder Matter for Consideration—Duty to File Straightforward Affidavits—Motion for Rescission of Ex Parte Order—Matter at Large—Neither Supreme Court Nor Court of Appeal Fettered by Discretion of Judge in Chambers — Leave to Defend Granted on Condition That Amount of Claim be Paid into Court or Security for Same Given—Code of Civil Procedure, Rule 495.

Appellant on 5th February, 1929, issued a bill writ claiming against respondent the sum of £765 10s. being the amount of two thirty day drafts issued by appellant on the respondent and accepted by the respondent. The drafts accompanied the documents for goods sent by appellant—who was a merchant in England—to the respondent in New Zealand. There were two shipments, the goods no doubt being consigned to "order" through a bank. Respondent sighted and accepted the first bill on 25th September, 1928, and on its presentation for payment on 27th October, payment was refused, the answer being "payment stopped." The same occurred with the second bill, the date of acceptance being 10th October, 1928, and the date of dishonour being 12th November, 1928. The respondent, under Rule 495, made an *ex parte* application for leave to defend. In support of the application there was filed an affidavit by one Samuel Levin who stated that he was a director of the respondent company. He admitted the acceptance of the bills, which he stated were accepted in payment of certain goods "then under consignment" to the respondent company. He said also that payment of the bills was stopped "on account of the materials contained in the said consignment failing to conform in description and quality with those ordered by the defendant company in that: (a) The said materials as delivered were of foreign manufacture instead of English manufacture.

and consequently were levied with foreign duty instead of English preferential duty. (b) The said goods were unsuitable for the purposes for which they were supplied. (c) The said materials were torn damaged and of obsolete design." The affidavit concluded by stating that the deponent believed that the respondent company had a good defence to the action on the grounds stated in the paragraph first quoted. An order giving leave to defend was made by Herdman, J., *ex parte*, without appearance by counsel. The plaintiff filed a motion for the rescission of the order which came before Ostler, J. His Honour refused to rescind the order, taking the view that he could not do so unless the facts upon which it was based were disproved. This was an appeal from that decision.

Cooke for appellant.

Leicester for respondent.

BLAIR, J., delivering the judgment of the Court said that nowhere in the affidavit was it stated that the respondent rejected the goods or in anywise attempted to exercise any right of rejection. In other words respondent must be deemed to have admitted acceptance of the goods as defined by Section 37 of the Sale of Goods Act, 1908. If therefore it had accepted the goods the matters alleged in paragraph 4 of the affidavit were more in the nature of a defence to the claim by way of breach of warranty in diminution of the price. It might be that, the action being one on bills of exchange, and not for the sale of goods, the remedy provided by Section 54 (a) of the Sale of Goods Act was not available to the respondent. That point was touched upon by Williams, J., in **Thompson v. Gilmour,** 2 N.Z.L.R. S.C. 226. That subsection permitted a buyer to set up breach of warranty in diminution of the price. Their Honours assumed, however, in favour of the respondent that he could in an action on the bills set that up as a defence. On that assumption the only defence alleged by the respondent to the appellant's case was a defence of diminution of price, to the extent of an amount not liquidated and not even estimated in the affidavit. The affidavit implied that the contract for the goods stipulated that they were to be of English manufacture and it implied also that some purpose was stated as the purpose for which the goods were ordered. Not only was the affidavit silent as to the contract between the parties, but it also left the Court entirely in the dark as to what the goods were. The respondent was described in the case as a clothing manufacturer, but whether the goods were clothing, or materials for making clothing, or something else, was not stated. No indication was given as to the amount of the excess duty, nor of the value of the goods in the condition in which they were, and it must be fairly obvious that the goods were worth something, and were in all probability of substantial value. The respondent's defence, therefore, to the claim was, on the assumption their Honours had made, merely one of diminution of the price and if it had not that defence, then the only answer it had to the claim was by way of counterclaim. Whether the remedy were defence or counterclaim the amount was unliquidated, and no information was given to the Court when leave to defend was applied for which would have enabled the Court to say how much of the claim was undisputed or what was the amount of the counterclaim. It might be that if the details relating to the alleged loss of preferential duty had been supplied the amount involved would have been small; and the entire want of detail as to the other heads of respondent's claim left the Court ignorant as to whether or not the alleged counterclaim, if it could be made out, represented any substantial reduction in the price.

That phase of the matter was referred to by the learned Judge in the Court below when he said that he doubted whether he would have been prepared to make an order in the absence of fuller information than was supplied in the respondent's affidavit. In reliance upon **Agra Bank v. Leighton,** L.R. 2 Ex. 56, and **Bank of New Zealand v. McLeod,** 2 N.Z.L.R. S.C. 39, he considered that an order giving leave to defend should be rescinded only if the facts upon which the order was made were subsequently shown not to exist. Bramwell, B., in the case first-mentioned referred to the fact that leave to defend would be rescinded when it was shown that the supposed facts upon which it was given were proved to be erroneous; but in neither case was it said that an order would not be rescinded on any other grounds. Rule 495 conferred a discretionary power on a Judge to give leave in certain cases. The order for leave made by Herdman, J., was on an *ex parte* application, without appearance by counsel. When a motion for rescission was heard it was usually taken by the Judge who made the *ex parte* order. It was a mere accident that by reason of Herdman, J.'s absence from Wellington the question of rescinding the order came before another Judge; but had it come before Herdman, J., he certainly would not have felt himself trammelled with the *ex parte* order which he had already made. On a motion for rescission additional facts might be brought before the Court, and the matter being argued from both sides, it was not impossible that new aspects of the facts disclosed on the *ex parte* motion would be apparent. It seemed to their Honours clear that on a motion for rescission the matter must be treated as entirely at large. When the matter came before Ostler, J., he seemed to have felt himself embarrassed by the existence of the *ex parte* order and considered that it would be competent for him to rescind or vary it only if the facts upon which it was based were shown not to exist. In their Honours' view, the matter being at large, and matter proper to be considered not having been considered in the lower Court, the matter was at large in this Court.

It was admitted by counsel for the appellant that for the purpose of the present appeal he was not disputing the facts as deposed to in Levin's affidavit. Nowhere did that affidavit say that the goods had been rejected, and the position, therefore, must be that the goods, the price of which was £765, were in the possession of the respondent, who retained them and yet refused to account to the seller for any portion of the price. If it had been shown that the goods had been rejected, that would have raised the defence of total failure of consideration, and in that case the appellant might have had great difficulty in disturbing the order. Ostler, J., seemed to have assumed that the material before the Court did disclose such a defence, but on a close consideration of the affidavit their Honours found that that was not the case. The affidavit made no attempt to inform the Court of the loss alleged to be due to foreign instead of British preferential duty, nor was the slightest indication given as to what the respondent admitted was the value of the goods he had retained. The appellant had on affidavit made the Court aware that the respondent was a "one man company," its nominal capital of £5,000, with the exception of one share held by a nominee, being all held by one Dorothy Levin, wife of Samuel Levin. The whole of the respondent's undertaking and assets, including uncalled capital, were charged with a debenture payable to bearer but held by the same Dorothy Levin. Plaintiff resided in England and it was fairly certain that by reason thereof the trial of the action might be considerably postponed. During the whole of the time, the goods, the price of which was the subject matter of the present action, were at the disposal of the respondent and were available to increase the assets covered by a debenture held by the owner of virtually the whole of the shares of the company. Under those circumstances was it right for the Court in the exercise of its discretionary powers under Rule 495 to give unconditional leave to the respondent to defend? On the motion for rescission it was open to the respondent to amplify the facts and to place before the Court the particulars as to which the respondent's original affidavit was woefully wanting. It was also open to the respondent by placing its financial position before the Court to remove the unpleasant flavour left by the disclosure of the nature of the charge on the undertaking. The respondent had only itself to blame if its silence in the face of that disclosure was given a sinister interpretation. The Court was entitled when a defendant came before it on an *ex parte* application to have a full and frank disclosure of the position so that it could see that justice was done to both parties to the proceedings. Hosking, J., in **Munt Cottrell and Co. Ltd. v. Smith,** (1921) G.L.R. 431, said: "Where the assistance of the Court is sought straightforward and honest affidavits should be filed by the applicant." Their Honours did not say that anything in the affidavit was untrue. That was a matter which would be settled at the trial. But the affidavit as filed did not make clear that the defence at best was a mere one of reduction in the price. No particulars were given to enable the Court to judge how much of the claim was undisputed. In the case cited Hosking, J., refused leave to defend unless the defendant either within 14 days paid into Court, or gave security (to be approved by the Registrar at Wellington) for the amount claimed and plaintiff's costs in the action. Their Honours thought that a somewhat similar order should be made in the present case. The leave to defend would stand, but upon condition that the respondent within seven days either paid into Court or gave security (to be approved by the Registrar of the Supreme Court at Wellington) for the amount claimed, but without costs.

Solicitors for appellant: **Chapman, Tripp, Cooke, and Watson,** Wellington.

Solicitors for respondent: **Leicester, Jowett, and Rainey,** Wellington.

Supreme Court

Myers, C.J. June 12; 13, 1929.
Napier.

S. v. S. and G.

Divorce—Custody of Child—Welfare of Child Paramount Consideration—Decree *nisi* Obtained by Husband—Husband Applying for Custody of Illegitimate Child Adopted by Parties—Wife Guilty Party in Divorce Proceedings—Wife Living in Adultery with Co-respondent—Semble Husband Living in Adultery—Separation Agreement Giving Custody of Child to Husband—Husband in Arrear with Payments of Maintenance Provided for by Deed of Separation and Neglecting to Pay Maintenance Under Subsequent Separation Order—Child in Custody of Mother of Co-respondent—Wife Given Custody Conditionally on Child Remaining with Respondent's Mother and on Child Not Being Taken to Live with Wife While Living Unmarried with Co-respondent.

Application by a husband who had obtained a decree *nisi* for divorce against his wife, for the custody of an illegitimate child which had been adopted by the parties. The facts sufficiently appear in the report of the judgment.

Lusk for petitioner.

Barnard for respondent.

MYERS, C.J. (orally) said the application for custody had given him a great deal of anxious consideration. The principles upon which matters of the kind were to be regarded were well settled and were stated in **Meurant v. Meurant,** (1922) N.Z. L.R. 262, 264, by Stringer, J. It had been said over and over again that in all questions affecting the custody of children the interests of the children were of paramount consideration and exceptional circumstances were required to be shown before the custody of children would be given to a guilty wife: **Van der Veen v. Van der Veen,** (1923) N.Z.L.R. 794. It was necessary to apply those principles to the facts of the present case.

The parties were married on 22nd January, 1914, and there had been no issue of the marriage. The child was a girl who had been legally adopted by the parties on 10th November, 1917, when she was three months old. She was an illegitimate child and the respondent alleged that she was the child of the petitioner, that the petitioner was the party who desired to adopt the child, that the petitioner admitted to her his paternity of the child, and that she the respondent forgave the petitioner his infidelity and agreed to adopt the child. The petitioner swore that that was not true and that he never had any relations with the mother of the child. All His Honour need say was that he himself had his own opinion as to which statement was correct. The petitioner had no home of his own but had been waiting until the decree *nisi* obtained by him against his wife was made absolute to marry a woman in Christchurch who was formerly married but who divorced her husband some time ago. That woman had several children. One of them lived at home and the others, some boys and some girls, were in orphanages, where they were apparently maintained wholly or partly by the father. Eventually, no doubt, those children would go back to the home of the mother, and of the petitioner, if he carried out his intention of marrying the woman. The petitioner had been living in that woman's house for several months past. The respondent was the guilty party in the divorce proceedings and the divorce was granted by reason of her misconduct with the co-respondent. She was living before the decree was granted, and had since been living, at the house of the co-respondent; she said merely as housekeeper—and she said that no misconduct had taken place between them. The answer to that was, if answer were required, that misconduct on 23rd December, 1928, was held at the trial of the suit to be proved; and it was on that ground that the decree was made. She said that as soon as the decree had been made absolute she and the co-respondent were to be married.

It was quite plain to His Honour's mind in the circumstances of the case that at the present moment the child should not be with either of the parents. She certainly should not be living in the house of the respondent, who, as His Honour was bound to infer, was living with the co-respondent as his wife. Neither should she be placed for the time being in the custody of the petitioner, who was living under circumstances which one could not regard as anything but doubtful in Christchurch.

For the time being, and for some time past, the child had been living in Christchurch with the co-respondent's mother, for whom she seemed to have a great affection, and apparently she had been quite well and happy and properly cared for. There were certain other relevant facts. The petitioner and the respondent were separated by deed of separation on 27th July, 1927. Under the deed of separation the petitioner agreed that the respondent should have the custody of the child. It did not by any means follow from that that the petitioner should be refused the custody at the present time, but it was a circumstance which His Honour thought should not be overlooked. The petitioner did not keep up his payments for maintenance under the deed of separation. He seemed to have kept them up until 13th July, 1928. From that date until December, 1928, he paid only about £7 for the maintenance of his wife and the child, and there was a considerable amount in arrear. It was necessary therefore, for the respondent in December, 1928, to take proceedings for a summary separation and for maintenance. She accordingly did so, and a separation order was granted and maintenance was ordered to be paid by the petitioner at the rate of 35s. per week, which, though not stated in the order itself, was admitted to have been on the basis of 20s. for the wife and 15s. for the child. As His Honour understood the matter, the petitioner had not paid a shilling under that order. In other words, not only did he flout the order of the Court by leaving his wife without any money, but he did not even pay a penny towards the maintenance of the child. It also appeared that while the petitioner and the respondent were living together the petitioner's payments to the respondent for the upkeep of the household were so small as to compel her to work in order to help in supporting the home and the child. In all those circumstances His Honour could not resist the conclusion that the petitioner's desire was not so much to obtain the custody of the child—not so much even to spite the respondent by trying to keep the custody of the child from her—as rather to rid himself of the payments under the order made in December, 1928, or under any other order for the maintenance of the child. The duty of the Court was to do the best it could for the child. His Honour came to the conclusion that at that stage at all events the petitioner must be refused the custody of the child. His Honour was equally of opinion that at that stage the child should not be actually living with the mother. His Honour proposed, therefore, to order that the child remain in the custody of the respondent until the further order of the Court on condition that she remain with the co-respondent's mother in Christchurch, and that she should not be taken by the respondent to live with her so long as she lived unmarried with the co-respondent, and on the further condition that the respondent should not seek to recover from the petitioner a greater amount than on the basis of 15s. per week for the maintenance of the child so long as the order of December, 1928, remained in existence and unvaried. The petitioner was to have reasonable access to the child. His Honour suggested that the parties should endeavour to arrange the necessary terms in regard to access. If not, the matter could be referred to His Honour and he should give such direction as might appear necessary.

Solicitors for petitioner: **Kennedy, Lusk and Morling,** Napier.
Solicitor for respondent: **W. H. Barnard,** Napier.

MacGregor, J. June 17; 21, 1929.
Wellington.

IN RE POLSON: POLSON v. POLSON.

Will—Construction—Provision for Payment out of "Nett Income" from Named Property of Fixed Annual Sums to Two Societies and for Division of Balance Among Four Other Beneficiaries—On Sale of Property Interest from Investment of Proceeds to be Similarly Divided—No Express Gift of Corpus—Gift of Income Amounting to Gift of Capital—Societies Taking Such Proportion of Capital as Fixed Annual Sums Bear to "Nett Income" of Property or Proceeds of Sale—Other Beneficiaries Taking Balance of Capital—Power of Court to Change Word in Will Incorrectly Used by Testator for Some Other Word.

Originating summons for the interpretation of the will of A. J. N. Polson, who died on 4th December, 1927. The will was dated 19th July, 1926, and, after directing certain properties to be sold at the best price obtainable, and directing that No. 32 Cambridge Terrace was not to be sold unless a price of £5,000 was obtainable for the same, directed that all proceeds of sales should be divided and paid as follows:—

"To my wife Isobel Sheppard Polson	one fifth
" " mother Jessie Polson	one fifth
" " father Donald Murray Polson	one fifth
" " sister Elsie Torrence Bright	one fifth
" Charitable institutions	one fifth."

The will then directed that the nett income from No. 32 Cambridge Terrace should be disposed of as follows: "(1) To the Society for Prevention of Cruelty to Animals fifty pounds (£50) per annum. (2) To the Wellington Cat Club ten pounds (£10) per annum. (3) The balance to be divided (one fifth per annum each) to the beneficiaries mentioned above, namely, I. S. Polson, J. Polson, D. M. Polson, and E. T. Bright. When sale of 32 Cambridge Terrace is effected at not less than £5,000 I direct that the money be invested on first mortgage at current rate of interest and distributions of yearly income made in the same manner as if the interest were the existing rent."

Several questions were submitted to the Court but the case is reported only in so far as it deals with the proper interpretation of the provisions of the will dealing with the Cambridge Terrace property.

Sievwright for plaintiffs and defendants D. M. Polson and J. Polson.

Hay for defendant I. S. Polson.

Hislop for defendant E. T. Bright.

Cornish for Wellington Society for Prevention of Cruelty to Animals.

Taylor for the Attorney-General.

MACGREGOR, J., said that the first part of the will provided for the sale on a cash basis of the whole real and personal property of the testator, and then proceeded to direct that the proceeds of such sales should be divided and paid in equal shares to and among five named beneficiaries. That general scheme of distribution, however, was followed by detailed provisions as to the disposal of the proceeds of sale of one particular property, known as the Cambridge Terrace property, which provisions at first sight appeared to be inconsistent with the general distribution above referred to, and also in the end to result in a partial intestacy. His Honour thought that the gift of the income arising from the proceeds of the sale of the Cambridge Terrace property operated to vest the capital moneys arising from such sale in the beneficiaries entitled to such income. It was clear law that a gift of the income of property to a person, without limitation as to time, was a gift of the capital, where no other disposition of the capital was made: **Theobald on Wills,** 8th Edn., 542; **In re L'Herminier,** (1894) 1 Ch. 675. The further question remained, in what respective shares or proportions did the said income and capital vest? The answer to that question of course depended upon the language of the will itself. It was clear from the will that the testator intended the Society for the Prevention of Cruelty to Animals to have £50, and the Wellington Cat Club £10 per annum, in any event from the income of the Cambridge Terrace property both before and after its sale. After payment of that fixed yearly amount of £60 the balance fell to be divided equally between the four named beneficiaries. His Honour thought, therefore, that the income and capital in question must be divided, as between the Society for the Prevention of Cruelty to Animals and the Wellington Cat Club on the one hand, and the four named beneficiaries on the other, in proportion that £60 bore to the "nett income" produced by the Cambridge Terrace property or its proceeds. In dealing with the balance to be divided among the four named beneficiaries the testator had used (in brackets) the following words: "(one fifth per annum each)." From the context His Honour was satisfied that that was a mere slip or blunder on his part. He obviously meant "one fourth" and not "one fifth." The Court had power to change a word when it appeared, from the context of the will, that the word was incorrectly employed by the testator in place of some other word: **Theobald on Wills,** 8th Edn., 844; **Hart v. Tulk,** 2 D.M. & G. 300. His Honour thought it so appeared in the present case, and accordingly the balance of income and capital in question should be divided among the four named beneficiaries in equal fourth shares. That construction had the desirable result of avoiding a partial intestacy.

Solicitors for plaintiffs and D. M. & J. Polson: **A. B. Sievwright,** Wellington.

Solicitors for I. S. Polson: **Mazengarb, Hay and Macalister,** Wellington.

Solicitors for E. T. Bright: **Brandon, Ward and Hislop,** Wellington.

Solicitors for Wellington Society for Prevention of Cruelty to Animals: **Webb, Richmond, Cornish, and Swan,** Wellington.

Solicitor for Wellington Cat Club: **J. Scott,** Wellington.

Solicitors for Attorney-General: **Crown Law Office,** Wellington.

Smith, J. May 23; June 22, 1929. Dunedin.

LETHBRIDGE v. OTAGO LAND BOARD.

Land Acts—Lease—Renewal—Lease of Small Grazing-Run—Board Taking Definitive Steps Towards Renewal of Lease—Not Entitled Subsequently to Recommend Subdivision by Minister and to Refuse to Renew Lease—Land Act, 1908, Sections 218, 219, 220, 221—Land Act, 1924, Sections 234, 235, 237, 240, 241.

Originating summons under the Declaratory Judgments Act, 1908, to determine whether the Land Board, having decided to proceed under Sections 234 and 235 of the Land Act, 1924, with the renewal of the lease of a small grazing run granted under the Land Act, 1908, and having taken certain steps in that direction, could subsequently revoke its decision and make recommendations to the Minister under Section 240 of the Act of 1924 with a view to having the land subdivided. Each of the three plaintiffs was the holder of a small grazing-run lease granted under the Land Act, 1908, and expiring on 28th February, 1931. An appraiser was on 8th August, 1928, appointed by the defendant Board to assess the fee simple of the land comprised in the respective runs, and the unimproved value of, as well as the value of the improvements upon, each run was fixed by such appraiser in September, 1928. On 10th October, 1928, the Board dealt with each of the runs. It resolved that Lethbridge's rental be fixed at 5% on the unimproved value, and that the rental of Elliott and of Patterson be fixed at 4½% on the unimproved value, and that the lessees be offered a renewal at such annual rentals. On 11th October, 1928, the Commissioner of Crown Lands wrote to each of the plaintiffs a letter stating the unimproved value fixed by the appraiser and intimating that the Board had decided, in terms of Section 234 (2) of the Land Act, 1924, to fix the rent as above stated. Each letter stated that if the lessee by notice in writing addressed to the Commissioner of Crown Lands objected to the valuation, such valuation should be determined by arbitration, and the rental would be fixed as above stated on the valuation so determined. It pointed out that the lessee plainly had the right to resort to arbitration on the valuation, but the arbitrators had not the power to alter the rate per cent. of the unimproved value fixed by the Board to be paid as rental. Each lessee was given until 31st August, 1930, (six months before the expiry of his existing lease) in which to choose whether he would accept a new lease at the rental offered, or whether he would resort to arbitration. On 22nd February, 1929, Lethbridge objected to the valuation, and appointed an arbitrator on his behalf. Neither Elliott nor Patterson had either objected or accepted. On 14th March, 1929, the Land Board held a meeting and resolved in the case of each plaintiff to rescind the resolution of 10th October, 1928, and to ascertain if the respective runs could be subdivided, and on the same day letters were sent to each plaintiff advising him of the terms of the resolution and stating that in terms of the resolution, the offer of a renewal had been withdrawn. On 21st March, 1929, Lethbridge replied objecting to the action of the Board on the ground that the Board had changed its mind after he had accepted a renewal of the lease subject to arbitration and had appointed his arbitrator, and he requested the Board to honour its contract. Elliott made no reply, but the agents of Patterson replied that their client had accepted the offer for renewal of the small grazing-run lease on the terms already detailed. That letter was not delivered until after the resolution to rescind was passed, and the letter of rescission posted to the plaintiff Patterson, but before it could have been delivered to him. The question arising for the consideration of the Court was whether the Board, having decided to proceed under Sections 234 and 235 of the Land Act, 1924, was bound to continue the steps specified in such Sections or whether it could subsequently take steps under Section 240 to have the runs subdivided.

Payne and J. S. Sinclair for plaintiffs.

F. B. Adams for defendant.

SMITH, J., said that as a result of Section 389 of the Land Act, 1924, the rights of renewal in respect of the leases were to be determined under the preceding legislation except where otherwise expressly provided. The rights of renewal under the Act of 1908 were contained in Sections 218 to 221 of that Act, as modified by the amending legislation prior to the consolidating and amending Act of 1924. Those rights of renewal were not expressly affected by the Act of 1924, except by Section 240 relating to the subdivision of small grazing runs. The originating summons assumed that the questions raised

were to be determined under the Land Act, 1924. The consolidating Act did not make any substantial alteration in the rights of renewal of lessees of small grazing-runs but the language was not identical, and the period of time within which a lessee must elect whether he would accept a renewal had been altered from twelve months to six months before the expiry of the lease. The strict position was then that the rights of renewal existed under the preceding legislation, but that those rights were modified by Section 240. Section 218 of the Act of 1908, as amended by Section 24 of the Act of 1912, by Section 6 of the Act of 1918, and by Section 10 of the Act of 1920, provided that, on the expiry by effluxion of time of the lease of any small grazing-run, a new lease should be offered to the existing lessee not earlier than three years and at least twelve months before the expiration of his lease at a rent to be ascertained as follows: (a) A valuation should be made by an appraiser appointed by the Board, of the then value of the fee simple of the land, and also a value of the substantial improvements of a permanent character made and then in existence on the land; (b) after the making and publishing of the valuations on the lessee and on the Commissioner, but not later than twelve months before the expiry of the term, the lessee should elect whether he would accept a fresh lease of the land for a further term of twenty-one years from the expiration of the then term at a rent to be fixed by the Board, such rent to be expressed as a proportion (being in no case less than 2½ per cent. of the unimproved value of the land), such lease to be subject to conditions similar to those of the previous lease except as to the amount of rent payable thereunder; (c) in the event of the lessee's not agreeing to the valuations made as aforesaid, then the valuations should be determined by arbitration. Sections 219, 220, and 221 of the 1908 Act contained certain provisions in case the lessee elected not to accept a renewal. Section 240 of the Act of 1924 was, His Honour stated, a consolidation of Section 28 of the amending Act of 1912 and of amendments to that Section made by the amending Acts of 1913, 1918, and 1920. His Honour referred at length to the provisions of that Section providing (*inter alia*) that the Minister might, on the recommendation of the Board, determine that the land comprised in the lease of a small grazing-run should, on the expiry of that lease, be disposed of in two or more allotments by way of lease. It was clear that Section 218 of the Act of 1908 (as well as Section 234 of the Act of 1924) contemplated that the lessee should have the opportunity, before the expiration of his lease, of accepting a new lease upon terms which had been previously settled. For that purpose the Board was bound to take the preliminary steps within specified times. Under Section 218 the lessee must elect twelve months before the expiry of the lease. Under Section 234 of the Act of 1924, which applied to leases granted under the Act of 1924, the lessee must elect at least six months before the expiry of his lease. Those provisions were necessary also from the Board's point of view in the event of the lessee's refusal of a new lease, in order that it might take the steps required by Sections 219 to 221 of the Act of 1908, or the steps required by Sections 235 to 237 of the Act of 1924, as the case might be. It was clear also that Section 240 of the Act of 1924 contemplated that when the subdivisional procedure was invoked, and was not revoked under Section 241, a lessee should still be entitled, upon the expiry of his lease, to receive (a) a lease of one of the subdivisions the terms of which had been previously settled, and (b) the value of his improvements, together with (c) the value (if any) of the right of renewal in respect of the other subdivisions. The procedure under Section 240 would appear to take, at the least, not less than the time required by the procedure under Sections 218 to 221, for before the values could be appraised the land must be subdivided. That was additional work. Then the values must be apportioned, and any dispute must be referred to arbitration. It was true that under Section 240 (6) the amount of any appreciation or depreciation in value between the date of valuation and the expiry of the lease was to be determined by arbitration, and added to or deducted from the value as previously determined. That might require action after the expiry of the lease; but it was in the nature of adjustment only, and did not affect the substantial position.

It was contended that Section 240 was an over-riding Section, and that before its effect was spent the procedure under Section 218 (or 234) must continue up to a point where rights were created which were indefeasible by any determination of the Minister to dispose of the land by subdivision under Section 240. But the true construction of the statutory provisions involved depended essentially, in His Honour's opinion, upon the meaning to be given to the words in Section 240: "notwithstanding anything in Section 234 hereof or the corresponding provisions of any former Land Act," in the light of a fair and reasonable view of the whole of the relevant provisions. The Board was charged with mandatory duties under Section 218 (or 234) which, duly performed, would result in the lessee having, before the expiration of his lease, the opportunity of taking a new lease of his small grazing-run, for the Board had, in His Honour's opinion, no right or authority to withdraw or revoke its offer of a new lease pursuant to Section 218 (or 234) at any time within the statutory period during which the lessee might elect to accept the same. It was intended that the lessee should have time to consider his position. In the interests of closer settlement, however, the Board was given the discretion of recommending the Minister to subdivide the small grazing-run, but if the Minister determined thereupon to dispose of the land by subdivision, it was to be done in such a way that the lessee would again, upon the expiration of his lease, know, if by then there were no revocation of the Minister's determination, that he could have a lease of one subdivision, with compensation in respect of the other subdivisions. In His Honour's opinion, the intention of the Legislature expressed in the opening words of Section 240 was to give the Board and the Minister, notwithstanding the mandatory provisions of Section 218 (or 234), the opportunity of putting into operation an alternative procedure which had for its object, not the renewal of the lease, but the subdivision of the small grazing-run. It seemed to His Honour clear that, once either procedure had been begun, that procedure must thereafter be continued to the exclusion of the other. It was not contemplated that the Board should have gone through the solemn farce of offering a renewal of the lease to the lessee, and that that offer should be cancelled. That view was strengthened, His Honour thought by a consideration of Section 241. Upon a fair view of the statutory provisions, therefore, the separate procedures to be adopted appeared to His Honour to be alternative in their nature. In His Honour's opinion, the key to the construction of the Statute rested in the fact that the Act did not say "notwithstanding anything theretofore done by the Board pursuant to Section 234 hereof or the corresponding provisions of any former Land Act." The words "notwithstanding anything in" in Section 240 were apt to exclude the operation of one machinery provision before the other had begun to operate. They were inept to exclude it after it had begun to operate. His Honour thought, then, that the opening words of Section 240 were intended merely to abrogate the mandatory effect of Section 218 (or 234) should the Minister decide upon a subdivision before action had been taken by the Board under Section 218 (or 234). Once, however, the Board had taken action under Sections 218 (or 234) the opening words of Section 240 were, in His Honour's opinion, insufficient to annul the mandatory nature of Sections 218 (or 234). There was no hardship in that view, for the initiative under Section 240 lay with the Board.

It followed from that construction that if the Board recommended the Minister to subdivide, and the Minister did not determine upon a subdivision before the Board must take action under Section 218 (or 234) in order to comply with its duties thereunder, then the Board must act under that Section and the Minister's power to determine upon a subdivision was gone. If the Minister determined upon a subdivision before the Board must take action under Section 218 (or 234) then the whole procedure under Section 240 must be followed. It was only then that the right of renewal under Section 218 (or 234) had gone. It was in that sense that the words of Section 240 (4) "together with the value (if any) of the right of renewal which he would have had by virtue of Section 234 hereof if this Section had not been enacted" were to be construed.

The construction of the difficult and disjointed statutory provisions above adopted appeared to His Honour to render certain the rights, duties and powers of the Board, the Minister, and the lessee; and to give full scope to a reasonably competent Board and Minister, when aware of the legal position, to attain the object for which Section 240 was enacted.

A subsidiary question was—when did the Board "take action" or "do anything" pursuant to Sections 218 or 234 respectively? The first definitive act of the Board under Section 218 of the Act of 1908 was the appointment of an appraiser under Section 218 (a). The first definitive act of the Board under Section 234 of the Act of 1924 was the act which the Board took under the requirement that "the Board shall cause the following valuations to be made by an appraiser appointed by the Board for that purpose." That was again the appointment of an appraiser. After such action had been taken by the Board under those Sections respectively, before any determination by the Minister, the whole procedure thereby initiated was legally binding upon the Board, to the exclusion of the powers conferred by Section 240.

On the facts stated for the decision of the originating summons, there had been no determination by the Minister under Section 240, and the Board had gone much further than the first definitive step under Section 218. His Honour thought, therefore,

that the plaintiffs were entitled to require the Board to proceed with the offer of a renewal of the lease of each small grazing run, and that it was not at that stage open to the Board to recommend the procedure for subdivision.

Solicitors for plaintiffs: **Downie Stewart and Payne,** Dunedin.
Solicitors for defendant: **Adams Brothers,** Dunedin.

Ostler, J. July 23; 26; 1929. Auckland.

HANDLEY v. THAMES COUNTY COUNCIL.

Road-Closing—County Council—Closing of Road under Control of Council—Decision of Council to Close Road Final—Bona fide Decision of Council That Way as Convenient as the Road Closed Left or Provided to Lands in Vicinity also Final—Public Works Act, 1908, Sections 106, 130, 131.

Motion for discharge of an interim injunction obtained by plaintiff against the defendants restraining them from taking further steps to close a road. The road was a county road under the control of the defendants. The first steps taken by defendants to close the road were taken in July, 1928, under Section 131 of the Public Works Act, 1908, which was then in force. It was admitted on behalf of the plaintiff that all the necessary steps were duly taken by the defendants, and that there remained only the gazetting of the consent of the Governor-General in Council under Section 133 to complete the closing of the road when the plaintiff commenced an action against the defendants claiming an injunction to restrain them from closing the road on the ground that a way to part of the plaintiff's land as convenient as the closed road had not been provided. In that action an interim injunction was granted on 27th November, 1928. The action had never been heard, but this motion was to dissolve that interim injunction.

Hogben in support of motion.
Finlay to oppose.

OSTLER, J., said that the Court of Appeal in **Clive Road Board, v. Guy,** 9 N.Z.L.R. 521, in dealing with a case where a road was stopped by a Road Board under Section 94 of the Public Works Act, 1882, held that the decision of a County Council under that Section confirming a decision of ratepayers that a road should be stopped was final, and not subject to review in any Court. The Court further held that it was the duty of the County Council to consider and determine whether a way to the lands adjacent as convenient as the road to be closed was left or provided, as required by Section 93 of the Act of 1882, and that its decision upon that question was also final. Section 94 was practically in the same words as Section 131 of the Public Works Act, 1908. Section 93 of the Act of 1882 was in the same words as Section 130 of the Act of 1908.

The only difference between the facts in **Clive Road Board v. Guy** (*cit. sup.*) and the present case was that there the road was stopped under the jurisdiction of a Road Board. In such a case the County Council was an independent body acting under Section 131 (h) in a quasi-appellate capacity. Where a County Council decided to stop a road under its own control the appeal must necessarily be to itself. But it could not be doubted that a County Council had the same power to stop roads as a Road Board. Section 106 provided that all the powers vested by the Act in a Road Board should in the case of a County road be vested in the County Council. A County Council, therefore, had the powers given to a Road Board by Section 131. That necessarily involved the result that there was no quasi-appeal from the County Council to any other local authority. In a sense the Council was a judge in its own cause. But notwithstanding that inconvenience in His Honour's opinion the reasoning of the judgments in **Clive Road Board v. Guy** (*cit. sup.*) applied with equal force to the stopping of a county road, and His Honour felt himself bound by that decision to hold that the decision of the County Council if given in good faith was final, and that Court had no jurisdiction to hear again the question whether the plaintiff had been provided with an equally convenient alternative way to his lands, or to grant an injunction to restrain the defendants from closing the road.

Interim injunction dissolved.

Solicitor for plaintiff: **A. K. Jones,** Paeroa.
Solicitor for defendant Council: **Julius Hogben,** Auckland.

Duty of Official Assignees in Bankruptcy.

The Doctrine of Ex parte James.

By C. H. Weston, LL.B.

Since the decision in *In re Ghee: ex parte Lowe King,* (1929) N.Z.L.R. 266, the fictional gentlemanly assignee must, in future, mind his own business and take his bankrupt as he finds him, good, bad, or indifferent, for better or for worse. He must not refuse to soil his hands with the doubtful transactions of the bankrupt although he is still bound in his own actions, as an officer of the Court, to be more than fastidious; and in New Zealand we owe the clearer vision of his duties to the dealings of two Chinamen in one of their national games. George Ghee, a Chinese merchant of Auckland, in his lifetime entered into partnership with Lowe King to provide their fellow countrymen with the illegitimate amusement of properly conducted fan-tan. The parties appointed agents who actually ran the game, and who, after deducting the agency commission, paid over any balance of the profits to George Ghee who acted as banker of the venture. Accounts were kept by George Ghee in Chinese, and at the time of his death they showed that his partner was entitled to £539 14s. 6d. The Public Trustee was Ghee's executor and, finding that the assets were insufficient to pay his liabilities, elected to administer the estate under Part IV of the Administration Act, 1908. Later, as such administrator, he was confronted with the necessity of making a decision upon a proof lodged by Lowe King against the estate for this sum of £539 14s. 6d. He decided to reject the proof, and a motion to reverse his decision and to admit the proof was brought before Stringer, J. The learned Judge conceded that if the question had to be determined as in an action between the creditor and the deceased in his lifetime to recover the moneys due, the creditor must fail as the law was clear, but as the action was between the creditor and an officer of the Court, the doctrine of *Ex parte James: in re Condon,* L.R. 9 Ch. 609, must prevail. His Honour said:—

> "It is well known that Chinese business men are as a rule scrupulously honest and exact in their monetary transactions, and there is no reason to suppose that if the deceased had lived he would have denied the right of the creditor to his share of the profits, or would, if sued, have set up the shabby and dishonourable defence that the action was barred by the fact that such profits resulted from the conduct of a national game which had been made illegal by statute, but which is no more inherently immoral than many lotteries and sweeps in which great numbers of the community participate with impunity. It would, I think, be deplorable if an officer of the Court should be compelled to do what the deceased Chinaman whose estate he is administering would, had he lived, have scorned to do."

The learned Judge concluded by saying that according to strict law there was a good defence to the creditor's claim, and neither the Public Trustee nor his advisers could probably ("properly" in the report in the Gazette Law Reports, (1928) G.L.R. 1 at p. 3) waive the defence without first submitting it to the Court for its ruling on the matter and for a direction as to what was the

correct course to adopt in the circumstances of the case. The decision, although not dealing with a statutory right as did *Scranton's Trustee v. Pearse*, (1922) 2 Ch. 87, went as far as the judgment in that case where Astbury, J., at p. 92, thus stated the doctrine.:—

> "The plaintiff has a statutory right to maintain this action, but he is subject to any order that the Court may make under the above rule under which the Court can refuse, if it is right to do so, to allow its officer to enforce legal or equitable rights."

Mr. Justice Stringer's judgment, over-ruled in the Court of Appeal, was startling to us, dulled though we may have been by the line of previous decisions : *Ex parte James : in re Condon*, L.R. 9 Ch. 609 ; *Ex parte Simmonds : in re Carnac*, 16 Q.B. D. 308 ; *In re Rhoades: ex parte Rhoades*, (1899), 2 Q.B. 347 ; *In re Tyler : ex parte Official Receiver*, (1907) 1 K.B. 865 ; *In re Thellusson : ex parte Abdy*, (1919) 2 K.B. 735. The doctrine had been approved by Alpers, J., in *In re Horton*, (1925) N.Z.L.R. 739, but as the Court expressed the opinion that the plaintiff could have succeeded without its aid, its standing in the case was rather that of an "*amicus curiae.*"

The principle of public policy is that "*ex dolo malo non oritur actio*" : it is not a statutory rule, but in our Courts has been allowed to override statutory rights in *In re Cash* (*deceased*), 30 N.Z.L.R. 577, *Johnston v. George*, (1927) N.Z.L.R. 490. The Court of Appeal in *In re Ghee* (*cit. sup.*) has set its seal on the principle. Lowe King must be presumed to have known that should Ghee die or file his schedule before he obtained a settlement, his chances of recovering any balance to his credit, had gone ; he would regard this as one of the incidents of the game. In the same way people dealing with infants, or making contracts verbally when they should be in writing, or allowing their debts to become statute barred or betting with bookmakers, know they are taking a risk of what is or has become a debt of honour, being repudiated. Should the judgment in *In re Ghee* (*cit.sup.*) have stood, their earnest prayer would have been that their debtors would die or be adjudicated bankrupts. That the rule was never intended to apply to such cases, was suggested by Younger, L.J., in *In re Wigzell : ex parte* Hart, (1921) 2 K.B. 835 :—

> "Accordingly it does appear to me that while *In re Thellusson*, (1919) 2 K.B. 735, is a decision binding upon us, the general extension of this principle to transactions initiated by the bankrupt as distinct from transactions initiated by the trustee is one which in future cases will have to be very jealously guarded."

It is difficult enough to ascertain what the law is, although we are all presumed to know it. There are, however, some precedents to assist us in its ascertainment, but where is the definition of honesty to be found ? Pontius Pilate asked the question nearly two thousand years ago, and more recently, Salter, J., remarked in *In re Wigzell* (*cit. sup.*) : "Questions of ethical propriety have always been, and will always be, the subject of honest difference amongst honest men." If George Ghee could have given his opinion from the Celestial Shades, he might even have voted in favour of paying his butcher and baker and merchant and allowing his gaming partner to go, and it is to be doubted whether Lowe King himself could have quarrelled with his decision.

In re Thellusson (*cit. sup.*) marked the high tide of favour of the doctrine in England, a doctrine, it may be remarked, that the Courts of Scotland do not entertain : *Clyde Marine Insurance Co. v. Renwick and Co.*, (1924) S.C. 113. It was then coldly received by a Court of Appeal consisting of Lord Sterndale, M.R., and Scrutton and Younger, L.JJ., in *In re Wigzell* (*cit. sup.*) and turned from the door by the same Bench (except that Warrington, L.J. occupied the seat of Scrutton, L.J.) in *Scranton's Trustees v. Pearse* (*cit. sup.*). In that case a trustee had sued for the payment of some gaming debts paid by the bankrupt by cheques : it was, therefore, the converse of Ghee's case. This was before the effect of *Sutters v. Briggs*, (1922) 1 A.C. 1, had been nullified in England by the Gaming Act Amendment of 1922. Astbury, J., considered that the doctrine of *Ex parte James* should be applied and refused to enforce the plaintiff's statutory right to recover the amount of these cheques. The three judgments in the Court of Appeal reversing his judgment make very good reading. The conclusion of the Master of the Rolls was this :

> "For these reasons I think that the doctrine in *Ex parte James*, L.R. 9 Ch. 609, does not apply to this case. We are bound by the decisions, but not by all the dicta of all the Judges who have given judgment in these cases which have followed *Ex parte James* and certainly we are not bound by the dicta apart from the particular facts of the case in which the dicta were uttered. It is always a most dangerous thing to take a somewhat wide expression of a learned Judge and separate it altogether from its context and the facts of the case and say : 'Now that is something which has to be followed in every other case.' The learned Judge, in ninety-nine cases out of a hundred, never meant anything of the kind. I see nothing in any of these cases to oblige us to hold that where there is an undoubted right of action given by a statute which says that a certain sum of money may be recovered as being paid for an illegal consideration and therefore a debt recoverable, and where that chose in action so constituted is by the express terms of the Bankruptcy Act made part of the assets which vest in the trustee, there is anything dishonourable or improper or unconscionable or shabby or dirty (or any of the other expressions that the learned Judges have used) in the trustee enforcing the debt in order to collect the asset and distribute it amongst the creditors who are his *cestuis que trust.* As I have said, I do not think that his position is in all respects, when you come to consider whether his act is honourable or not, the same as that of the bankrupt if he had remained solvent and had brought the action himself for his own benefit."

Younger, L.J., delivered a most illuminating judgment which, but for considerations of space, might well be quoted in full. One can imagine that George Ghee deceased, if he could, would read his Lordship's illustrations of the difficulties that sometimes face us in deciding upon a standard of honour, with respectful agreement. His summary at the end of the judgment will make a fitting conclusion to this article :

> "We have here a right in the trustee which has been declared existent by Act of Parliament, partial and anomalous though that Act may be. We find that the trustee in bankruptcy and his committee of inspection are desirous that that legal right of the

trustee shall be enforced—that right given to him by Act of Parliament. We find that there is not open to the defendant in respect of the claim which is made against him any kind of equity, or any special circumstance of aggravation which would make his position, in reference to the claim, one in respect to which any favour might be fairly conceded to him. The question for this Court then is whether we have here a case in which there is any room at all for the application of the doctrine which has been invoked? If to such a case as this, the doctrine is to be extended, as I think the learned Judge has extended it, merely because no special circumstance exists to prevent its exercise, there would in another case be a grave danger that the Court would be led into conflict with the Legislature itself and the result of such a conflict might well be that this valuable principle—extremely valuable in my view when properly applied—would be at risk of being swept away altogether. I am not prepared, speaking for myself, to be a party to putting the principle in such a position of peril. I think it would be placed in that position if it were stressed to the point to which the learned Judge has carried it in this case."

Legal Conferences.

Papers v. Resolutions.

The Law Society of England holds each year a Provincial Meeting which corresponds in some degree to the annual conferences of the Profession here which now seem to have become a recognised, and indeed indispensable, part of our professional life. The business side of the English Provincial Meetings consists solely of the reading of papers, for the discussion of which it has in the past been found that little opportunity is able to be afforded, and the memorandum attached to this year's report of the Law Society sets out the difficulties which lie in the way of altering the existing procedure. Practitioners in this country will however almost certainly agree with the following comment of our English contemporary, "*The Law Journal*," on the position:

> "The Provincial Meetings would gain immeasurably in interest and usefulness if the 'business' side were not in practice confined to the reading of papers, some interesting, others dull, and others unsuitable. Why is it necessary that the business side of the meeting should be confined to the reading and discussion of papers? Why should not members be able to move resolutions—previously submitted to the Council? Many a member who is unable to spare the time to write a paper would, we have no doubt, be prepared to move a resolution which would give rise to an interesting and useful discussion. And one thing is quite certain—so long as the present system of announcing on the programme sufficient papers to take up the time allotted to the business side of the meeting is continued, there will be no proper discussion of the papers read. Members will not rise to discuss a paper when they know that the result of their doing so will be to deprive another member who has taken the trouble to write a paper of the opportunity of reading it."

The experience of our Legal Conferences so far seems entirely to confirm this criticism.

Lord Halsbury.

His Life and Times.

Permission has been granted to the "New Zealand Law Journal" to publish a series of extracts from the Biography of the first Earl of Halsbury, which is shortly to be published.

(*Concluded from page 219*)

The Laws of England—(ctd.)

Lord Halsbury, as has been stated, read every title as it passed through the printers' hands, a copy of the final proof being sent to him, and no title was printed off until Lord Halsbury's proof had been returned to him, or he had signified his approval. As a rule, the corrections made by Lord Halsbury at this stage did not involve extensive alterations in the text, but there was certainly one occasion when he expressed his strong disapproval, the result of which may be seen on turning to the title "Parliament" in Volume XXI, at page 792. The title "Parliament" dealt of necessity with many matters affected by the Parliament Bill, of which Lord Halsbury was a determined opponent during its passage through the Houses of Parliament. Not only did Lord Halsbury, who was himself one of the authors of the title, write a prefatory note at the end of the table of contents on page 616, but when he came to Part VIII, which deals with the relations between the Houses of Parliament, and discusses in Section 2 the control of public money, he disagreed with a paragraph which one of the subordinate authors of the title had written, setting out what was, in the writer's opinion, the relationship between the two Houses in matters of finance.

Lord Halsbury insisted on the offending paragraph being deleted, a drastic alteration to make when the title was in page proof, and it was only after considerable negotiation, during which the publisher's manager of the department responsible for the publication of the work made, with the aid of several cabs, a number of frantic journeys to and from Lord Halsbury's residence, that the paragraph in question (paragraph 1487 on page 792) was finally approved. The paragraph, as it now stands, runs as follows: "*Note.*—It would be inappropriate to the purpose of this work to enter controversially into the political and historical question of the right of the House of Lords to deal with finance, in any way whatever. Until the preamble of the Parliament Act, 1911, is acted upon one must wait to see whether the interference of the House of Lords may be authorised in any way.—Halsbury."

The meaning of this paragraph is, perhaps, not as clear as it might be, and it may be suggested that the statement is not so much that of the great lawyer, as of the stubborn politician, and that Lord Halsbury allowed indignation, for once, to master his judgment. Be that however as it may, it cannot be disputed that the work is as a whole, an authoritative exposition of the laws of England, cited with approval in every Court in the Empire, and that Lord Halsbury rendered a very great service when he undertook the laborious task of reducing "an ungodly jumble," as Oliver Cromwell called the laws of England, into a concise and clearly-arranged statement of the law.

The need for, and justification of the work is to be seen in its wonderful success, and in the remarkable

position it has made for itself, and its reputation to-day stands so high, and is so strongly established, that it is unlikely that even Lord Halsbury, with all his sagacity and foresight, realised that his venture would be a perpetual monument to his memory.

Another thing which might have militated against the close and arduous work he had undertaken was that he had lost the sight of an eye, from a neglected blow in his youth. The oculist, however, had told him that if he lived long enough he would recover it. And actually, when he was approaching ninety, the sight did return to a certain degree. He was also beginning to suffer from slight deafness, but his intellect was as clear, and his physical faculties as unimpaired as ever in all other respects.

Even with such a work in hand, the ex-Chancellor never failed, while Parliament was sitting, to be in his place in the House of Lords, and however late the Division was taken, to record his vote. After which he walked stoutly home to his house in Kensington.

Kindness to Young People.

He was always extraordinarily kind to young people. When he was standing counsel for one of the largest financial firms for the City, the solicitor for another of these houses instructed his articled clerk, a youth just down from Oxford, to appoint a conference with Sir Hardinge, when the solicitor and the governor would attend, a special day being named. Sir Hardinge's clerk said it was impossible on that day as his master was already engaged to see his constituents at a meeting at Launceston. The youth, following his instructions, insisted that the business was urgent, and requested the clerk to go into Sir Hardinge's room to explain matters. The result was that the clerk was told to telegraph to Launceston and put off the meeting. So the appointment was booked, and the young man returned to report the result. However, to his dismay he found he had booked the appointment for the wrong day, was severely rebuked for his carelessness, and told he must at once go and rectify it. With doubtless a very sinking heart he did so, and made his way back to Chambers, where he learnt that the appointment at Launceston had already been cancelled. He felt that all hope had gone, when Sir Hardinge came out of the room, and the youth with fear and trembling confessed his mistake. In the most good-natured way Sir Hardinge again altered his engagement, and all was well. It was not every busy lawyer who would have been so considerate of the feelings of a young clerk.

A Filial Tribute.

His daughter writes of him: "I do not think any children could have had a kinder or more indulgent father than we had. I am sure the great intimacy and friendship between us never lessened our respect for him. I think the better anyone knew him, the more they must honour him, and we should certainly have minded losing his good opinion very much. In spite of all he had to do, we saw a great deal of him. He spent all his leisure with us. We had our breakfast with him and saw him again in the evenings. He always helped with our games in the holidays and wrote and rehearsed plays for us. He helped my mother nurse us when we were ill, and always read aloud to us in the holidays. He preferred Scott or Dickens, but I can also remember some Wilkie Collins. He did not care for Thackeray" (whose cynical outlook was probably foreign to his own optimistic view of human nature). "He shared and was deeply interested in, our religious instruction.

"He generally gave us a very short lesson in the holidays and read aloud some history book. I remember one holiday we had Herodotus. I think we both enjoyed this. I know I did. It was a great surprise to me when I grew up to find people considered him old. I had always found him able to do everything, and generally seeing that mother and I did not over exert ourselves.

"I also found that though most busy men require a quiet room to work in, we had been used to see my father writing with everybody talking round him, and generally dogs and cats playing in the room as well. Perhaps this was another reason for the legend that he never prepared his work.

"It is only by comparing notes with my contemporaries that I realise how much more frank and less restrained our intercourse with him was than was usual at that time. Of course, we took it all as a matter of course, and did not know how much more care and attention we were given than most families.

"He liked a young lively party for tennis, which he played till he was eighty, for the sake of the exercise, but he would have been bored by practising shots to improve his game. He always said a game was a game, and though he took up golf to please my mother, who thought tennis was too strenuous, he never took it seriously. We got him to have a few lessons from a professional, but the latter confided to my husband, 'He's a nice gentleman, and he likes your company, but he doesn't take any heed to what you tell him.'

"His health was always wonderful, but, of course, it was helped by his very abstemious diet. He was a small eater, and liked quite plain food. He never, till quite late in life, took any drink before dinner, and very little at dinner. He did not smoke and never drove if he could walk."

(Concluded).

Magistrates and Wigs.

The stipendiary magistrate for Middlesborough is one of the few stipendiaries who wear wig and gown on the Bench. Generally speaking, of course, no one in a police Court wears any forensic costume: neither magistrates, clerks, counsel, nor solicitors. Only the usher wears a gown. Metropolitan and stipendiary magistrates, who are all members of the Bar, could wear wig and gown if they chose; and from time to time it is urged that they should in order to make the proceedings more impressive. Against this it may be said that in what Mr. Cecil Chapman has aptly called "The Poor Man's Court of Justice," absence of formality and everything that induces people to open their hearts without any feelings of awe and embarassment is to be encouraged.

Possibly the reason why the magistrates have not usually worn wig and gown is to be found in the history of their appointment. Originally paid justices of the peace, the metropolitan magistrates, to be followed later by the stipendiary magistrates, were given the powers of two justices; but the Courts were originally those of the lay justices.

—*Justice of the Peace and Local Government Review.*

London Letter.

Temple, London,
5th June, 1929.

My dear N.Z.,

The result of the General Election now conceals all other events and interests behind a smoke screen, exactly as the anticipations of it have for some weeks past obscured all other transactions and affairs. One way and another, we look like never getting down to our lawful occasions again this side of the far end of the Long Vacation; by the time the excitement has subsided, we shall be well towards the beginning of our annual rest. Meanwhile, I do not mind saying, and I trust you will not mind hearing, I have had a devil of a time and shall really be glad of some temporary subsidence or other. Though I have, as I told you, had to speak here and there on some thirty platforms because I am a barrister and this sort of thing is expected of the fraternity, I have, on the other hand, suffered from not being a candidate in this sense, that my business in the Courts, so far from being temporarily postponed to enable the tubthumping, has been in most respects expedited by the postponement of barrister-candidates' cases: their cases going temporarily out of the List have caused my cases to come prematurely in. Thus I, and all the lesser and less political brethren, have been upside down for these recent days and weeks, and we shall be heartily glad when the statesmen amongst us shall have composed their differences, agreed upon a new government and returned, and allowed others to return, to the normal.

Who is to be the head of the Law under this new Labour Government? No one knows; tipsters have been so very much at a discount over the whole political event, that no one can tell what is about to happen next. As, however, many are none the less willing to speculate, perhaps all the more willing on this account, I may say that Lord Justice Sankey is one minute positively stated to be Lord Chancellor elect and the next moment is unequivocally reported to have had the offer and refused it; and it is simultaneously asserted on the highest authority that Lord Parmoor, Cripps the Conservative that was, has the offer from Ramsay Macdonald in his pocket and has had it there for many a long day, it being also said that Ramsay Macdonald cannot bear Lord Parmoor and will have none of him. It is, therefore, reduced to a matter of betting; the fact that Sankey, L.J., was found not to be sitting in his usual Court of Appeal to-day, and that Scrutton, L.J., told some of us that the Court of Appeal would be reconstituted to-morrow in a new form, makes the odds tend in favour of Sankey, L.J.

There next arises the question of the other Law Officers, and as to this we have the positive assurance that Slesser will not be the Attorney-General. In passing, we may recall the dispute there was on the last occasion of a Labour Government, as to his becoming Solicitor-General; and I dare say you may just possibly recollect my observations upon the matter? Slesser is an old Labourite; and if he was little known of at the Bar, when his greatness landed upon him, he was at any rate so definitely part and parcel of the party that all fairminded men felt and argued that he deserved his good fortune and it would be a shame to pass him over, for more modern and, shall we say, more opportunist recruits to the Labour cause. This view prevailed, and the sinister looking, but not unpleasant featured Slesser became Solicitor-General and is now one of the ones in the Profession. Will he be Attorney-General; and, if so, will Melville, a recent K.C. and a recent addition, I believe, to the Party, become Solicitor-General? Rumour says not; rumour says that Jowitt, K.C., notwithstanding that he sought and obtained election as a Liberal, is to be appointed the Labour Attorney-General; but whether rumour is a lying jade or a well-informed flapper (with a vote) you will probably know, by cable, long before this letter reaches you, by mail. Again, you will recall that Patrick Hastings was the former Labour Attorney-General; and again you may possibly recall my news and observations upon his Attorneyship, how (some argue) it wrecked the party and caused its ousting, in 1924, in disgraceful defeat?

With Sankey as Lord Chancellor, Jowitt as Attorney-General and Slesser as Solicitor-General, the Labour Party would be putting up a fine show on our side of the business. With Lord Parmoor as Lord Chancellor, Slesser as Attorney-General and Melville as Solicitor-General, they would be hardly spectacular in this regard.

Meanwhile, we all mourn the political demise, be it temporary even, of Inskip, the ever popular Tom Inskip whose ability used not to be very greatly thought of but whose renown has increased by slow degrees and sure until lately, when it had continued to increase but has speeded up the degrees.

I regret that what with politics and one thing and another, as I have told you above, the confusion I am in becomes suddenly worse confounded, and unless I can get an additional instalment of this letter off by a last minute expedient of the post, then this must be all of it, and the other legal discussions I have for you must stand over.

Yours ever,

INNER TEMPLAR.

P.S.—Time, and a smooth-running train permits at least of a postscript. The position of infants in the law, in its struggle between logical doctrines and natural justice, has been again a leading subject of discussion. *Valentine v. Canali*, 24 Q.B.D. 166, is, as you recall, the leading case on the particular point to which I refer and which Lord Coleridge thus summarised: "When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he paid for it." The recent pronouncements in the matter are in the Divisional Court case of *Pearce v. Brain*, the Judges being Acton and Swift, JJ. The debate turned upon a contract of exchange made with an infant, much to the disadvantage of the infant. Indeed the infant's combination (motor-bicycle and side-car) was valued at £30, the motor car he received in exchange for it being valued at £15. The car proving defective, the infant sought to cancel the exchange and restore the *status quo* but the principle was applied, that, as the infant had had the use, he could not recover the price. Swift, J., made it obvious that authority alone brought him to this conclusion and that his own independent sense would have taken him to the opposite.

As to Juniors, Swift, J., has been busy of late upon the theme of the employment of several counsel in the prosecution of one man on several indictments. Of course it is a most proper remark that only one counsel should

in a case like that, be employed ; but what a trifle to make a fuss about in contrast to those same leader's fees of earlier mention in this letter! Why, the Inland Revenue has just given Maddox, K.C., a fee of three hundred guineas, to go to a provincial town and conduct a prosecution which took under a day and which any tolerably experienced junior of the circuit could have done with the same, inevitable result : and they tell me that Birkett got a fee of a thousand guineas to defend a charge at other Assizes which, though it was against a man of position upon a gross indecency, very nearly got thrown out by the committing magistrates and was obviously incapable of success at Assizes. It is all madness. Is it all the *Quem deus vult perdere prius dementat* sort of madness, so that this is Providence' way of putting a stop to crime and litigation ? I do not know ; but at least the learned Judges might leave the poor, miserable Junior alone, he who works away, for a bricklayer's wage, upon causes which are never fought, or rarely fought, owing to the extortion of the leaders who should fight them.

There is only time to add, if the post is to be caught to-night to catch to-morrow's mail, that Eve, J., has or may have, caught the public eye again in his private pastimes. Great excitement prevailed in a certain section of the press, just before the Election, at the possibility of a country wanderer, a caravaner, being identifiable with his Lordship, the latter wandering incognito. But that same Election, obscurer of so many things as I have told you, saved the disclosure of the identity (if any) and reduces my gossip to idle gossip.—I.T.

Correspondence.

The Editor,
"N.Z. Law Journal."
Sir,

Quashing of Special Orders.

Your Journal has a Dominion-wide circulation and purely local matters are, I suppose, not as a general rule of sufficient interest to warrant treatment in your columns. But there is a provision in the Wellington City Empowering and Amendment Bill now before Parliament which, if passed, will establish a dangerous legislative precedent and may lead to its being followed in special Acts dealing with other local bodies, and perhaps even to its application by general enactment to all local bodies.

Clause 8 of the Bill in its present form reads : "*No special order passed by the Council for the purpose of raising loans shall after the passing thereof be quashed by any proceedings in any Court or otherwise.*"

Why should not a special order be liable to be quashed if the statutory formalities are not complied with ? Is the clause intended to cure merely defects of form or procedure or is it intended to validate *ultra vires* special orders ? Finally, why should the special orders of the Wellington City Council be made immune from attack, when the special orders of other local authorities remain liable to be quashed in accordance with the general law ?

I am, etc.,

"COMMON LAW."

Wellington.

Statements to Police.

Views of Mr. Justice McCardie.

Mr. Justice McCardie, in a motor manslaughter case at the Old Bailey, recently commented on the fact that a 'bus driver's statement taken by the police had not been communicated to the defence. If, he said, statements were made for and against an accused, and only those put forward which were against the accused, the jury had no idea that there was a conflict of testimony.

Mr. G. G. Raphael (prosecuting) said that the usual practice was to place all available evidence at the disposal of the defence. In this particular case the 'bus driver had said he did not witness the accident.

Mr. Justice McCardie said that passages in the statement were very important, and the police should have let the accused know that the statement was in their possession. "In the future," added the learned Judge, "I hope a different course will be followed. It is vital that the public should feel that a prosecution of this sort is conducted not with the mere desire to obtain a conviction at all hazards, but in order that a man should be found guilty only after all the available evidence has been fairly and properly presented to the jury. I only want to make it quite plain that when a man is charged with a crime he should have the advantage of all the testimony in his favour as well as the disadvantage of all the evidence that tells against him. If that principle is grasped I am sure it will help the administration of justice in this country, which is marked by so many satisfactory features."

Divisional Detective Inspector Wesley explained that the practice of the police was to take statements from all the witnesses available, and, if the Commissioner approved, to hand them to the Director of Public Prosecutions or the police solicitors. It had never been the practice to supply the defence with statements without application. In the case in question only names and addresses were asked for by the defence, and those were supplied with the exception of that of the 'bus driver, who had not then been traced. "I am sure," added the officer, "that had the solicitors for the prosecution been asked by the defence for a copy of the statement it would have been supplied."

Judge Sitting after Age for Retirement.

We reported previously (ante p. 186) the fact that Mr. Justice Campbell of the Supreme Court of New South Wales found recently that he had been performing his judicial duties after he had attained the age for compulsory retirement, and the matter is also the subject of comment in the latest *Australian Notes* of Mr. W. Blacket, K.C. (ante p. 222). The summons taken out to test the validity of a judgment pronounced by the learned Judge after he had reached the age of seventy has been dismissed, but without a determination of the real question. The summons was unsuccessful because the applicant was unable to identify the person named in the birth certificate produced as the learned Judge.

Bench and Bar.

We regret to have to record the death of Mr. Charles Frederick Buddle, of Auckland, at the age of seventy-one. Mr. Buddle was born at Onehunga and was a son of the Reverend Thomas Buddle, one of the pioneer Methodist missionaries in New Zealand. He was educated at Nelson College and later studied law, being for some time associate to the late Mr. Justice Gillies. Mr. Buddle joined the staff of the legal firm of Whitaker and Russell, of which his brother, Mr. Thomas Buddle, was managing clerk. On Sir Frederick Whitaker's death and the retirement of Mr. Russell, the practice was taken over by Mr. T. Buddle, who, joined by Mr. C. E. Button and Mr. C. F. Buddle, constituted the firm of Buddle, Button and Co. After the deaths of his brother and Mr. Button, Mr. C. F. Buddle admitted into partnership Mr. H. P. Richmond, and the firm has for some time practised under the style of Buddle, Richmond and Buddle. Owing to failing health Mr. Buddle had retired from practice in September last.

Tribute to the memory of the late Mr. C. F. Buddle was paid in the Supreme Court at Auckland. Mr. Justice Herdman and Mr. Justice Ostler were on the Bench.

Mr. F. L. G. West, president of the Auckland Law Society, said that Mr. Buddle had practised for forty-eight years in Auckland city and at one time he was associated with Sir Frederick Whitaker and Mr. Thomas Russell, both Cabinet Ministers. He was of an extremely modest disposition and publicity had very little attraction for him; he was entirely devoted to his profession and was frank, outright, a thinker and a speaker. They wished to extend to his widow and family their sincere sympathy in their loss.

Mr. Justice Herdman said: "It is always a melancholy experience to take part in an assemblage of this kind. It is only fitting that we should meet and publicly pay our respect to the memory of one who over a long period of years was a safe and sound adviser to so many residents of the city of Auckland. I had not the privilege of knowing the late Mr. Buddle well, but I knew of him. If, however, I wished for proof of his worth I have it in the gallery of Auckland lawyers who worked with him and who are well able to form a correct estimate of his services to the public. During his lifetime Auckland grew from a village to a populous city. He was a witness to many changes. He saw lawyers come and he saw lawyers go. He watched judges take office and leave office. He knew the law as it was forty or fifty years ago and he knew the law as it is to-day. Throughout all the changes that have taken place the name of his firm always stood for what was strictly honourable and efficient. One laments the fact that the ranks of the old-time lawyers are every year becoming thinner. My brother Ostler and I join with you in expressing regret that the profession should have lost so worthy a member as Mr. Buddle, and with you we associate ourselves in expressing sincere sympathy with the members of his family who are left to mourn his loss."

Mr. Gilbert Nelson Hayes of the firm of Hayes, Mitchell and Goulding, died recently at Dargaville. Mr. Hayes was born in Waimate but went to Dargaville in 1906 where he commenced practice in partnership with Mr. E. T. Field. Mr. C. Darling and Mr. G. S. Mitchell were later taken into the practice, the firm being known as Hayes, Darling and Mitchell. After the death of Mr. Darling at the Great War, Mr. F. S. Goulding was taken into partnership, the style of the firm being altered to Hayes, Mitchell and Goulding. The late Mr. Hayes was always keenly interested in local affairs. He was a member of the Kaipara Licensing Committee, and was for some years on the Dargaville Fire Board. He was a past-president of the Racing Club and of the Bowling Club. The Dargaville post-office tower-clock was erected by means of his gift of £1,000 in memory of his late partner, Mr. Charles Darling.

Messrs. Gittos, Uren, Gregory and Bourke have admitted into partnership their managing clerk, Mr. A. M. M. Greig. The firm's name will remain unaltered.

The New Lord Chancellor.

There was practically no information in the cable news on the subject as to how the appointment to the Lord Chancellorship of Lord Justice Sankey is regarded by the Profession, but from the English legal and other journals which are now coming to hand it would appear to be plain that the appointment is an exceedingly popular one. It is of considerable interest to observe that Lord Birkenhead writing, as early as February last, in *Brittannia* on "The Labour Party and its Leaders," said:

> "And what is Mr. Ramsay Macdonald likely to do (what, indeed, will he be compelled to do) in order to strengthen his well-disciplined, but very senile team in the House of Lords? He must find a Lord Chancellor. No lawyer known to me who is at this moment an avowed member of the Labour Party could be appointed to the woolsack without something approaching a public scandal. Possibly the precedent—a very fortunate one—adopted by the late Labour Government when they appointed Mr. Macmillan to be Scottish Law Advocate without political responsibility might be repeated. In such a case, the appointment of a Judge such as Mr. Justice Sankey or one of the very able Judges of the Court of Appeal would not, in my opinion, affront either the legal profession or the community as a whole."

Lord Birkenhead overlooked the fact that Lord Justice Sankey had been a member of the Court of Appeal for exactly a year; but that is by-the-way. It does not seem that it can be yet definitely asserted that the appointment of Lord Justice Sankey is, as Lord Birkenhead anticipated, without political responsibility, although the *Law Journal* says, editorially: "That it can be treated as a political appointment in the ordinary sense we are not sure. Of Sir John Sankey it would be inappropriate to speak in terms of party politics."

It is well-known that the new Lord Chancellor has very definite views on the subject of bureaucratic government. "It would be strange," he said in a lecture last year on "The Principles and Practice of the Law To-day," "if we had escaped the frying-pan of the prerogative to fall into the fire of a Minister's regulations." On the subject of Crown procedure Lord Sankey is understood to hold the views of the vast majority of the Profession.

Bills Before Parliament.

Captive Birds Shooting Prohibition. (Hon. Mr. Thomson). Every person promoting, arranging, conducting, assisting in, receiving money for, or taking part in any event whatsoever at or in course of which captive birds liberated for purpose of being shot at time of liberation or who, being owner, occupier, or person in charge of any premises, permits premises or property or any part thereof to be used for any such purpose, liable on summary conviction to fine not exceeding £25.—Cl. 2.

Defence Amendment. (Mr. Mason). In determining whether certificate of exemption to be granted under S. 65 of Defence Act, 1912, sufficient if Magistrate is satisfied that applicant believes, on religious grounds, "or on grounds immediately derivable therefrom," that he ought not to take part in military training or service. Views of religious organisations or bodies not to affect applicant's right to certificate of exemption.—Cl. 2. The non-military services to be prescribed under S. 65 (3) shall not be service in Defence Department or Defence Forces or be required to be performed under order or supervision of Defence Department or any member of Defence Forces.—Cl. 3. No applicant for certificate of exemption entitled to demand that non-military service to be performed by him shall or shall not be of any specific character, nor shall any question be put to such an applicant as to what non-military service he is willing to perform.—Cl. 4.

Education Amendment. (Mr. Fletcher). Repealing Sub-section (2) of Section 15 of Education Amendment Act, 1919, which provides that no regulation under that Section shall be invalid because it deals with any matter provided for in principal Act or is contrary to the provisions of that Act.—Cl. 2.

Education Amendment. (Hon. Mr. Thomson). Act to come into operation on 1st January, 1930. S. 56 of Education Act, 1914, amended by inserting after the word "secular" in subsection (4) the words "in the sense of non-sectarian." Half-an-hour on one or two school days in each week may be set apart for the giving of religious instruction by qualified persons approved by the Minister. During time so set apart no secular instruction to be given to children not attending classes for religious instruction. No child required to attend for religious instruction unless parent or guardian signifies willingness in writing. No State school-teacher required to give religious instruction during the time set apart.—Cl. 2.

Evidence Amendment. (Mr. Mason). S. 20 of Evidence Act, 1908, repealed.—Cl. 2. "In tendering evidence of admissions or confessions in any criminal proceeding it shall be upon the prosecution to prove affirmatively, to the satisfaction of the Judge who tries the case, that such admissions or confessions were not induced by any promise of favour or advantage or by the use of fear or threats or pressure by a person in authority."—Cl. 3.

Imprest Supply (No. 2). (Rt. Hon. Sir Joseph Ward). Authorising imprest grant up to £2,647,000 out of funds and accounts specified in First Schedule and imprest grant up to £306,000 out of accounts mentioned in Second Schedule.—Cl. 2. Sums to be charged as expressed in any Act or Acts passed in present session of Parliament for appropriating public revenues of Dominion for year ending 31st March, 1930.—Cl. 3.

Local Authorities Empowering (Aviation Encouragement). (Hon. Mr. Wilford). "Aviation authority" means persons or association of persons, whether corporate or unincorporate, having authority to use aircraft under license issued in accordance with regulations made under Aviation Act, 1918. "Local authority" means a local authority as defined by Local Government Loans Board Act, 1926, and includes any public body declared by Governor-General in Council to be a local authority for the purposes of that Act.—Cl. 2. Minister of Defence may recognize for purposes of Act any aviation authority.—Cl. 3. Local authorities may contribute to funds of recognized aviation authority, maximum contribution in any financial year not to exceed, without consent of Local Government Loans Board, an amount equal to its possible unauthorised expenditure for that year. Local authority not empowered by any Act to expend any portion of funds for purposes not authorised by law may, with approval of Local Government Loans Board, contribute to funds of an "aviation authority."—Cl. 4. Local authority in which reserve or other land vested may, *notwithstanding any trust or other restriction upon disposition*, grant to recognized aviation authority license to occupy such land or any portion thereof as or in connection with landing-place for aircraft.—Cl. 5. Conditions prescribed subject to which certain classes of local authorities may establish and maintain aerodromes. Any local authority providing an aerodrome empowered to carry on in connection therewith any subsidiary business which *in the opinion of the Governor-General in Council* is ancillary to the carrying-on of an aerodrome.—Cl. 6.

Police Offences Amendment. (Mr. Black). Every person deemed idle and disorderly person and liable to imprisonment for any term not exceeding three months who, having no visible lawful means or insufficient lawful means of support, on being thereto required by any Justice, or who having been duly summoned for such purpose or brought before any Justice in pursuance of this Act, does not give a good account of his means of support to the satisfaction of such Justice.—Cl. 2. S. 50 of Police Offences Amendment Act, 1927, repealed.—Cl. 3.

Preferential Voting. (Mr. McCombs). Provisions of Act to apply to all national rolls held to obtain determination of electors on all proposals submitted to national referendum, provided such proposals exceed two in number on any one voting paper; method of voting and of counting the votes at each national referendum poll to be as prescribed in schedule. Cl. 2. Schedule contains some twenty machinery clauses.

Scaffolding and Excavation Amendment. (Hon. Mr. Veitch). Definition of "excavation" in S. 2 of principal Act amended.—Cl. 2. Every Inspector under principal Act to have in relation to any excavation same powers as conferred on him in relation to scaffolding by S. 4 of principal Act.—Cl. 3. S. 5 (1) of principal Act amended.—Cl. 4. Application of certain provisions of principal Act to excavations made by local authorities or public bodies; consequential amendment of S. 1 (2) of principal Act.—Cl. 5. Subsection (2) of S. 9 of principal Act repealed and substitution therefor.—Cl. 6.

Local Bills.

Auckland City Sinking Funds and Empowering.
Auckland Electric Power Board Amendment.
Borough of Lyttelton Corporation Enabling.
Manawatu-Oroua River District Amendment.
Otago Harbour Board Empowering.
Petone and Lower Hutt Gas-Lighting Amendment.
Timaru Harbour Board Loan.
Wanganui Harbour District and Empowering Amendment.
Wellington City Empowering and Amendment.
Wellington City Milk Supply Amendment.

Rules and Regulations.

Explosive and Dangerous Goods Amendment Act, 1920.—Dangerous Goods Regulations, 1928, Amendment No. 1, Gazette No. 53, 1st August, 1929.

Mental Defectives Act, 1911.—Additional Regulations.—Gazette No. 55, 8th August, 1929.

Dairy Produce Export Control Act, 1923.—Dairy Produce Control Election Regulations, 1926, Amendment No. 1.—Gazette No. 55, 8th August, 1929.

Introduction of Plants Act, 1927.—*Torretia volubilis* declared to be a prohibited plant.—Gazette No. 55, 8th August, 1929.

Public Works Act, 1928.—Information required in application under Section 319 of the Act, for licenses to construct and use electric lines. Information required in applications under Section 318 of the Act, for licenses to use water for the purpose of generating electricity.—Gazette No. 55, 8th August, 1929.

Shipping and Seamen Act, 1908.—Additional and amending rules for the examination of masters and mates.—Gazette No. 55, 8th August, 1929.

Legal Literature.

Kerr on Fraud and Mistake.

Sixth Edition: By S. E. Williams.
(pp. xxxvi; 633; lii: Sweet & Maxwell Ltd.)

Kerr on Fraud and Mistake has long been regarded as one of our leading text-books and for its present position it owes much to its editor, Mr. S. E. Williams, who has had the sponsorship now of four editions of the work since 1902. This latest edition has eclipsed its predecessors by the incorporation in the text of part of that scholarly work *May's Fraudulent and Voluntary Dispositions*. It is, perhaps, a little misleading to say, however, as is stated in the preface: "The present edition of this work has been enlarged and greatly improved by the incorporation therein of the valuable and well-known treatise on Fraudulent Dispositions by the late Mr. H. W. May." No doubt the statement is literally true, for that part of Mr. May's work which treats of fraudulent dispositions has been incorporated, and it needs but little reflection to appreciate that any discussion of voluntary dispositions would be foreign to the scope of the incorporating work; nevertheless the casual reader, used to regarding *May* as one undivided work, might be misled into imagining that the whole of the work had been absorbed in this new volume. A most pleasing feature, and a most useful one, is the inclusion in this edition of numerous Canadian, Indian, Australian, and New Zealand decisions. Of the decisions of our own Courts one finds quite a few: *Richardson v. Hatrick*, 28 N.Z.L.R. 170, *Lazarus v. Morrison*, 8 G.L.R. 717, *Young v. Butler*, 22 N.Z.L.R. 407, *Easterbrook v. Hopkins*, (1918) N.Z.L.R. 428, *Smith v. Mackenzie*, 1 N.Z.L.R., C.A. 1, *Foley's Creek Co. v. Cullen*, 22 N.Z.L.R. 759, *Re Harper Black and Co.*, Mac. 944, *Brunskill v. Anderson*, 31 N.Z.L.R. 1018, *Nixon v. Fetzer*, 30 N.Z.L.R. 229, *Samson v. Collins*, 29 N.Z.L.R. 1163, *Paterson v. Gore*, 27 N.Z.L.R. 718, *Halliday v. Southland County Council*, 25 N.Z.L.R. 939, are some which appear in the footnotes and no doubt an exhaustive search would reveal others. It is, however, a pity that of the above decisions in two cases the name of the decision and in two cases the reference should be incorrectly stated. The work does not, of course, though all Dominion practitioners would wish it did, purport to include all the colonial cases, and probably it will be many years yet before that happy condition is found to exist in an English text-book. Nevertheless the apparently gradually increasing practice of English writers incorporating even only a selection of the Dominion decisions is, despite the fact that it may, on occasion, prove a trap to the unwary, one deserving of every encouragement. And while on the subject it is interesting to notice that the principles laid down in *Rutherford v. Acton-Adams*, (1915) A.C. 866, and *Bisset v. Wilkinson*, (1927) A.C. 117, by the Privy Council on appeal from our own Courts are incorporated by the learned editor in his text: some English text-writers seem a little inclined sometimes to treat the decisions of the Judicial Committee—not, of course, binding precedents in England—with scant respect, and to relegate them, preceded by such words as "*and see*," to foot-notes.

Kerr is still, this reviewer believes, the only English legal work devoted exclusively to the difficult topics of fraud and mistake, and that is, in itself, apart from the outstanding merit of the treatise, sufficient reason for its being on the shelves of every practitioner. Fraud, though difficult to prove, is, unfortunately perhaps, a matter of most frequent allegation.

King's Counsel.

There is no immutable law or custom relating to the number of years of practice as a junior necessary to qualify for a silk gown, though it is the exception for a barrister of less than ten years' standing to be granted the patent of King's Counsel. Sir John Simon and Lord Birkenhead were called within the Bar in 1908 after nine years of practice as juniors. It was then, it may perhaps be observed, that Lord Loreburn, the reigning Lord Chancellor, whose practice as a junior had not been oppressive, advised Simon, on hearing that he was seeking silk as a refuge from overwork and nocturnal toil, never to take work home from chambers. "I," said the Lord Chancellor, "always observed that rule."

Sir Samuel Evans took silk when he had been a few months less than ten years at the Bar: Lord Alverstone was just over the ten. Quite a number, like Lord Haldane, have been called within the Bar after eleven years. The "youngest," apparently, of all was Francis North who became Q.C. in 1668 after seven years as a junior; but his appointment came at the end of a period of over sixty years during which there had been no recruits to the ranks of the silks. Of the batch of new K.C.'s appointed in England in February last Mr. T. J. O'Connor is the "baby," having been called to the Bar as late as January 27th, 1919.

Reading the Correspondence.

Lord Hanworth, the Master of the Rolls, in his recently published memoir of Chief Baron Pollock repeats from Lord Alvestone's Recollections a very good story of the Lord Chief Baron. When on circuit at York he was called at 5 a.m. to read a voluminous brief; but he picked up "Heart of Midlothian" and became so absorbed in it that he never touched the papers until breakfast-time. The Court sat at nine, and Pollock went into Court in total ignorance of the contents of the brief and of the two or three hundred letters in the correspondence. But, equal to the occasion, he said to the jury: "I could not better present the facts of the case to you than by using the language of the parties themselves, and I shall therefore read to you the correspondence in chronological order." This he proceeded to do. At last Abbot, C.J., growing weary, asked whether it was necessary for the whole of the correspondence to be read. "Absolutely, my Lord," was Pollock's reply, "for I never read it before."

"A privilege of the Bar is its virtual immunity from public criticism. The British public evidently believes that the members of the Bar are doing their work reasonably well, and simply leaves them alone."
—E. M. Konstam, C.B.E., K.C.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"Cheap law does not always mean cheap justice."
—Lord Lyndhurst.

Vol. V. Tuesday, September 3, 1929 No. 14.

Right of Appeal to Privy Council.

The retention of the right of final appeal from the decisions of Dominion Courts to the Judicial Committee of the Privy Council has been the subject of a considerable amount of discussion during the last few weeks. The question has arisen owing to publication in the newspapers of a cablegram to the effect that it was anticipated that the MacDonald Government was ready to permit any Dominion to abolish the right of appeal to the Privy Council if it should so desire. This right of abolition was foreshadowed in the Imperial Conference discussions of 1926. We believe that it was then reported to the Dominion Governments that the Irish Free State had been informed that there would be no objection on the part of the British Government to abolition of the right of appeal if it was desired. Discussions between the then Lord Chancellor Lord Cave, Lord Birkenhead ex-Lord Chancellor, one of the signatories to the agreement with the Irish Free State, and those of the Dominion delegates who were lawyers, disclosed serious opposition to the proposal and resulted, we understand, in the question being held over.

The matter has not, however, been allowed to rest. Certain sections in the Irish Free State have been pressing for abolition. Rumour has it that a considerable section of opinion in Canada desires a more restricted right of appeal. In New Zealand, Sir Robert Stout, while Chief Justice, was at times a stern critic, but he has always recognised the advantage of a final appellate Court, however much he may have desired reform in the constitution of the Judicial Committee. In a recent statement to the daily press, Sir Robert Stout says:

> "I do not think there is a single Dominion or Colony that, if asked to abolish the appeal to the Privy Council, would agree to the suggestion. No doubt there are men to be found in the Colonies who want no appeals to the Privy Council, but they are very few. I think the suggestion is to be regretted. We should do what we can to strengthen the Empire, not weaken it, and to keep it together. Anything that tends to create severance between the different parts of the Empire is a mistake, and it shows a want of loyalty to the Constitution to attempt to create differences between the various parts of the Empire."

We believe that these views correctly represent informed opinion in this Dominion, but we have not reliable information as to the trend of thought in the other overseas Dominions. The questions of the constitution and the functions of the Judicial Committee are distinct, but dissatisfaction with its constitution does not, as some infer, imply a desire for total abolition. We believe that there has never been in England any opposition to representation of Dominion Judges on the Judicial Committee of the Privy Council, but that, on the contrary, their presence and assistance has been welcomed. The reason why Dominion Judges do not sit permanently on the Board has been that the Dominions have not provided salaries for such a position. It is hardly the province of the English Government to pay for Dominion Judges sitting as members of the Board to hear appeals from the Dominions. It can be safely said that if the Dominions will provide the salaries they can have permanent representation on the Judicial Committee of the Privy Council, and that upon such questions as the Dominions concerned may agree their Judges will be entitled to sit. There is consequently no need to advocate the abolition of the right of appeal to the Privy Council, because of criticism of the present constitution of that body. No objections to increasing the personnel of that body, so as to include representation on it of the Dominions, will be made by the English Government so long as finance is provided. The question of its abolition or retention should be approached on the assumption that, even if it is not now the case, the Privy Council can be made an appellate tribunal for the Empire so constituted that criticism directed against its knowledge of the local circumstances of outlying parts of the Empire cannot be justly charged against it.

Next to lawyers the persons mostly concerned with the retention of the right of final appeal are the business community. The conditions of modern business render it increasingly important that the interpretation and application of the common law and the law merchant should be uniform. Neither the common law nor the law merchant have the rigidity of codified systems: their strength lies in their flexibility and their capacity to meet changing conditions. With some statutory exceptions the principles governing most kinds of commercial contracts are much the same, and in many cases identical, throughout the Empire, and the fact that the interpretation, exposition and application of these principles by the Courts of the different Dominions is ultimately subject to review by a common appellate court establishes most useful confidence in dealing amongst the subjects of the whole Empire. Possibly the views of the Irish Free State may be considerably modified when the advantages of uniform interpretation of the principles of the common law and the law merchant, are made manifest to them by the Dominions who wish to assume that the principles of law applicable to the relations created by Imperial trade are the same in one country as in another. We believe that when it was pointed out to Lord Birkenhead that the right given to any Dominion to abolish the right of appeal to the Privy Council affected not only the Dominion abolishing that right but also the other Dominions he admitted the weight of that view.

If instead of regarding the right which subjects of the Dominions have of appealing to the Judicial Committee of the Privy Council as a limit upon the independence of the Dominions one regards the right of appeal as a valuable privilege of which not only the subjects but the governments of the various Dominions can take advantage a truer prospective of the position of the Privy Council in the constitution of the British Empire will be gained. In the opinion of most people the right of appeal to the Privy Council, properly safeguarded as it is so as to protect citizens against frivolous and vexatious appeals, is an added liberty and not a restriction upon liberty, and no effort should be spared to preserve its very great services to the Empire as a whole.

Privy Council.

The Lord Chancellor (Lord Hailsham).
Lord Shaw.
Lord Carson
Lord Blanesburgh.
Lord Tomlin.

April 24, 25, 26; June 13, 1929. London.

BURNARD v. LYSNAR.

Principal and Surety—Time Given to Principal Debtor—Surety Ratifying Arrangement by Conduct—Surety Not Discharged.

Appeal from decision of Court of Appeal (Sim, A.C.J., Herdman, Reed and Adams, JJ.) reversing a decision of Ostler, J. The case in the Supreme Court and Court of Appeal is reported (1927) N.Z.L.R. 767, where the facts will be found fully stated.

Greene, K.C., and **Stamp** for appellant.
Respondent in person.

LORD BLANESBURGH delivering the judgment of the Judicial Committee said that the Courts of the Dominion, perhaps accepting the allegation at its face value, assumed, as it would appear without any definite inquiry into the circumstances, that the arrangement of 27th March, 1925, was one for which George Henry Lysnar was solely responsible, and they did not concern themselves to ascertain how far, in fact, the respondent was cognisant of and had become bound by its terms. In consequence they occupied themselves chiefly with the question—in their eyes the most important—whether notice of the position of the respondent as a surety only could properly at the date of the arrangement be imputed to the appellant. And in the result those Courts were in difference as to the proper answer. The learned Trial Judge held that such notice could not be so imputed and decreed the action against the respondent. The Court of Appeal, on the other hand, being of opinion that the appellant must at the critical date be fixed with notice of the respondent's position as between his brother and himself, adjudged the respondent to be discharged by the arrangement referred to from all further liability under the deed, and by an order of the 18th October, 1927, dismissed him from the action with costs. Hence the present appeal.

In the course of the arguments before the Board, not only that question on which the Dominion Courts were divided, but many others of interest in connection with the law of suretyship, were fully canvassed. A review of the whole case had served, however, to make it clear to the Board that such questions might not survive for determination by them if an affirmative answer was on investigation, given to the fundamental inquiry not so far judicially pronounced upon, viz., whether the respondent must not be held to be as completely committed to and bound by the arrangement referred to as was his co-defendant who concluded it. In the review of the facts to which their Lordships now proceeded they would not stop until they have examined those upon which the answer to that preliminary and, it might be, decisive inquiry must depend.

Their Lordships then reviewed the facts leading up to the execution of the deed of 21st December, 1923, and said that it was not questioned—it had indeed been admitted by the respondent—that that deed on its face contained no indication or suggestion that his position thereunder was that of a surety only. On the contrary, his part in the transaction was to all appearance that of protagonist. His name was first in the order of liability. It was his separate property which was made security for a debt recited as being one for which each obligant was at the moment of execution jointly and severally liable. And the significance of all that was the more marked when it was remembered that the liabilities of the respondent to the grantee were not by the deed being assumed for the first time. Indeed, to their Lordships it seemed clear that the liability which was then being dealt with was treated as the equivalent of the liability on the part of the grantors which would have been constituted by the mere formality of entering judgment against them in the pending action. In other words, their former obligations in respect of the note were treated as having ripened into a joint and several debt of agreed amount immediately exigible. If that debt was not at once to be enforced, then, in respect of it, new obligations had to be entered into and security for its repayment provided. All of which was the purpose of the deed.

To meet those obstacles to the success of his main defence the respondent at the trial was concerned to prove that as between himself and his brother he had been and that, in respect of the new covenants, he remained, no more than a surety, and, further, that notice of that fact was expressly given by him to Mr. Burnard prior to the execution of the deed. Upon much of that, as it turned out, there was no real contest. It was not seriously disputed that the respondent's original liability under the promissory note transaction had been that of a surety only, while his statement that, by later arrangement with his brother, it so continued under the deed was not seriously challenged. Further, it might be inferred from the evidence of Mr. Bennett that the position of the respondent as surety under the promissory note ought to have been known to him and also, although that was disputed, to Mr. Burnard as his solicitor. Finally, the appellant accepted the position that any notice or knowledge imputable to her husband was equally imputable to herself. Their Lordships then referred to the conflict of evidence between the respondent and Mr. Burnard as to the contents of the draft deed and to the acceptance by the trial Judge of the evidence of the latter, and said that the question, therefore, whether notice of the respondent's suretyship in respect of the covenants in the deed might properly be imputed to Mr. Burnard at the date of the arrangement, in a moment to be referred to, must, in the face of his accepted statement that he did not suspect it, be made to depend entirely upon the fact that he knew, or must be taken to have known, that the relation of surety and principal existed between the respondent and his brother in relation to the liability under the promissory note, and that, notwithstanding the obligation into which that liability had ripened, and notwithstanding the readiness of the respondent to execute a security which appeared to negative the continued existence of the relationship, Mr. Burnard was bound to presume that suretyship persisted until by inquiry he ascertained that it had ceased.

Their Lordships had thought it right to review in detail the facts with reference to which the question of imputed notice must be decided. They had done so because, as they saw those facts, the resulting proposition of law was very different from that discussed by the Court of Appeal when that Court decided that issue in the respondent's favour. But having said so much, their Lordships passed on. They would return to this question if, having examined the later history, they found that any decision of theirs upon it was called for.

Their Lordships then reviewed the evidence as to the correspondence and negotiations leading up to the making of the arrangement of 27th March, 1925, and said that throughout all the interviews leading to the arrangement of 27th March, 1925, their Lordships could not doubt G. H. Lysnar was present, not only on his own account, but with full knowledge of the respondent, and intent on making, on behalf of both, as he purported to do, the best arrangement possible for postponing payment of what was due. Before the Board the respondent stated that he was willing that his case should be determined on the footing that everything that had passed between Mr. Burnard and George Henry Lysnar was at once communicated to him. And that conclusion their Lordships would themselves have reached, even if the respondent had not expressed his willingness that they should assume it. They had seen the respondent and had had the opportunity of appreciating his intelligence, and they could not doubt that he speedily informed himself, through his brother, of the terms upon which alone Mr. Burnard's demand for immediate payment and his threat to enforce the security had been withdrawn. Any doubt their Lordships might otherwise have entertained on that subject was dispelled by the respondent's reception of Mr. Burnard's succeeding letters to himself. Those letters, as the respondent agreed when the question was put to him, were written by one who was assuming, as a matter of course, both the knowledge of the agreement and the adhesion of the respondent to it. And from the respondent there was neither protest against nor disclaimer of that position.

The letters were so striking that their Lordships thought it right to refer to them specifically. They felt a satisfaction that their conclusions on that part of the case did not have exclusively to depend on concessions made in the course of argument by a respondent in person. Their Lordships referred at length to the letters and said that on the above review of the facts they could have no doubt that that allegation of the respondent's had not been made good. Whether the arrangement was made without his previous approval or consent—which might be all the allegation was intended to convey—they did not pause further to inquire, because they were satisfied that if the arrangement in terms made on his behalf as a party thereto was not previously authorised, it was subsequently

ratified by him, so that it became an arrangement with himself as completely as if his signature had been in the event attached thereto. It was only thus that without attributing to the respondent a dishonourable silence which their Lordships would be slow to impute to him, his failure to dissociate himself from the agreement, as an answer to Mr. Burnard's successive letters, could be understood. It was only thus that his joining with George Henry Lysnar as late as 1926 in raising money towards meeting Mr. Burnard's demands could be explained. The respondent sought to account for his silence and action by suggesting that until by service of the writ a direct demand for payment by himself was made, he had not troubled to investigate and did not really know the facts. It was only after the inquiry which he then made that he came to realise that he had by the arrangement of March, 1925, been completely discharged. The respondent did not in that statement do himself justice. Direct demands upon him for payment had been made, as had been seen, before the arrangement, on the 22nd December, 1924, and the 21st January, 1925, and, after it, on the 1st April, 1925, and the 26th March, 1926. His knowledge of the arrangement itself he had never denied. The inquiry of his after writ could not have brought him knowledge of any relevant fact that he had not thoroughly known all along. What might well have been suggested to him by it was the view of the law, since apparently entertained by him, that, notwithstanding all the circumstances just stated, he was a surety discharged because notice of the arrangement had not been directly sent him on the appellant's behalf, and because he had not expressly agreed to be bound by its terms after such notice had been so given him. And that was his contention before the Board. But the view of his legal position, as so contended for by him, had in their Lordships' view, neither principle nor authority to support it. An arrangement made on behalf of a surety by an agent in that behalf previously authorised or whose purported authority was afterwards ratified was as binding upon the surety as if in the first instance the arrangement had been made by himself and none the less because the surety's representative in the arrangement with the creditor was, as here, the principal debtor himself.

Their Lordships accordingly did not find it necessary, so far as that defence of the respondent was concerned, further to consider the question of notice which they had reserved.

To the respondent's case the appellant had further answers, to which no allusion had been made. It was not, in the circumstances, necessary for the Board further to consider those.

Appeal allowed.

Solicitors for appellant: **Pritchard, Englefield and Co.**, London, agents for **Burnard and Bull**, Gisborne.

Solicitors for respondent: **Linklater and Paines**, London, agents for **Coleman and Coleman**, Gisborne.

Full Court.

Myers, C.J.
Herdman, J.
Adams, J.
Ostler, J.
Smith, J.

July 6, 8; 26, 1929.
Wellington.

BALL v. SCOTT TIMBER CO. LTD. AND OTHERS.

Wages Protection and Contractors Liens—Liens of Sub-contractors—Several Claims by Sub-contractors and Workers for Charges on Monies Payable to Contractor—Sum Due to Contractor Paid Into Court—All Claims Heard Together—Claim of Respondent Sub-contractor for Charge in Respect of Timber Supplied Contested on Ground That Timber Not Supplied Under Single Contract—Magistrate Allowing All Claims—Appeal by One of Claimants Against Magistrate's Decision as to Charge of Respondent—Claimant Entitled to Appeal—Respondent Supplying Timber Under Separate Orders And Not Under Continuous Contract Entitled to Charge only in Respect of Claims Arising Within Thirty Days Before Notice of Charge Given—Wages Protection and Contractors Liens Act 1908, Sections 55, 56, 61, 62, 64, 66, 67, 68, 69, 80, 81—Magistrates Courts Act, 1928, Section 164.

Appeal from an order of the Stipendiary Magistrate at Wellington, holding that the respondents had established a charge upon a fund paid into the Magistrate's Court. The respondent Miller was the contractor under a contract with the respondent, the St. Luke's Church Property Trust Board, for the erection of a Hall at Wadestown. He employed various sub-contractors. He became unable to meet his debts to them. On 8th November, 1928, the respondent, the Scott Timber Co., Ltd., which had supplied the timber to the contractor, gave notice of its intention to claim a charge to the amount of £298 15s. 10d. on the moneys payable by the respondent Board to the contractor. Similar claims for charges on the same fund were made by four other persons claiming as sub-contractors, and by three other persons claiming as workers. Each of those persons took proceedings in the Magistrate's Court against the respondent Miller, and the respondent Trust Board, to establish their claims. The total amount of the separate claims was £886 4s. 8d. The respondent Board admitted its total liability to the contractor at £541 15s. 0d. The amount was not disputed. Of that amount, the Board paid into the Magistrate's Court the sum of £453 4s. 0d., representing the unpaid balance of the contract price. All the above-mentioned claims were heard together by the Magistrate on 12th and 15th April, 1929. At the hearing, counsel for each claimant was permitted to cross-examine the witnesses called by the other claimants, and to address the Court in respect of each of the claims. The claim of the respondent company to a charge for the full amount claimed by it was disputed upon two grounds, viz.: (1) failure to comply with the provisions of Section 56 of the Wages Protection and Contractors' Liens Act, 1908, and (2) that the respondent Company's claim depended not on a series of instalment deliveries pursuant to a single contract to supply the whole of the timber required for the building, but upon a series of orders, each resulting in a separate contract for the sale and delivery of the timber comprised in that order. The Magistrate decided both contentions in favour of the respondent company, and made an order that the respondent company had established a charge to the extent of £298 15s. 10d., being the total amount claimed by it. The Magistrate further decided that all the other claims then before him had also been established. He reserved to each claimant the right to move for a final order when all competing claims had been settled. The present appellant was one of the competing sub-contractors whose own claim to a charge was established by the Magistrate, and who contested the claim of the respondent company. The appeal came before Ostler, J., who directed its argument before the Full Court on account of two questions of general importance raised on the appeal.

Cousins for appellant.

Cunningham for respondent.

SMITH, J., delivering the judgment of the Court, said that counsel for the respondent company had taken the preliminary point that the appellant had no right of appeal from the Magistrate's order. His contentions might be summarised in the following way: (1) if the Magistrate's order was made in the proceeding brought by the respondent company to establish its charge, than the appellant was not a party to that proceeding and had no right of appeal; alternatively, (2) if the Magistrate's order was made in a proceeding under Section 69, in which the respondent company claimed by virtue of its claim for a lien or charge, then, although the appellant might be a party to that proceeding, all the claims in that proceeding had not yet been settled and the appeal was premature. The proper view of the position appeared to be that there was no separately constituted proceeding under Section 69. If there had been, the Magistrate would have taken care to see that notice of the hearing was given to all the competing claimants interested in the fund in Court. What occurred was that the Magistrate heard several claims for charge together. He then made separate orders in respect of each claim. The latter portion of his order meant, their Honours thought, that when each competing claim was individually settled, then a proceeding would be constituted, presumably under Section 69, for the distribution of the fund in Court. In their Honours' opinion, that was the correct interpretation of the Magistrate's statement as to the nature of the proceedings in his Court. Their Honours thought, then, that the notice of appeal was correct in appealing from the order of the Magistrate made on the hearing of the respondent Company's proceeding, in the sense that it was an order made in that proceeding. On the other hand, it might be said, at once, that if the Magistrate's order was made in a proceeding under Section 69, the Magistrate having chosen to proceed without having all the rival claimants before him, then the appellant was a party to that proceeding, and would have had the right of appeal from

that decision within the time limited for appeals in civil proceedings in the Magistrate's Court: Section 64.

In their Honours' opinion, the appellant had the right to appeal from the Magistrate's order made in the respondent company's proceeding. His Honour dealt at length with the nature of the rights and liabilities conferred and imposed by the Act and said that their Honours thought at least that claims made under the Act by a person or persons against another or others with whom there was no privity of contract were in the nature of proceedings in *rem*. A fund, or *res*, was to be distributed among claimants who were each entitled to their due proportion thereof. If the fund claimed against was insufficient, then the claims conflicted and each claimant was interested in seeing that a rival claimant got no more than was his due. That view was in accordance with the judgment of Cooper, J., in **In re Marton Club House Buildings Co. Ltd.,** 10 G.L.R. 582. The jurisdiction of the Court under the Act appeared to be similar to the jurisdiction of the Court in Admiralty when property was proceeded against. In an action in such jurisdiction in England, any person not named in the writ might intervene and appear on filing an affidavit showing that he was interested in the *res* under arrest, or in the fund in the registry: Order 12, Rule 24. Such persons included persons who had possessory liens or competing maritime liens, and generally persons who were plaintiffs in other actions in *rem*, against the same property: **1 Halsbury,** 87, par. 166. **The Two Ellens,** L.R. 3 A. & E. 345, 355; **The Chioggia,** (1898) P. 1, 3; **The Veritas,** (1901) P. 304, 308.

His Honour then proceeded to consider what particular provision was made by the Act for carrying out its main purpose, and dealt in detail with the provisions of Sections 55, 56, 61, 62, 66, 67, 68, 69, 80 and 81 of the Act, and said that it was clear, however, in their Honours' opinion, both from a consideration of the general principle of the Act and of its particular provisions, that the proceedings of every claimant against a person with whom there was no privity of contract must be regarded as in the nature of proceedings in *rem*. In such a case, every person interested in taking or sharing the fund had the right to intervene in a proceeding to establish a rival claim to take or share in that fund, and all such persons so intervening must be regarded as parties to each such proceeding. Where a rival claimant did not intervene, but the decision was against his interest and he was prejudiced thereby, he ought, their Honours thought, to be regarded as a person aggrieved, and entitled, with leave, to appeal against that decision: **In re Markham,** 16 Ch. D. 1; **Bank of New Zealand v. Scandinavian Water-race Company,** 26 N.Z.L.R. 1345; and see **Annual Practice, 1929,** 1195 and cases there cited.

In the present case, the appellant did intervene, and he was to be regarded *as a party* to the respondent company's proceeding, although he was not upon the record. He did not, therefore, require leave to appeal. The right of such a person to appeal followed from his status as a party, and it appeared to be clearly covered by the wording of Section 64 (1) of the Act conferring the right to appeal. The form of wording of that Section might be contrasted with that of Section 164 of the Magistrates' Courts Act, 1928, which provided that every party might appeal to the Supreme Court. The latter portion of Section 64 referred only to the conditions of appeal and the procedure involved in bringing the appeal, and not to the substantive right to appeal. Although there were no Rules corresponding to the English Order 12 Rule 24, providing for intervention in an Admiralty action in *rem*, both the Supreme Court under Rule 604, and the Magistrate's Court under its corresponding Rule 61, had power to regulate the procedure on intervention. In the present case, the appellant was in fact an intervener in the respondent company's proceeding in the Magistrate's Court, and in their Honours' opinion he had the right of appeal from the order made by the Magistrate therein. The contention that Section 56 had not been complied with was not urged before the Court, and it was necessary to deal with the appeal on the merits.

The claim of a sub-contractor arose when money was due to him under his sub-contract; and notice of the intention to claim a charge must be given within 30 days after the completion of the work in respect of which the claim was made: Section 56 (1). It was well established that the supply of timber was "work" within the Act. If then, in any case, the supply of each order for timber gave rise to a separate claim under the Act, every such claim should be made within 30 days after each claim arose. The question arising was, however, whether each order did give rise to a separate claim under the Act or whether the timber was not supplied under a continuous contract entitling the respondent to claim within 30 days after completion of such supply. Their Honours in dealing with this question referred at length to the cases of **In re A. and T. Burt, Ltd.,** 21 N.Z.L.R. 540, **Reid v. Barnett,** 22 N.Z.L.R. 964, **Halley and Ewing v. Searle,** 24 N.Z.L.R. 151, **Marton Club House Building Co. Ltd.,** 10 G.L.R. 582, **Penketh v. Midwood,** 33 N.Z.L.R. 1399, **Taupo Totara Timber Co. v. Smith and Egden,** 30 N.Z.L.R. 77, **Carrara Ceiling Co. Ltd. v. Taranaki Amusement Co. Ltd.,** (1918) G.L.R. 200, and **Dominion Home Builders Ltd. v. Ward and Beaumont,** (1923) N.Z.L.R. 724. All those cases, except **Reid v. Barnett** (*cit. sup.*) and the **Carrara Ceiling Company's case** (*cit. sup.*) were consistent with the statement by Edwards, J., in the **Taupo Totara Timber Company's case** (*cit. sup.*) that unless there was a binding contract between the contractor and the sub-contractor for the supply of all the material actually supplied, the supply of each item of material gave rise to a separate claim under the Statute. That statement was consistent with the statement quoted with approval by Stout, C.J., in **Reid v. Barnett** (*cit. sup.*) and **Penketh v. Midwood** (*cit. sup.*) from **Phillips on Mechanics' Liens,** 3rd Edn., 564. In **Reid v. Barnett,** Stout, C.J., did not decide that the various items supplied prior to the extra order for fittings constituted one continuous contract. He merely said that it might have been so. With much respect, their Honours did not think that those items could be regarded as supplied pursuant to one continuous contract. In the **Carrara Company's case,** their Honours were of opinion, again with much respect, that Edwards, J., relied upon a mistaken view of the decision of Stout, C.J., in **Reid v. Barnett,** and that being so, the decision in the **Carrara Company's case** could not be regarded as an authority, in respect of that part of the judgment which dealt with the question of continuous contract. Their Honours concluded, therefore, that the law was correctly expressed by Edwards, J., in the **Taupo Totara Company's case.** In order to show a continuous contract for materials supplied, the contractor must be able to show that the materials supplied by him were supplied pursuant to an accepted order, i.e., a binding contract for the supply of all the materials actually supplied by him from time to time and comprised in what was alleged to be the continuous contract. The point of time at which that must be shown to exist must necessarily be the commencement of the supply.

The evidence in the present case fell short of establishing that the various deliveries of timber were made pursuant to one accepted order for all the timber supplied. Hyde, the traveller for the respondent company, knew the respondent contractor, Miller, and had supplied timber to him at another job. Hyde saw Miller in May, 1928, when the latter was on a job at Seatoun. Miller then had the Wadestown job, and about that date had some timber sent up to that job. Miller asked Hyde, at the Seatoun interview, about certain timbers and if he could supply them, and if his company held certain sizes, and if so whether it would hold them for him. The evidence disclosed no reply to those inquiries. Hyde's evidence continued that Miller gave him an idea of what would be wanted. The flooring was to be kept dry. Hyde gave Miller a quotation a fortnight after that interview. It was a statement of the prices for classes of timber but no lengths or quantities were specified. Hyde further stated "I understood that we were to get the timber order for the job." On 13th October, 1928, Miller wrote the respondent company a letter commencing with the words "Please send to complete my job at Wadestown the following as soon as possible and oblige," and there followed a list of timber. Mr. Cunningham relied on the words "to complete my job" as showing a contract from the beginning of the supply. Their Honours thought the words were not capable of that construction. They only described the timber as timber required for the completion of Miller's job. There was no evidence of any undertaking on the part of the respondent company to supply the timber. Although all the timber for the job seemed to have been in fact supplied by the respondent company, there was no evidence that it was supplied pursuant to one order, still less one accepted order, for all the timber required for the job. In their Honours' opinion, the Magistrate's judgment was not capable of being supported on the facts.

Appeal allowed.

Solicitors for appellant: **Findlay, Hoggard, Cousins and Wright,** Wellington.

Solicitors for respondents: **Luke, Cunningham and Clere,** Wellington.

Myers, C.J.
Herdman, J.
Adams, J.
Blair, J.
Smith, J.

July 8, 9; 26, 1929.
Wellington.

IN RE DUNEDIN, ETC., HAIRDRESSERS' AND TOBACCONISTS' ASSISTANTS' BOARD.

Industrial Conciliation and Arbitration—Certiorari—Preference to Unionists—Order of Court of Arbitration Amending Award to Provide for Compulsory Unionism and Dismissal of Non-Unionist Employees—Ultra vires—Union Agreeing to Amendment of Award as to Holidays on Employers Agreeing to Amendment as to Compulsory Unionism—Failure of Consideration for Union's Agreement—Whole Order Quashed—Quaere as to Power of Supreme Court to Quash Portion of Order of Court of Arbitration—Industrial Conciliation and Arbitration Act, 1925, Sections 2, 92, 97.

Application for writ of certiorari to quash an order of the Court of Arbitration dated 12th March, 1929, on the ground of want of jurisdiction. By this order an award was amended by the inclusion of a clause (Clause 1) making an alteration in the holidays provided for by the award and a further clause (Clause 2), substituted for Clause 22 in the original award, providing as follows:—

"From and after the 11th day of March, 1929, all persons being employed as assistants in the hairdressers' and tobacconists' shops within a radius of twenty miles of the Chief Post Office, Invercargill, shall within fourteen days become members of the Otago Hairdressers' and Tobacconists' Assistants' Industrial Union of Workers, it being agreed that the entrance fee shall not exceed 5s. and subscriptions shall not exceed 6d. per week. It shall be a condition of employment of all the said employees that they shall join the said union and that they shall remain members of the said union. If any employee shall neglect to become a member of the union within the time specified, he shall be dismissed. If any person who has already joined the union, or who shall pursuant to the provisions of this clause join the union, shall voluntarily and of his own motion resign from the union, he shall be liable to dismissal, and shall receive a notification from the employer that he is so liable, and unless he rejoins the union within a week from the date of the notice he shall be dismissed."

The question arising was whether Clause 2 was within the jurisdiction of the Court.

Stevenson for plaintiffs.
F. W. Ongley for defendant Union.

MYERS, C.J., stated that notwithstanding the provisions of Section 97 of the Industrial Conciliation and Arbitration Act, 1925, the contention was not open in the Supreme Court, since the decision in **N.Z. Watersiders Federation, etc. v. Frazer and Others,** (1924) N.Z.L.R. 689, that a writ of certiorari could not be granted to bring into that Court an award or order of the Court of Arbitration which was made in excess of the jurisdiction of that Court. The real question for determination in the present case was whether the order made by the Court of Arbitration, on 12th March, 1929, was within the jurisdiction of that Court. In His Honour's opinion the point was concluded by the decision in **Magner v. Gohns,** (1916) N.Z.L.R. 529, which was binding on the present Court. Mr. Ongley properly admitted that in view of the decision of the Court of Appeal in that case he could not support the first portion of the clause substituted by Clause 2 of the order for Clause 22 (which was a "preference" clause in the usual form) of the original award, because the effect of that portion of such clause would be to compel workers in the industry affected to join a union; and it was held in **Magner v. Gohns** (*cit. sup.*) that such a compulsory clause was not within the power of the Arbitration Court. Mr. Ongley argued, however, that the remaining portion of Clause 2 of the order was within the jurisdiction of the Arbitration Court to prescribe. That argument was based upon the view that the subject matter of the portion of the clause under notice, though it might not be justified by paragraph (e) in the definition of "industrial matters" in Section 2 of the Industrial Conciliation and Arbitration Act, 1925, came within the previous part of the definition, that was to say within the words "all matters affecting or relating to work done or to be done by workers, or the privileges rights and duties of employers or workers in any industry, not involving questions which are or may be the subject of proceedings for an indictable offence": and Mr. Ongley further contended that paragraph (e) was not to be construed as limiting the definition of "industrial matters" coming within the jurisdiction of the Arbitration Court, because although the interpretation clause set out a number of paragraphs, including paragraph (e), as special matters which were included within the definition of "industrial matters," such inclusion was expressed to be "without limiting the general nature of the above definition." In His Honour's opinion that contention could not be accepted in view of the decision of the majority of the Court in **Magner v. Gohns** (*cit. sup.*). In that case Edwards and Cooper, JJ., definitely held that the provisions of paragraph (e) as to the claims of unionists to be employed in preference to non-unionists showed that despite the previous words "without limiting the general nature of the above definition" the intention of the legislature was that the relative claims of unionists and non-unionists to employment should be regulated under the power given by that sub-paragraph alone. And it followed, in His Honour's opinion, from what was said in the judgment of those learned Judges at p. 550 that, in view of paragraphs (d) and (e), there was no jurisdiction to make an award forbidding employers to employ in any trade affected by such award any person who was not a unionist. It was true that Sim and Hosking, JJ., took a different view from Edwards and Cooper, JJ., as to the effect of paragraph (e), but Stout, C.J., said (at p. 547) that in his opinion the enacting of paragraphs (d) and (e) of the definition of "industrial matters" must be looked upon as a defining of the Arbitration Court's jurisdiction. It seemed to His Honour that that language could be construed only as a concurrence with the view expressed by Edwards and Cooper, JJ. It was interesting also to note that the Solicitor-General, in the argument of the case, said that it was doubtful whether it was possible to rely on the general words at the commencement of the definition of "industrial matters." Paragraph (d) of the definition included within "industrial matters" all matters relating to the claim of members of an industrial union of employers to preference of service from unemployed members of an industrial union of workers, and paragraph (e) all matters relating to the claim of members of industrial unions of workers to be employed in preference to non-members. It seemed to His Honour that the portion of clause (2) of the order under consideration went beyond what was contemplated or provided for in paragraph (e); and, it followed, in His Honour's opinion, from the judgment of the majority of the Court of Appeal in **Magner v. Gohns** (*cit. sup.*) that the subject matter of the clause was not within the jurisdiction of the Arbitration Court. His Honour was unable to see that the Arbitration Court could possibly have jurisdiction to make in an order under Section 92 of the Act, purporting to amend the award, a provision which it had no jurisdiction to make in the award itself.

Even apart from the effect of **Magner v. Gohns** His Honour thought that the various parts of clause 2 were so inseparably connected or related that it might be very difficult to attempt to sever them and hold that though part of the clause was bad the other part was good. If clause (2) of the order was bad, as His Honour thought it was, it seemed that the whole order must go. The making of the order was assumed by the Arbitration Court to be a matter of agreement between the parties. On that assumption it was common ground at the Bar that the Union agreed to clause (1) in consideration of the employers (or such of them as were in fact parties to the arrangement) agreeing to clause (2). Mr. Stevenson in his argument conceded that if clause (2) were held to be bad as being in excess of the jurisdiction of the Court, clause (1) should also be quashed. His Honour thought that that concession was properly made; because if clause (2) could not stand, it seemed to His Honour that there was a total failure of consideration for the agreement made by the Union in respect of clause (1). Once it was held that clause (2) of the order was bad as not being within the jurisdiction of the Court, His Honour did not think it could be said that the Court had found that there was such desire of the parties as was required by Section 92 (1) (c) for the review and amendment of the Award in respect of the first clause alone. Moreover, His Honour was not fully satisfied that it would be competent for the Supreme Court to quash merely a portion of the order and allow the rest to stand, but that again was a point which in the circumstances of the case it was unnecessary to consider. His Honour thought that the writ of certiorari must be granted and the whole order quashed.

HERDMAN, ADAMS and BLAIR, JJ., delivered separate judgments to the same effect.

SMITH, J., arrived at the same result as the majority of the Court holding that clause (2) of the award did not relate to an industrial matter and was bad for want of jurisdiction. His

Honour dissented, however, from the view of the majority of the Court that the jurisdiction of the Court of Arbitration was limited by subclauses (d) and (e) of the definition of "industrial matters," and that such was decided in **Magner v. Gohns** (*cit. sup.*).

Solicitors for plaintiffs: **Izard, Weston, Stevenson and Castle,** Wellington.

Solicitors for defendant Union: **Ongley and O'Donovan,** Wellington.

Supreme Court

Smith, J. June 17; July 8, 1929
Christchurch.

McCONNELL v. McCORMICK.

Vendor and Purchaser—Agreement for Sale and Purchase—Forfeiture—Purchaser in Possession—Notice—Sufficiency of Notice under Section 94 of Property Law Act, 1908—Several Breaches Alleged—Particular Terms Broken Not Specified—Particular Breach Complained of Specified in Some Cases But Not in Others—Statements That Land Not Kept Free From Gorse and That Buildings Not Kept in Repair to Satisfaction of Vendor Not Sufficient Specification of Breaches—Not Indicating with Reasonable Certainty What Purchaser Required to do—Notice Grouping Breaches Sufficiently Specified With Breaches Insufficiently Specified Bad—Notice Bad Also in Requiring Compensation as Alternative to Remedying of Remediable Breaches—Property Law Act, 1908, Section 94.

By an agreement, dated 1st June, 1920, Henry McConnell agreed to sell to one W. G. Chapman, a certain farm for the sum of £10 per acre, upon terms and conditions set out. By an agreement of 9th July, 1920, Chapman assigned all his estate and interest under the agreement of 1st June, 1920, to the defendants. By an agreement of 29th May, 1923, to which McConnell was a party, W. G. Chapman was released from responsibility under the agreement of 1st June, 1920, and the defendants A. G. and J. S. McCormick undertook jointly and severally the performance and observance of the covenants and conditions on the part of Chapman contained or implied in the agreement of the 1st June, 1920; and Archibald McCormick, the father of the defendants, agreed to indemnify the said Henry McConnell in certain events. The obligations so undertaken by the defendants included (a) an obligation to take over a mortgage under which McConnell was the mortgagor, and to pay the principal and interest thereon; (b) an obligation to keep all buildings and erections fences gates drains and ditches upon the land in good order repair and condition to the satisfaction of the vendor and not to remove any buildings erections or fences from the land without having first obtained the written consent of the vendor and to keep well and sufficiently painted such of the buildings as had hitherto been painted, and (c) an obligation to keep the land free from twitch, noxious weeds, broom, and spreading gorse, and also to clear and keep clear of gorse and broom the road lines adjacent to the land.

McConnell died on 22nd August, 1927. The plaintiff was the executrix of his will. On 8th February, 1928, she wrote by her agent to the defendants requesting them to give her authority to arrange for the renewal of the mortgage and requesting them to have the buildings painted as it would assist in the renewal of the mortgage. No reply to that letter was received. The mortgage fell due on 1st August, 1928. In that month the plaintiff sent the defendants a notice requiring them to remove the gorse from the property. On 8th October, 1928, she wrote again to the defendants to the effect that the renewal of the mortgage would depend upon the valuation, and she hoped that defendants were making better progress with the gorse than was being made when she inspected the property a fortnight before. She received no answer. In November, 1928, the plaintiff placed the matter in the hands of her solicitor. On 12th December, 1928, the plaintiff interviewed the solicitor for the defendants but no agreement was apparently arrived at, for on the next day the plaintiff's solicitor sent the following notice to comply with Section 94 of the Property Law Act, 1908:—

"To Archibald George McCormick of Hinds farmer, John Stewart McCormick of Hinds farmer, Archibald McCormick of Ashburton farmer.

Whereas default has been made as follows and has continued for three months in the performance or observance of the terms of an Agreement dated the 1st day of June, 1920" (parties stated) "as modified by an agreement dated the 29th day of May, 1923" (parties stated): "(1) Failure in the payment of the principal due under Memorandum of Mortgage Number 101409. (2) The land has not been kept free from twitch and spreading gorse. (3) The buildings erections fences and gates upon the said land have not been kept in good order repair and condition to the satisfaction of the Vendor under the said Agreement. (4) Such of the said buildings as prior to the said Agreement had been painted have not been kept well and sufficiently painted.

Take Notice that unless the said breaches are remedied to the satisfaction of the Vendor within one month of the date hereof or within that date you make compensation in money for such breaches to the extent of one thousand pounds the said Agreement dated the 1st day of June, 1920, as subsequently modified will be cancelled in accordance with the provisions thereof and all moneys paid thereunder shall be wholly forfeited to the Vendor.

Dated the 13th day of December 1928.

I. H. McConnell
Executrix Estate late Henry McConnell
by her Solicitor and Agent,
(Sgd.) L. A. Charles."

On 6th February, 1929, the plaintiff's solicitors wrote to the defendant stating that as the time for remedying the breaches specified had elapsed and those breaches had not been remedied and no compensation in money had been made, the vendor cancelled the agreements and declared the monies forfeited; and they requested the defendants to render up possession to the plaintiff. In February, 1929, the plaintiff paid the interest on the principal sum due under the mortgage in order to save the penal rate. In April 1929, the defendants offered to pay that interest to the plaintiff, but she declined to accept the amount and on 5th April, 1929, the plaintiff issued a writ claiming possession of the land comprised in the said agreement for sale and purchase.

Charles for plaintiff.

Upham and Nicoll for defendants.

SMITH, J., said that at the conclusion of the plaintiff's case, counsel for the defendants moved for a nonsuit on the following grounds: (1) That there was no evidence to show that the notice was not complied with; (2) That the notice under Section 94 was bad in that it was not sufficiently precise; (3) That a reasonable length of time had not been given for the performance of the requirements of the notice; (4) That the defendants were required to pay the extravagant sum of £1,000. His Honour declined to nonsuit the plaintiff on her own case, and the defendants called evidence. As His Honour was of opinion that the notice was bad, it was not necessary to consider the evidence in detail. **Bray v. Kuch,** 28 N.Z.L.R. 667, was authority for the proposition that Section 94 applied to an agreement for sale and purchase of land when the purchaser was in possession under the agreement. That was the position in the present case. Section 94 required a notice to be given which was a condition precedent to the exercise of the lessor's (or vendor's) right of re-entry by action or otherwise. The nature of the notice was important. The principal English cases decided on Section 14 (1) of the Conveyancing and Law of Property Act, 1881, (corresponding with Section 94 (1) New Zealand) were reviewed in **Fox v. Jolly,** (1916) 1 A.C. 1. So far as was required for the decision of the present case, the law might be stated, His Honour thought, as follows:—

(1) The notice must specify the particular breach complained of. That involved: (a) specifying or "pointing out" the particular covenants or conditions stated to have been broken. In the English cases which His Honour had examined the notices all appeared to have set out in full, or to have pointed out, the particular covenant or covenants stated to have been broken. It also involved (b) giving the lessee precise information of what was alleged against him and what was demanded from him—i.e., the notice must be such as to enable the lessee to understand with reasonable certainty what it was he was required to do. It must provide full and sufficient information upon which, given a reasonable time, the lessee could determine what course of action he was to adopt: **Horsey Estate v. Steiger,** (1899) 2 Q.B. 79, 91. See **Fletcher v. Nokes,** (1897) 1 Ch. 271, **Horsey**

Estate v. Steiger, (*cit. sup.*), **Fox v. Jolly,** (*cit. sup.*). In respect of a covenant to repair, a mere statement that it had been broken was insufficient: **Fletcher v. Nokes,** (*cit. sup.*). The particulars given need not be identical with those which would be required as particulars in a subsequent action to recover possession, or possession and damages, and the notice was not necessarily dependent upon such a standard of particulars. The action was, however, dependent on the particulars in the notice. It might proceed in respect of breaches set out in the statement of claim which were specified in the notice but not in respect of breaches set out in the statement of claim which were not specified in the notice: **Jolly v. Brown,** (1914) 2 K.B. 109; **Fox v. Jolly,** (*cit. sup.*)

(2) The particulars in the notice might specify too much, but if that which was so specified was not a breach—**Pannell v. City of London Brewery Co.,** (1900) 1 Ch. 496—or was general and immaterial—**Fox v. Jolly,** (*cit. sup.*)—the notice was not invalid.

(3) The notice might specify the breach of more than one covenant. Where the notice was sufficiently definite with regard to the breach of one or more covenants but was indefinite in relation to the breach of another covenant or covenants, the authorities differed as to whether the notice was good or bad. Such a notice was held to be bad in **In re Serle,** (1898) 1 Ch. 652. The question was reserved by Lord Buckmaster in **Fox v. Jolly,** (*cit. sup.*) at p. 14; but the decision in **In re Serle** appeared to be disapproved by Lord Atkinson in that case. His Honour quoted from Lord Atkinson's judgment at p. 18 and said that he himself was of the respectful opinion, however, that if the notice were so framed by the lessor as to group the breaches together, then the notice must be regarded *in globo* in order to determine the main question, namely whether the lessee could understand with reasonable certainty what it was which he was required to do, and whether the information given by the notice was such as to enable him to determine in a reasonable time what course of action he should adopt. In such a case, the decision in **In re Serle,** (*cit. sup.*) could, His Honour thought, apply.

(4) If the breach were capable of remedy the notice must require the lessee to remedy that breach.

(5) Where the lessor desired compensation he must ask for it in the notice; but where there was no sense in asking for compensation the notice need not require it: **Lock v. Pearce,** (1893) 2 Ch. 271, **Blake v. Official Assignee of Rendell,** 11 G.L.R. 452, and **Civil Service Co-operative Society v. McGrigor's Trustees,** (1923) 2 Ch. 347. Where the lessor did require compensation, he need not specify the amount in his notice, and the lessee was only required to make reasonable compensation in money to the lessor. The Section did not authorise a notice requiring compensation in lieu of the remedy of a breach, where the breach was capable of remedy. Where the breach was capable of remedy, the compensation asked for must be upon the basis that the lessee would remedy the breach, and not upon the basis that the lessor was to have damages for an unremedied breach which was to continue unremedied by the lessee. That was not in any sense the object of the notice.

In the present case, the only notice which could be relied upon was the notice of 13th December, 1928. His Honour thought that that notice was wholly bad for the following reasons: (1) It did not specify the particular terms (or covenants) stated to have been broken. The responsibility was on the plaintiff to specify those terms and not upon the defendants to speculate as to the particular terms to which the notice was intended to refer. (2) It required compensation to the extent of £1,000 as an alternative to the remedy of breaches which were capable of remedy and which were required to be remedied. Such a form of notice was not authorised by the Section. (3) The notice ought to be regarded *in globo*, and even if the specification of one or two breaches were good, the others were bad and the whole notice was bad. All of the items dealt with breaches and they were not immaterial. Assuming items 1 and 4 to be sufficiently specified (apart from the failure to point out the particular terms affecting them) items 2 and 3 were clearly not sufficiently specified. The evidence showed that the farm was divided into 15 paddocks. The defendants could not tell from the notice what clearing the plaintiff actually required to be done; and in fact no particular breach was alleged by plaintiff in her particulars in the action in respect of paddocks 2, 3, 4, 6 and 10. Items 2 and 3 of the notice were at most merely statements that terms in the nature of covenants to repair had been broken; and that was insufficient: **Fletcher v. Nokes,** (*cit. sup.*) and cases cited supra. Items 1 and 4 were then grouped with items 2 and 3 by the requirement that they should all be remedied within one month. The plaintiff was under no obligation to specify any time in her notice, but only to wait a reasonable time before bringing her action. The month so specified was an unreasonable time in respect of item 1 in that the solicitors' offices were closed during the Christmas and New Year holidays which occupied the larger part of the month in question. It was also unreasonable in respect of items 2 and 3 for the evidence showed that a reasonable time in respect of the clearing would have extended at least to the winter of 1929. It was, however, on the evidence a reasonable time for the painting. All the items were again grouped together by the requirement of paying compensation to the extent of £1,000 in lieu of remedying them. Even assuming, then, that the specification of item 4 as to painting, or that that specification and the specification of item 1, as to paying off the mortgage, were both sufficiently specific His Honour was of opinion that the good specification or specifications were so linked with the bad specifications that it was impossible for the defendants to know with reasonable certainty what they were required to do in order to avoid a forfeiture. They did not have in respect of any good item, so coupled with the other items, sufficient information to enable them to determine what course of action they should adopt. The whole notice was therefore bad, and the plaintiff was not entitled to bring the action: **In re Serle,** (*cit. sup.*) at p. 657.

Judgment for defendants.

Solicitors for plaintiff: **Orbell and Charles,** Ashburton.

Solicitors for defendants: **Harper, Pascoe, Buchanan and Upham,** Christchurch.

Ostler, J. May 31; July 17, 1929.
New Plymouth.

JOHNSON v. ELTHAM CO-OPERATIVE DAIRY FACTORY CO. LTD.

Company—Contract—Restraint of Trade—Co-operative Dairy Company—Article Providing that Member Not Supplying All Milk During Whole Season to Company Not Entitled to Any Payments Above Ordinary Monthly Payments—Article *ultra vires*—No Evidence of Contract Between Company and Member on Basis of Article—Onus of Proof of Contract on Company—*Semble* That Reasonable Contract as to Supply by Members of Milk to Company Under Penalty of Forfeiting Part of Price Not Invalid as Being in Restraint of Trade.

Action to recover £101 16s. 7d., alleged to be the balance due for milk supplied by the plaintiff to defendant company from July, 1924, to February, 1925. The plaintiff became a shareholder in the company in 1911 when he acquired 76 shares under the original articles then still in force. Article 8 of the articles of association at that time provided that the whole of the nett profits (subject to dividends) should be paid to suppliers, provided that each supplier held one share for every 300 gallons of milk or 108 lbs. of butterfat supplied by him during the year. In May, 1912, defendant company altered its articles by providing in Article 8 that suppliers should take up one share for every 150 gallons of milk or 56 lbs. of butterfat supplied. On 7th September, 1912, the plaintiff acquired a further 107 shares in compliance with the requirements of the amended articles. Those shares did not become fully paid up until June, 1920. In 1917 the company's articles were again altered. The basis upon which it was provided that shares were to be held by suppliers was not altered, but the following alterations were made. By Article 2 it was provided that "'*Bona fide* member' shall mean a member who holds the number of shares required by Article 8 hereof within the time required and who supplies the Company with all the milk he receives from the particular herd of cows which he has for the purpose of supplying milk save such a reasonable quantity as he may require for his own use during the milking season, i.e. all times during the financial year of the Company when the particular factory or creamery of the Company which receives the aforesaid milk is open to receive milk from its members." Article 55 was in the following terms: "All milk, butterfat or produce supplied by a non *bona fide* member or a person not holding shares in the Company shall, in the absence of any agreement as to price between the Company and such member or person, be deemed to be purchased by the Company at the price paid by the Company to its members on the twentieth day of each calendar month or such other determined date for milk or butterfat supplied to the end of the preceding month as mentioned in Article 53 hereof, and such non *bona fide* member or person as aforesaid shall not be entitled to any further payments which the the Company may make in any subsequent month for the same

milk or butterfat, and all moneys received by the Company on the sale of such non *bona fide* members' and other persons' milk or butterfat as aforesaid over and above the amount paid by the Company to such non *bona fide* member or person as aforesaid shall be deemed profits of the Company."

The plaintiff stated that he did not attend the meetings called in 1917 for the purpose of amending the articles and did not know that the articles had been altered in the manner indicated. There was no evidence from the minute books or otherwise to show that he was present at either of the meetings at which the alterations were made, and though he admitted that subsequently he attended at least one annual meeting at which he voted. The learned Judge accepted his evidence that he was unaware of the new provision that if a member did not supply his milk for the whole season he would get no payment beyond the ordinary monthly payment. He continued supplying the whole of his milk to the Company down to the end of the 1923-24 season. In the following season he supplied the whole of his milk to the Company down to 4th November, 1924. From that date until 28th February, 1925, he supplied only half his milk to the Company. During that period he was informed by officials of the Company that unless he supplied the whole of his milk he would not be entitled under the articles to share in the bonuses. His answer then was that he knew all about the articles, but he said at the trial that till then he did not know that the articles so provided. From 28th February, 1925, the plaintiff ceased to supply any milk to the Company. The practice of the Company was to pay out to members of the company on the twentieth day of each month a sum in respect of the supply for the previous month. The amount of that sum was based upon the then ruling price of the London market, and upon the state of the company's finances.

During the whole of the season 1924-25 plaintiff was the holder of the requisite number of shares. It was agreed that the amount of the subsequent payments or bonuses which would have been paid to the plaintiff, had he continued to supply all his milk to the end of the season, was £101 16s. 7d. The plaintiff claimed that he was entitled to recover that sum from the company.

Chrystal for plaintiff.
Weir for defendant.

OSTLER, J., said that in his opinion no principle of company law was more clearly settled than the principle that a company could not by its articles impose upon its members any pecuniary obligation over and above the obligation to pay up to the full amount due on the shares they had agreed to take. It was recognised by the Full Court in **McDonald v. Normanby Dairy Co.,** (1923) N.Z.L.R. 122, where the authorities had been collected. It was referred to again and restated in a masterly manner in Salmond, J.'s judgment in the Court of Appeal in **Shalfoon v. Cheddar Valley Dairy Co.,** (1924) N.Z.L.R. 561, at p. 577. It was suggested by counsel for the defendant company that the authority of that judgment had been weakened because it was partly based on the case of **Dibble v. Wilts and Somerset Farmers Ltd.,** (1923) 1 Ch. 342, which case was overruled by the House of Lords in **Biddulph v. The Agricultural Wholesale Society Ltd.,** (1927) A.C. 76. In His Honour's opinion, however, that was not so. **Biddulph's case** was decided upon the ground that there was a contract between the society and the objecting member to take up additional shares. A company of course had power to make contracts with its members in the same manner and to the same extent as it had power to make contracts with strangers. There seemed to be no reason in law why the terms of such contracts should not be embodied in its articles. **Biddulph's case** was an authority to show that they could, and it had become a common practice to so insert the terms of contracts between a company and its members. Such articles, although *ultra vires* if relied on as regulations made by the company's own legislative authority, might well be quite valid contracts between the company and its members. The question of a contract did not arise in **McDonald v. Normanby Dairy Co.** (*cit. sup.*) because the plaintiff had been a dissenting party to the alteration of the articles and had refused to take up the additional shares required by it.

In the present case, in His Honour's opinion, Article 55, regarded as an act of legislative authority by the company over its shareholders was *ultra vires* of the company. It imposed a penalty upon shareholders who did not supply all their milk for the season. That penalty might be a very small one if the supplier ceased to supply early in the season, or it might be a very substantial one if the supply was kept up for the greater part of the season. His Honour agreed with the opinion expressed by Salmond, J., in **Shalfoon v. Cheddar Valley Dairy Co.** (*cit. sup.*) at p. 577) that there was no distinction in principle between an obligation to find money and one to find money's worth. In His Honour's opinion a company, whether a co-operative dairy company or not, had no power, apart from contract with its members, to provide by its articles that its members should supply all their milk for the season on pain of the company forfeiting a part of its value. Although that was not done in form, it was done in substance. In His Honour's opinion there was, however, no reason in law why a co-operative dairy company should not make such an agreement with its members. It was essential to the success of such a company that the continuity of its supply should be assured. It seemed to His Honour that in view of the circumstances of the case, although such a contract did restrict the freedom of the supplier, and therefore was in restraint of trade, if its terms were reasonable it went no further than was reasonably necessary for the protection of the company, and was, therefore, not so unreasonably in restraint of trade as to justify the Court in declaring it void. Such a contract with all the other shareholders was to the advantage of each single shareholder, because it ensured for him the highest possible price for his product. There was nothing in such a contract against the public interest. It was to the advantage of the public of the country that so important a national industry as the dairy industry should be fostered, and that co-operative dairy companies should have the power to bind their members in any reasonable way and by any reasonable contract to make their supply continuous, so that they might be able to produce the greatest value for the lowest possible overhead charges, and thus prosper. The prosperity of the country depended very largely on the prosperity of the dairy industry. At the hearing of the present case model articles of association for co-operative dairy companies prepared for the National Dairy Association were produced. Those articles contained a similar provision to Article 55, which had no doubt been widely adopted. His Honour could see no reason why co-operative dairy companies should not make valid contracts of that nature with their members.

But where a company wished to rely on the terms of one of its articles as a contract with its members it must prove *aliunde* that such a contract was made. The onus seemed to His Honour to be on the company. The contract must be proved just as a contract with a stranger upon which the company relied would have to be proved by it. The mere proof of the article was not by itself sufficient proof of the contract. In His Honour's opinion the company had failed in its proof of a contract in the terms of Article 55 with the plaintiff. It could not prove that he was present at either of the meetings when Article 55 was adopted. It could not prove that the article was ever brought to the notice of plaintiff, and His Honour accepted plaintiff's oath that he never knew of it until he had already incurred the penalty. It was clear that the plaintiff agreed to the contract evidenced by Article 3 (a) of the original articles, which provided that the whole of the nett profit (after providing for dividends on the shares) should be paid to suppliers who held the necessary number of shares; for he took up the necessary number of shares in 1911, and thereby qualified himself to receive his share of the nett profits. It was equally clear that he agreed to the alteration of 1912 as to taking up more shares, for he applied for the necessary shares and duly paid for them. But there was no evidence whatever to show that he agreed to any further alteration of his contract with the company. Consequently he was not bound by any attempted alteration of that contract by the company. A contract could not be varied except with the consent of all the parties to it. His Honour therefore held that the milk supplied by plaintiff to the defendant company during the Season 1924-25 was supplied under the contract evidenced by Article 8 (a) of the original articles, as amended in 1912, and under that contract the plaintiff was entitled to the whole of his share of the nett profits. As to whether the particular contract alleged, if it had been found that it was a contract agreed to by the plaintiff, would have been void as in unreasonable restraint of trade, His Honour expressly refrained from deciding. There were other articles which had been referred to which, it was argued, read in conjunction with Article 55, would render such a contract void as being in unreasonable restraint of trade. His Honour had not quoted those articles nor considered closely their effect, because such a course was unnecessary for the decision of the present case. All His Honour had said was that if framed in a reasonable manner a contract with a shareholder that he should give his whole supply of milk for a season to the company, under pain of the company forfeiting a part of the price, would not be void as being an unreasonable restraint of trade.

Judgment for plaintiff.

Solicitors for plaintiff: **A. Chrystal,** Eltham.

Solicitors for defendant: **Syme and Weir,** Eltham.

Burnard v. Lysnar.

A Review of the Reasons for the Judgments in the Several Courts.

The decision of the Judicial Committee of the Privy Council in *Burnard v. Lysnar* is now to hand. For several reasons the case attracted considerable interest when it was before the New Zealand Courts and the questions at issue between the parties would of themselves, it is thought, warrant notice in these columns. Further, the decision reaches New Zealand at an opportune time, when the question of the abolition of the right of appeal to the Judicial Committee is under discussion, and furnishes a powerful argument for the retention of that right, for it is seen that the Board decided the appeal upon an aspect of the matter not considered at all either in the Supreme Court or in the Court of Appeal.

To appreciate fully the reasons given for the judgments in the several Courts it is necessary first to traverse at some length the facts of the case. One Bennett was the holder in due course of two promissory notes (the Privy Council speaks of a single note, but the point is immaterial) signed by G. H. Lysnar and endorsed by W. D. Lysnar; Bennett knew that the latter had not received value for the endorsements and was only an accommodation party. On 26th October, 1923, the notes being overdue, Bennett commenced an action (or, it may be, two actions—the statements in the judgments conflict) in the Supreme Court against both G. H. and W. D. Lysnar claiming the moneys due under the notes. Neither defendant put in a defence and Bennett, by identical letters of his solicitors, Messrs. Burnard and Bull, intimated to each defendant that, failing payment by a date named, judgment would be entered and proceeded upon without delay. W. D. Lysnar offered to furnish security from his own property if time for payment were given and judgment in the action not taken. A deed was accordingly drawn up by Messrs. Burnard and Bull and duly executed on 21st December, 1923, expressed to be made between W. D. and G. H. Lysnar as grantors and Bennett as grantee. It recited that W. D. Lysnar was the owner of the chattels scheduled, that the grantors were jointly and severally indebted to the grantee in the sum of £5,280, and witnessed that in consideration of the sum now owing by the grantors to the grantee W. D. Lysnar assigned to the grantee the scheduled chattels by way of mortgage to secure its repayment with interest in manner thereinafter provided, and the grantors jointly and severally covenanted for repayment of the £5,280 as follows: (a) £1,000 on 20th January, 1924, (b) £1,000 on 20th January, 1925, (c) £1,000 on 20th January, 1926, (d) the balance on or before 20th January, 1927. W. D. Lysnar's evidence that a draft of the deed recited that he was a principal debtor, and that this recital was struck out on his refusal to sign the document unless the words were deleted, was rejected by Ostler, J., who accepted Mr. Burnard's evidence that had he supposed W. D. Lysnar to be a surety he would have felt it his duty to insert terms similar to those of a bank guarantee taking away his special rights as a surety.

The first instalment of £1,000 due under the deed was duly paid to Mr. Bennett. On 24th August, 1924, a transfer of the security to Mrs. Burnard, the wife of Mr. L. T. Burnard of Burnard and Bull, was registered. It should be stated, at this stage of the narrative, that G. H. Lysnar had mortgaged certain of his properties to Burnard and Bull to secure a separate indebtedness of his own; with that indebtedness Mrs. Burnard was in no way concerned. No interest was paid in 1924 under the deed of 21st December, and on December 22nd, 1924, W. D. and G. H. Lysnar were notified by Mr. Burnard in identical letters that £1,000 principal was due on 20th January, 1925, and that in addition to the overdue interest, payment of that amount would be required on that day; no response was made to that demand. On 21st January, 1925, a further letter was addressed by Mr. Burnard to G. H. Lysnar, and a copy of it sent at the same time to W. D. Lysnar, stating that if £400 was paid by G. H. Lysnar in respect of his personal indebtedness to Burnard and Bull, and the sum of £428 accrued interest and £600 principal paid under the security, the writer would be prepared to treat that security as current and allow a further three months for payment of the balance of overdue principal, £400; the letter concluded by saying that if the proposal was not strictly complied with steps would be taken to enforce the security. After a series of interviews between G. H. Lysnar and Mr. Burnard an agreement was come to between them on 27th March, 1925, for the postponement of certain payments under the security. It is unnecessary to state in detail the terms of this arrangement. The Lysnars did not strictly adhere to their obligations under the arrangement, and *letters were sent by Messrs. Burnard and Bull to both W. D. and G. H. Lysnar on 1st April, 1925, 25th June, 1925, and 26th March, 1926, all referring to the arrangement of 27th March, 1925, and making direct demands for fulfilment of the arrangement. On 14th April, 1926, £1,750 was paid to Mr. Burnard on account of the moneys then due, this sum being portion of a sum raised for the purpose by G. H. Lysnar on the guarantee of W. D. Lysnar.* Further defaults were subsequently made and Mrs. Burnard commenced an action against W. D. and G. H. Lysnar claiming the moneys then due under the security.

For the purpose of this article it is unnecessary to refer to the partial confession and partial defence of G. H. Lysnar who accepted the judgment of the Supreme Court against him for the full amount claimed. But W. D. Lysnar claimed that he was to the knowledge of the plaintiff a surety only as between himself and G. H. Lysnar, and that he was, therefore, discharged by the making of the arrangement of 27th March, 1925. It was admitted that Mr. Burnard's knowledge must be attributed to the plaintiff.

Ostler, J., the trial Judge, decided against this contention, holding that it had not been proved that Mr. Burnard at any time knew W. D. Lysnar to be only a surety, and that the mere fact that Bennett knew that he did not receive value for his endorsements to the notes did not prove that this fact was known to Mr. Burnard. The Judicial Committee while affirming the learned Judge in the result did not, it should be observed, proceed upon the same ground, and indeed inferred that W. D. Lysnar's position as surety under the promissory notes ought to have been known to Mr. Burnard as Bennett's solicitor.

W. D. Lysnar appealed and the appeal was heard by Sim, A.C.J., Herdman, Reed and Adams, JJ., and allowed. Reed, J., delivered the judgment of the Court, and the reasons of the learned Judge can be thus summarised:—

(i) Bennett knew the appellant was only an indorser for accommodation of the notes.
(ii) When Bennett took the security in the shape of the bill of sale the position had not altered: the appellant did not become a principal debtor but remained a surety.
(iii) That it had to be inferred that Mr. Burnard knew this when he prepared the security.

And the judgment was based, as well, upon another ground:

(iv) That the respondent took the transfer of the bill of sale subject to the equities by which Bennett was bound.

From this judgment Mrs. Burnard appealed to the Privy council, and the appeal was argued before an exceptionally strong Bench—Lord Hailsham (the then Lord Chancellor), Lord Shaw, Lord Carson, Lord Blanesburgh, and Lord Tomlin. The judgment of the Judicial Committee was delivered by Lord Blanesburgh. On one ground only, and that a ground not touched upon even remotely in the Supreme Court or Court of Appeal, the case is most convincingly decided, and it is difficult to conceive that anyone who reads carefully the facts of the case can doubt for one instant the correctness of the decision on the point taken. The second paragraph of the Board's judgment commences thus:

> "The Courts of the Dominion, perhaps accepting the allegation at its face value, assumed, as it would appear, without any definite inquiry into the circumstances, that the arrangement alluded to" (*i.e.*, of 27th March, 1925) "was one for which George Henry Lysnar was solely responsible, and they did not concern themselves to ascertain how far, in fact, the respondent was cognisant of and had become bound by its terms."

Their Lordships could not doubt upon the evidence that throughout the negotiations which led to the arrangement of 27th March, 1925, G. H. Lysnar was present not only on his own account but with the full knowledge of W. D. Lysnar, and intent on making, on behalf of both as he purported to do, the best arrangement possible for postponing payment of what was due, and whether or not W. D. Lysnar approved or consented to the arrangement at the time, their Lordships were satisfied that it was subsequently ratified by him, so that it became an arrangement with himself as completely as if his signature had been attached thereto. *It was only thus that, without attributing to W. D. Lysnar a dishonourable silence which their Lordships would be slow to impute to him, his failure to dissociate himself from the agreement, as an answer to Mr. Burnard's successive letters, could be understood. It was only thus that his joining with G. H. Lysnar as late as 1927 in raising money in meeting Mr. Burnard's demands could be explained.* Their Lordships were also, it would seem, quite ready to hold, had it been necessary for them to do so, that the Court of Appeal was wrong in holding that the suretyship in respect of the notes continued in respect of the deed, or were at all events prepared to hold that neither Bennett nor Mr. Burnard was bound to presume that the suretyship persisted.

It may no doubt be said that the Judicial Committee is only right because there is no higher appellate tribunal; but it is difficult to deny the force of the reasoning contained in the italicised words. It is certainly surprising that the point taken should be completely overlooked in the Supreme Court and Court of Appeal, and one can only wonder whether the position would have been otherwise had the learned members of the latter Court prepared and delivered separate judgments. Whatever else may be said, *Burnard v. Lysnar* stands as a powerful argument for the retention by New Zealand of the right of final appeal to the Privy Council.

Literature and the Law.

A Recent Magisterial Decision on the Indecent Publications Act.

Section 5 of the Indecent Publications Act, 1910, reads as follows:—

> "In determining whether any document or other matter is indecent within the meaning of this Act the Magistrate shall take into consideration not merely the nature of that document or matter itself, but also the nature and circumstances of the act done by the defendant with respect thereto, and the purpose with which the act was done, and the literary, scientific, or artistic merit or importance of the document or matter; and no document or matter shall be held to be indecent unless, having regard to these and all other relevant considerations, the Magistrate is of opinion that the act of the defendant was of an immoral or mischievous tendency."

Mr. E. Page, S.M., has recently given at Wellington an important and interesting decision dismissing an information laid under the Section. The statute has seldom been considered by our superior Courts, and for this reason, and in view of the attention that has recently been drawn in English legal circles to the subject of indecent publications generally, it is thought that a statement of the learned Magistrate's judgment will be of interest to most members of the Profession. The facts stated below are those found by the learned Magistrate.

The defendant, who was a bookseller, was charged with selling an indecent document, to wit, a book entitled "*Enduring Passion*," by Doctor Marie C. Stopes. The writer, who was a Doctor of Science, London, had written a number of other works: "Sex and the Young," "The Human Body and Its Functions," "Married Love," "Radiant Motherhood," "Wise Parenthood." She was a strong advocate of constructive birth control, had established in London a Birth Control Clinic, and her work "*Contraception*: Its Theory, History and Practice," which had run through many reprints and had been translated into many languages, appeared to be regarded as an authority on that subject. "Enduring Passion," which was stated by its author to be a continuation of her earlier volume "Married Love," written some ten years previously, set forth her views as being "further new contributions to the solution of sex difficulties." It was written for married people who were no longer young. It dealt with a number of the difficulties and disappointments liable to be experienced in their marital relations by those for whom it was written, and it sought by its advice and guidance to improve their health and to enhance their happiness and content. It advocated throughout a mutual adjustment of their needs. In the course of its twelve chapters it discussed with much detail the psychological and physiological problems with which it dealt.

The learned Magistrate said that it was obvious that in works of a medical or *quasi*-medical or sociological nature subjects might be dealt with that would not

be tolerated in the pages of a novel. Though, therefore, the nature of the book was an important element to be considered, the test of criminal liability was not the quality of the book itself but the act of the defendant in relation thereto. The question was: Was the act of the defendant of an immoral or mischievous tendancy? The evidence showed that on receipt of the book from the publishers the defendant, knowing the general nature of the works of the writer, enquired by telephone from the Police Department in Wellington whether the book was banned. On being advised that it was not, he placed it on his shelves for sale. It was the practice of the Customs Department to refuse entry into New Zealand of books which were indecent or obscene, and such books were spoken of as being banned. Power to refuse the entry of such books was contained in Section 46 of the Customs Act, 1913. On the 26th April, 1929 a detective, under instructions, went to the defendant's shop. He saw displayed in the side window amongst a large number of books there exposed for sale, three volumes of the works of Dr. Stopes, one being the book under consideration, the other two being "Radiant Motherhood" and "Sex and the Young." He saw the defendant and applied to purchase the three, but the defendant, who had heard through his association some suggestion of the possibility of the other two being placed on the list of banned books, declined to sell them to him but sold him that one. The detective, who was married, was 32 years of age. He stated that the book was sold by other booksellers and that it had not been banned.

In His Worship's view the book was entirely unsuited for indiscriminate sale. Read by those to whom it was addressed and for whom it was written it would, he thought, prove in many cases a help and would tend to promote happiness in their relations with one another. The sale which was challenged in the proceedings was a sale to a married man of mature years. In His Worship's opinion the evidence in regard to the possession and sale of the book by the defendant as above detailed did not establish that his act with respect thereto was of an immoral or mischievous tendency.

On one point, at any rate—the weight of the fact, in considering whether the act of the defendant was of an immoral or mischievous tendency, that the sale complained of was to a detective of mature years—the learned Magistrate certainly breaks new ground.

Testators' Family Maintenance.

The latest issue (July) of the *Law Quarterly Review* contains an article on the subject of Testators' Family Maintenance in New Zealand by Mr. S. A. Wiren, of Wellington. The mass of reported decisions under the Act is rather embarrassing to the Dominion practitioner, and while Mr. Wiren's able article does not, of course, purport to cite every decision, it will without doubt be found a useful guide to the main principles and to the main facts which the Court takes into consideration in determining the question of "adequate provision."

"With existing methods of legislature there is very little security that the final expression of the law-maker's intention will be apt, adequate, or even consistent."

—Sir Frederick Pollock.

London Letter.

Temple, London,
19th June, 1929.

My dear N.Z.,

Hot controversy maintains as to the action of Sir William Jowitt, become Attorney-General by a going over to Labour. The complainants' case is an obvious one, and you will have all the details and points of it well in your mind long before this letter reaches you. The respondents' case (and there are more of the Bar, who do respond, than you might have been led to suppose) is less obvious; it certainly does not rely on the published correspondence between the Attorney-General and the Prime Minister, which, as all agree, is unfortunate, not to say sickly. The case, for the defence of the action taken, first depends upon the utility of it, from a national point of view; it has resulted in securing for the Attorney-Generalship a King's Counsel fit for the post, a consummation much to be desired but not otherwise attainable. But there is more to it than that. Many of us feel that the present division of parties is entirely artificial; and there is a prevalent sympathy for the first man who has had the sense to say so and act accordingly. Ramsay Macdonald, and his real and trusty supporters, are as much Liberal as Lloyd George and his men; in a sense neither element is pure Liberal, but in another sense both are as near the old conception as is possible in these times, when all political parties are necessarily radical with a tendency to reasonable socialism. To refrain from admitting, and even avowing, the true condition of political differences is not only to delay progress towards the best national management, but it is actually to threaten the perfect working of the fundamental principle of British constitutional government, the inter relation and inter-action of Government and Opposition. Apart from the inept letters which announced it, the event displays what is a chief characteristic and merit of the new Attorney, his astonishing candour, as courageous, at least, as it is cynical. In what situation the controversy stands at the moment, it is difficult to ascertain or to estimate. Undoubtedly feeling was very strong, at the outset, against the individual under criticism; but when an anonymous "K.C." weighed in with a letter to the "Times," severely condemning Jowitt and professing to speak for the whole English Bar, an almost equally strong feeling developed in Jowitt's defence, instigated by the facts that "K.C." assumed a mandate which he clearly had not received nor was entitled to take for granted and that he remained anonymous. "Whatever you may say to the disadvantage of Bill Jowitt," I have heard an old and respected King's Counsel declare, in consultation before going into action against him, "no one can deny he has courage." And when a man of candour and courage is attacked by an anonymous, he is immediately and automatically assured of a certain support in his defence.

More frankly speaking, there is a large element at the Bar (before it and behind it) which refrains from political activity, because it believes that we barristers are necessarily men to be briefed and, in such issues as are the political, it is not really conceivable that we should be ever guided and inspired and decided by any convictions. If this belief is well founded, then all King's Counsel in the House are there as holding briefs

for political employers and for a political remuneration; and if that be true, then there is nothing iniquitous in what has occurred and much to be commended in respect of the elimination of humbug. It is as difficult to know which side of the controversy is right, as it is to know whether British righteousness (a very definite racial element) is due to innate virtue, in the first place, or, as some say, to inveterate humbug.

A more serious matter, though very much less criticised and more readily taken for granted, is the arrangement by which Slesser becomes a Lord Justice of Appeal, a post for the discharge of whose functions he is (so far as we yet know) without qualification. As another, and more balanced, correspondent in the "*Times*" has pointed out, the Court of Appeal is to-day the highly responsible and severely tested custodian and guardian of our great Common Law. Quite recklessly, and quite callously, the political powers that now be use that Court as a resort, reward and refuge for a deserving minion; and Sir Henry Slesser, has, apparently, no difficulty of soul or conscience in lending himself to the expedient and profiting by it. Wherefore has the Idealist allowed himself to be removed to a sphere where he can render his people no sort of assistance, since he has gone where he must administer the law as it is and cannot change it to make it more fair? And why, being clever enough to get where he has got politically, has he been so foolish as to put himself in a position where he must be misunderstood?

Anyhow, the promotion of Lord Justice Sankey is a matter to be pleased about, uncontroversially and heartily.

Big Finance mainly occupies the attention of the Courts, from the House of Lords down to the High Courts of first instance, in so far as these are not unmanned by the prevalence of the Summer Assizes. The Marconi organisations and apparatus occupy, or have recently occupied, the Judges of first instance, their patent, as well as their share, rights being subject of discussion. I doubt if these are matters to be reported to the readers of this journal, except in so far as they are operators on 'Change. No more, I expect, are the current proceedings in the test case being heard by the House of Lords as to the loan relations between Mr. Urquhart and Messrs. Workman, Clarke and Company, Limited, all of Belfast, whence the litigation comes on final appeal. I have not seen, though you may have done, any report of the proceedings, either on first hearing or on appeal, in Ireland; but one of the solicitors involved is a club-mate of mine; and I have run across him both before and after the lengthy visits he has lately had to make over the Channel in their prosecution. I suggest you look out for the Lords' final judgment, when it is arrived at; the case involves some interesting points, so far as I follow and recall my man's detail of it, as to the company prospectus and the directors' liability. I have not a very exact knowledge, however, because we meet as from different sides, he coming from Chancery (in this matter) and I, by calling, from the Common Law side.

Lastly as to current cases, there is a small matter to be mentioned but one which, possibly, may be as agreeable to you as it is to me. No doubt with you as with us there is a habit of cross-examining leaders which tends to become intolerable when carried to excess: the habit of warning the witness to be very, very careful and of menacing him with most serious consequences, when he, poor man, is doing his best to tell the truth as he recalls it and, at worst, is only being discovered in small inaccuracies and being put to the necessity of correcting what he first said. A London City Criminal Court Bench has had the good sense to protest against the carrying too far of this tiresome habit; and the protest has been broadcast and should do much good. After all, there should be some distinction observed as between the witness-box and the dock; or even if there is to be no such distinction, it is not too much to ask that, in the former as in the latter, a man should be presumed to be innocent until he is proved guilty. Not every witness is necessarily suspect; not every man, who on his oath makes a mistake or has to correct a detail upon further consideration, is necessarily a blackguard.

I conclude this letter by a sympathetic reference, if you will permit it, to the earthquake you have recently suffered and which fills our newspapers, as I write; and a further reference, equally sad, to the first misfortune (involving death) to our Imperial Airways. The catastrophe of the "City of Ottawa" will no doubt be subject to an enquiry of a searching nature. As pilot, mechanic and wreck are all available, the result of the enquiry should be profitable with a view to the prevention of similar accidents in the future. It will be interesting to see if this event is the forerunner of a code of air navigation laws, rather more positive and informed than such as yet exists or can, having regard to the novelty of the subject, exist, and somewhat on the basis of those parts of the Merchant Shipping Act which bear upon safety at sea.

Yours ever,

INNER TEMPLAR.

Land Transfer System.

Compulsory Registration.

The annual report of the Registrar-General of Land states that the work of bringing all titles to land under the provisions of the Land Transfer Act, as required by the Land Transfer (Compulsory Registration of Titles) Act, 1924, is being steadily proceeded with and has been completed in the districts of Canterbury, Hawke's Bay, Gisborne and Westland, with the exception of a few titles in each district with which it has been considered unwise to deal at present owing to grave doubt as to ownership or for some other reason. The work is nearing completion in several other districts. The fees paid during the year under the Act of 1924 amount to £6,720, while the fees outstanding total £19,583 15s. 0d.

"Not only does the Crown get in some respects an advantage over the subject, but, unfortunately, there is so much mystery and obscurity about Crown proceedings that the subject is afraid to support his rights against the Crown, and in a great many cases is lead by fear to put up with less than justice. It is very important that all legal proceedings against the Crown, or otherwise, should be made as simple and intelligent to the public as possible, and at present that is not the case."

SIR THOMAS HUGHES, K.C.

Australian Notes.

(By Wilfred Blacket, K.C.)

Under the Commonwealth of Australia Constitution Act the Federal Parliament has power to enact laws relating to divorce. It has not yet done so, and as the States, pending the passing of such an enactment retain their power of legislating on this subject, the variance of enactment and resulting confusion are constantly increasing in importance. A recent suit tried before Burnside, J., in Perth, W.A., is illustrative of the latter fact. The parties had been married in England and, while living there, in 1924 had executed a deed of separation under which the husband agreed to pay his wife £360 per year. Shortly after this he went to Western Australia and made a permanent home there, but neglected to pay anything for maintenance as agreed. The wife came out to Perth in 1929, and sued for divorce under a provision of the Divorce Amendment Act, W.A., which provides that divorce may be granted to a wife if "being separated from her husband by an order of a competent Court, or under a deed of separation, he repeatedly and habitually fails during a period of three years and upwards to make periodical payments for her maintenance under the order or deed." His Honour granted a decree of divorce although he expressed some doubt—it may indeed have been a reasonable doubt—whether a wife who had been separated from her husband in England could come to Australia and acquire the domicile of her husband there, but the point of present importance is that the ground of divorce admitted by His Honour would not be a good ground in at least two other States of the Commonwealth, and I think not in any. In New South Wales, as I mentioned recently, arrears of money due under a judicial decree may now be sued for under the sections of the Acts relating to deserted wives and children, but default in this behalf is no ground of divorce although it may be relevant on the ground of desertion.

The Sydney police have recently prosecuted a great number of persons for conducting starting price betting shops, and included among the defendants have been a considerable number of women who carry on this illegal business in small grocery or confectionery shops. Some of these female defendants have been doing considerable business and have been heavily fined. Herein is proof of the statement very commonly made that "women can do things every bit as well as the men can," and that "women suffer great hardship under man-made laws." It is, however, only the little fish that suffer from these prosecutions. Nearly all the big bookmakers have betting shops in Sydney where very heavy ante post and starting price betting takes place, and some years ago just before a spring meeting the police raided a great number of these shops and arrested the persons conducting them. Then it was found that if a bookmaker was proved to be doing starting price betting the license permitting him to bet on licensed race courses would be automatically cancelled. So many shops had been raided that if the proceedings were continued to conviction there would be a scarcity of bookmakers at Randwick, so the defendants were informed that they might go *sine die*, and the spring meeting was a great success.

Writing of bookmakers reminds me that many years ago—Consule Planco, or as we say here, when Parkes was Premier—a junior came to me with an opinion he had written advising a client that he had a good cause of action. The facts were that the client had obtained a license from the A.J.C. permitting him to bet on registered courses in the metropolitan area during the year, but providing that if he betted on unregistered courses on any day when there were races on a registered course his license would be cancelled. He did the forbidden thing and was prevented from betting at Randwick. My learned friend had advised that the condition was bad because it was against public policy as it would tend to limit the number of bookmakers ready to "set punters at the ponies," and was also "void as being an agreement in restraint of trade."

In Sydney it always has been the right of any junior to go to a senior and get his assistance upon any point arising in his practice, and especially upon any question of etiquette; to this extent we assist one another, but we never have been a sociable fraternity. We are as "brothers in law" rather than "legal brethren." In Melbourne the barristers have, or at least had, a Saturday night supper club, a walking club, and other friendly associations, and at half past four half the members of the Bar were gathered together at afternoon tea. Our only rendezvous is the University Club where some barristers lunch and dine, but they constitute only a minority of the barristers and of the club members. It would be impossible to hold an Australian Conference of the kind recently held in New Zealand for the interstate borders have always been unto us as the Great Wall once was to China; and I doubt very much whether even the lawyers of New South Wales alone will ever hold such a conference.

Dontreband v, Dontreband, in divorce, is an interesting case on the point of collusion. The wife filed her petition alleging adultery and asking for judicial separation. The husband did not defend. After petition filed the husband agreed to pay her a sum of £4,000 which she claimed to be due to her, and with his consent the petition was amended to ask for a dissolution of the marriage. A decree *nisi* for dissolution was granted, but before the rule was made absolute the husband filed a notice of motion asking for a rescission of the decree and the substitution of a decree for judicial separation. The matter was brought before the Full Court for a decision on the point whether there had been collusion. The Court decided that the mere fact of an agreement, whereby the petitioner for valuable consideration agreed to change the form of relief applied for, so as to secure to the respondent complete relief from the marriage tie, could not be treated as collusion.

On page 223 of this Journal's issue of August 6th, "Junior" raises the question whether District Courts should be re-established in the Dominion; facts relating to District Courts and their work in N.S.W. may therefore be of interest. These Courts are held by judges who receive a miserable salary of £1,500 and pension dependent upon years of service, and who act also as Chairmen of Quarter Sessions. The Courts have jurisdiction at Common Law up to £200 where title to land is in question, and up to £400 in other cases. Equitable defences may be pleaded. The suit is begun by pliant accompanied by particulars where these are appropriate. The defendant who desires to contest the claim must give notice of appearance and if he

wishes to set up the Statute of Frauds or any other special defence must do so within a time limited. At the hearing he has to state his "grounds of defence." The pleadings are quite informal. I remember "getting home" in one case where the plaint was for "goods sold and delivered," and the particulars were "One black gelding branded J.S. in circle on near fore shoulder killed by the defendant's negligence worth £30." In Sydney about 500 cases are listed for hearing each month: about twenty or thirty are jury cases, for either party may obtain a jury of four as of course. Five judges sit regularly in the country districts.

The New Attorney-General.

Sir W. A. Jowitt, K.C.

The members of the English Bar do not appear to be unanimous in the views they take as to Mr. (now Sir) W. A. Jowitt's political opportunism in changing from an elected Liberal to a member of the Labour Party after the numbers went up. "Inner Templar" deals with the matter in his London Letter rather favouably to the person concerned. The views expressed in the English legal periodicals which are now to hand, must be read subject to the fact that Sir William Jowitt has since resigned his seat and been returned again by his electorate, this time as a straight-out Labourite.

"*Outlaw*" a vigorous, but apparently always fair, critic writes in the *Law Journal*: "Of the two shocks administered in rapid succession to an innocent and unsuspecting Bar, the translation of Jowitt has affected them more deeply; and not yet have the troubled waters of the Temple been smoothed to their accustomed calm. The Bar has taken it badly; and the serene acceptance by the London press of this sudden political conversion is in strange contrast to the free expressions of opinion heard within the outspoken and privileged precincts of the Inns of Court." The *Law Journal* in an editorial, is equally outspoken: "A flexible mind is no doubt an asset in some circumstances, and to confess a change of views after mature reflection may on occasion be the mark both of sincerity and courage. But the political flexibility of Mr. Jowitt is, we believe, without parallel in modern times, and his courage in remodelling his political convictions might be—nay, has been—called by other names. Elected as a Liberal on May 30th, and appointed Socialist Attorney-General on June 7th, Mr. Jowitt can hardly be surprised if his appointment is not wildly acclaimed by the Bar. Still less can he wonder if the general opinion is that the letter to the Prime Minister in which he so prettily sets out his creed would have been a far more seemly document had it been dated in May instead of June. Mr. Jowitt may be acting from the highest motives of public duty in taking office but he is quite experienced enough to know that, as a result of delaying his formal adherence to Labour till the material reward was certain, he is in the position of the man who gets his bet on after the race, and he must expect to hear it said that a knighthood, the Attorney-Generalship with its not inconsiderable prestige and remuneration, and the chance of promotion to still higher things are not negligible spurs in the direction of that particular kind of public duty."

Probation.

Nature of Cases in which Granted During Year.

The mere name of an offence—e.g., theft, assault, arson—is, of course, no guide at all as to whether the case is one for probation, the whole of the circumstances relating to the offence and the character of the offender requiring consideration. Nevertheless the following list, taken from a recent Departmental report, of offences for which probation was granted during the year ended 31st December, 1928, is of some interest.

Offence.	Admitted to Probation.	Deferred Sentence	Total.
Theft	353	65	418
False pretences	66	18	84
Breaking, entering, and theft	40	4	44
Vagrancy	17	9	26
Unlawful conversion of property	17	5	22
Receiving stolen property	19	2	21
Forgery and uttering	18	2	20
Common assault	13	6	19
Obscene language	12	4	16
Attempted suicide	1	15	16
Breach of probation	11	..	11
Unlawfully on premises	7	4	11
Mischief and wilful damage	6	2	8
Indecent assault	4	2	6
Indecent acts	3	2	5
Breach of Bankruptcy Act	4	..	4
False declaration under Marriage Act	3	1	4
Drunkenness	..	4	4
Intoxicated while in charge of a car	3	..	3
Released under section 15 (in lieu of bail)	3	..	3
Disobedience of maintenance orders	2	1	3
Trespassing on wife's premises whilst separated	..	3	3
Carnal knowledge	2	..	2
Arson	2	..	2
Breach of Post and Telegraph Act	2	..	2
Unlawfully supplying noxious thing	1	1	2
Cruelty to animals	1	1	2
Stowing away	..	2	2
Manslaughter	1	..	1
Bigamy	1	.	1
Dual voting	1	..	1
Permitting use of an instrument	1	..	1
In possession of unregistered firearms	1	..	1
Breach of prohibition order	..	1	1
Totals	615	154	769

"No Judge ever gave a long judgment without saying something which would better have been omitted."

—Mr. Justice Connolly.

Bills Before Parliament.

Apprentices Amendment. (Hon. Mr. Veitch.) Qualification of representatives of employers and workers on Apprenticeship Committees.—Cl. 2. S. 4 of principal Act amended by inserting new subsection after subsection (3) providing for vacation of seat on Committee by absence from meetings.—Cl. 3. Where Apprenticeship Committee unable to come to decision matter to be referred to the Court, person or persons who would have been affected had the Committee come to a decision being entitled either to appear before or be heard by the Court or to submit to it a statement in writing.—Cl. 4. Court may by order authorise District Registrar to exercise powers of Apprenticeship Committees in certain cases: order may be cancelled or amended by Court at any time.—Cl. 5. Limiting area within which Apprenticeship Committee may exercise its functions: Court in certain circumstances may extend locality.—Cl. 6. Subsection (4) of Section 5 of principal Act amended by inserting after paragraph (j) new paragraph giving Court certain powers as to dealing with complaints by employer of misconduct of apprentice, and by amending paragraph (k).—Cl. 7. S. 7 of principal Act amended.—Cl. 8. Registrar or Apprenticeship Committee may state case for advice and opinion of Court.—Cl. 9. Subsections (1) and (8) of Section 8 of principal Act amended.—Cl. 10. Where body corporate party to contract of apprenticeship contract need not be under seal.—Cl. 11. Subsection (3) of S. 9 of principal Act amended by adding proviso prescribing time for taking of proceedings in respect of failure to register contract of apprenticeship.—Cl. 12. On bankruptcy of employer or winding-up of employer company Crown may order payment out of assets to be made in certain cases, such amount to constitute a debt and to rank equally with debts mentioned in paragraph (d) of S. 120 of Bankruptcy Act, 1908, or in S. 249 (1) of Companies Act, 1908, as case may require.—Cl. 13. Providing for suspension and discharge of apprentices for misconduct or grave incapacity: S. 15 of principal Act repealed.—Cl. 14. Section 16 of principal Act amended.—Cl. 15. Employer of apprentices to keep wages and time book.—Cl. 16. Copy of apprenticeship order to be exhibited in place where apprentice to whom order applies employed.—Cl. 17.

Bank of New Zealand Amendment. (Mr. Langstone). Proviso added to S. 2 of Bank of New Zealand and Banking Act Amendment Act, 1898, to effect that persons appointed by Governor-General in Council as directors of Bank of New Zealand shall not while holding such appointment be directors or shareholders in any other bank, insurance company "or any other public or private commercial company."—Cl. 2. S. 9 of Bank of New Zealand Act, 1920, amended by omitting from paragraph (b) of subsection (2) the word "no" and substituting the word "the."—Cl. 3. S. 10 of that Act amended by omitting from paragraph (d) of subsection (2) the word "no" and substituting the word "the."—Cl. 4. S. 13 of Bank of New Zealand Act, 1926, amended by omitting from paragraph (c) of subsection (1) the words "one-seventh" and "six-sevenths" and substituting respectively "one-third" and "two-thirds."—Cl. 5.

Counties Amendment. (Hon. Mr. de la Perrelle.) Separate rates made under S. 122 of principal Act or any special works rate made under S. 125 may, in certain circumstances, be made annually recurring rates.—Cl. 2. Separate rates and special-works rates may be made on authority of poll of ratepayers as well as by special order.—Cl. 3. S. 3 paragraph (a) of principal Act amended.—Cl. 4. S. 126 (1) of principal Act amended.—Cl. 5.

Hospitals and Charitable Institutions Amendment. (Hon. Mr. Stallworthy.) Making special provision as to administration of Picton Hospital in event of union of Picton and Wairau Hospital Districts. Provisional repeal of S. 9 of principal Act.—Cl. 2.

New Zealand Institute of Architects Amendment. (Mr. Wright). S. 27 of Act of 1913 amended by omitting from subsection (2) word "registered" and by repealing subsection (5).—Cl. 2. S. 8 of principal Act repealed.—Cl. 3. Every person entitled to be registered as member of Institute who (a) holds a recognised certificate as defined; (b) is over 24 and has for three consecutive years before 1st January, 1930, been *bona fdie* engaged as a principal in practice of architecture in New Zealand; (c) is over 25 and has been engaged for seven years before 1st January, 1930, in acquirement of professional knowledge in architecture in manner satisfactory to Board; (d) is engineer of not less than five years' experience and satisfies Board as to proficiency in duties of an architect; (e) has during three consecutive years before 1st January, 1930, been engaged in New Zealand for part period as in (b) and for part period as in (c) and satisfies the Board as to proficiency in duties of an architect (application for registration in (a) (b) (c) (d) and (e) must be made within twelve months from 1st January, 1930); (f) is over 21 and has not less than three years been pupil or apprentice to architectural practitioner entitled to membership of Institute on 1st January, 1930, and satisfies Board or Council of due diligence during such apprenticeship; (g) is over 21 and has served for period of not less than three years as pupil or apprentice to architectural practitioner as mentioned in (f) or completed course of study in architectural subjects at any college or school and has had such practical experience as in opinion of Board or Council fits him to be member of Institute (application for registration under (f) or (g) to be made within five years from 1st January, 1930); (h) has before 1st January, 1930, for three years continuously, with no greater interval than three months at any one time, been employed in New Zealand in any position in which his sole or principal duties were those of an architect, and satisfies Board or Council as to proficiency in duties of an architect; (i) has in opinion of Board or Council attained great eminence in profession of architecture and as to whom Board or Council considers it just and fitting that he be registered as member of Institute; (j) passes examinations required by Institute under provisions of Act and regulations. No person entitled to be registered under (f) or (g) unless pupilship, apprenticeship, study, or practical experience commenced before 1st January, 1930. Member whose name removed from register of members by reason of registration or non-payment of fees may apply to Council for re-admission. Council may grant re-admission upon terms and conditions. Members re-admitted deemed to have been members of Institute during period for which name removed.—Cl. 4.

Patents, Designs and Trade-marks Amendment. (Hon. Mr. Wilford.) Offices of Registrar and Deputy Registrar of Patents, Designs, and Trade-marks abolished and offices of Commissioner and Deputy Commissioner of Patents, Designs, and Trade-marks substituted therefor. Persons holding office as Registrar and Deputy Registrar become Commissioner and Deputy Commissioner. References to Registrar and Deputy Registrar deemed references to Commissioner and Deputy Commissioner.—Cl. 2. Remaining provisions of Bill are designed to give effect to the Amendments of the International Convention decided upon by the 1928 Conference of the International Union for the protection of Industrial Property. The English Parliament last year passed an Act to meet its obligations under the amended Convention, and this Bill is intended to keep our law uniform with that of Great Britain. Cl. 3 of the Bill amends S. 1 of the principal Act, relating to the grant of a patent. A patent usually bears the same date as the date of the application for it. Where, however, a patent has been applied for in another Union country and application is then made in New Zealand within the prescribed period for a similar patent, the date of the patent, if granted, will be the date of the application in the other country (S. 144 of principal Act). The date a patent would bear, if granted, is therefore substituted for the date of the application for the patent in considering various points arising out of opposition proceedings. Cl. 4 amends S. 29 of the principal Act, relating to the abuse of monopoly rights. A period of three years after the date of the grant of a patent is fixed before proceedings can be commenced under the section. Where non-working is alleged the time is to be reckoned from the grant of the patent instead of the date of the patent. Cl. 5 replaces S. 51 of the principal Act, relating to inventions on visiting ships, the use of which in New Zealand waters would constitute a technical breach of a New Zealand patent. The new section is extended to apply to aircraft and land vehicles temporarily or accidentally in New Zealand.

Shops and Offices Amendment (No. 2). (Hon. Mr. Veitch.) Saturday closing-day and weekly half-holiday requirements of principal Act deemed, in certain events, to be complied with. S. 26 (3) of principal Act and S. 11 of Act of 1927 consequentially repealed.—Cl. 2. S. 30 of principal Act amended as to dispensation with requirement as to separate entrances. Cl. 3. S. 33 of principal Act amended to extend Minister's powers of prohibition of after-hours trading.—Cl. 4. S. 66 (2) of principal Act amended to extend Inspector's right of entry.—Cl. 5.

Correspondence.

The Editor,
"N.Z. Law Journal."

Sir,

Effect of Assignment of Part of Debt.

With reference to the notes under this heading, (ante p. 170) of your contributor "Senior Counsel," in which he mentions the omission, apparently, in *In re Gleeson*, 5 N.Z.L.J. 344, (1929) G.L.R. 100, of reference to *In re McDonald*, (1918) N.Z.L.R. 626, and to *Bank of Liverpool and Martin's Ltd. v. Holland*, 32 Com. Cas. 56; but there are also two other important New Zealand decisions. In *Hodder and Tolley Ltd. v. Cornes*, (1923) N.Z.L.R. 876, at p. 878, Salmond, J., said: "The assignment, since it does not include the entire debt but merely a part of it, is not a valid assignment at law under Section 46 of the Property Law Act, 1908: *In re Steel Wing Co.*, (1921) 1 Ch. 349. Subject, however, to certain considerations to which I shall presently refer, it is a good equitable assignment." Then in *McPherson v. Andrew Lees Ltd.*, (1926) N.Z.L.R. 523, Sim, J., at p. 525, said: "The decisions and dicta on the subject are referred to by Lawrence, J., in his judgment in *In re Steel Wing Co.*, (1921) 1 Ch. 349, 354. The weight of authority seems to be in favour of the view taken by the learned Judge in that case, that an assignment of part of a debt is not a good assignment within the meaning of the Judicature Act. I find it unnecessary, however, to decide this question in the present case."

Reference might also be made to *G. and T Earle, Ltd. v. Hemsworth*, 44 T.L.R. 605, where at p. 609 Wright, J., prefers once more *In re Steel Wing Co.* (*cit. sup.*). The learned Judge's decision was affirmed on appeal, 44 T.L.R. 758.—I am, etc.,

C. C. C.

Auckland.

The Editor,
"N.Z. Law Journal."

Sir,

Lawyers as Custodians of the Law.

The words of Sir Henry Slesser, K.C., at the annual dinner of the Leeds Law Society, might well be learned by every member of our profession in this Dominion. Sir Henry is reported as follows:—"Lawyers were not merely practitioners in the law: they were custodians, charged with the duty of protecting it from inroads and expounding its meaning. There never was a time when it was more important that they should safeguard legal traditions than today, for unless the Profession could defend the power of the common law there was a danger that the country might drift into a state where the legal sense was lost altogether. Lawyers must look with some disquietude on the tendency to exclude the jurisdiction of the High Court and to put the power into the hands of persons in civil departments, and they could not do a better work than to insist, regardless of politics, that no right should be taken from anyone or given to anyone without the safeguard of an appeal to the King's Bench." He went on to urge the necessity for the maintenance of a high standard of education in those entering the Profession. It was, he said, an age in which noise passed very easily for knowledge and sentiment for sense, and it was their duty to see that short cuts to knowledge, cheap methods of arriving at results, should be discounted. If other people were content with the meretricious and artificial there was the more reason that lawyers should insist for the honour of their Profession that they would have nothing but the best.—I am, etc.,

"Eldon."

Wellington Law Students' Society.

At the last meeting of the Wellington Law Students' Society Mr. H. F. von Haast, M.A., LL.B., delivered a most interesting address on the subject: "The Courts and Constitution of Jersey." It is impossible in a brief report to do justice to the address, but the following is an abridged account of some of the matters discussed by the speaker.

The judiciary of Jersey, said Mr. von Haast, was almost unique in that it consisted of twelve jurats elected for life by the rate-payers who exercised a dual function as Judges and Members of Parliament. Their position was peculiar in that they might have to pronounce on the legality of legislation enacted by themselves with others. The Court was presided over by the Bailiff who was the Chief Justice, the Speaker of the Estates, and the Chief Executive Officer, and possessed extensive powers for the regulation of the affairs of the Island, including the deportation of objectionable persons. The Bailiff, the Attorney-General and the Solicitor-General were appointed by the Crown. Below the Bailiff was the Greffier, who was the Registrar of the Court and also Clerk of Parliament. The Governor might also attend proceedings.

Sittings at *nisi prius* were held before the Bailiff and two jurats, while for cases in the Full Court or Court of Appeal seven jurats were necessary. All proceedings were in French, except where the parties to a document were English. Final appeal lay to the Judicial Committee of the Privy Council. Criminals were tried by the Grande Enquete, consisting of the Bailiff and seven jurats with a jury of twenty-four of whom seventeen had to agree for a conviction. Until 1852 all legal matters however small came before the Royal Court, but in that year a petty judge was appointed with limited criminal jurisdiction, and civil jurisdiction in petty debt cases up to ten pounds. The police system was mainly in the hands of civilians acting in an honorary capacity. The constable of each parish was head of the police and was assisted by officers called centeniers and vingteniers.

Twice a year the Royal Court sat as the Cour d' Heritage or Court of Inheritance and Real Property. Feudal seigneurs then appeared and answered their names, a remnant of the homage once done to the Sovereign. There was also the Clameur de Haro, a legal summary process availed of mainly in trespass, operating as an interlocutory injunction to stay proceedings until the decision of the Court which was summoned immediately after the claimant uttered the set form of words.

The law administered was an extraordinary mixture of English law and ancient Norman custom. The latter was codified in Le Grand Coustumier de Normandie of the thirteenth century, and in a later treatise. English mercantile law was followed in the Island.

There was little difference between advocates and solicitors, and advocates might do solicitors' work. It was strange, however, to see on a sale-board: "For Sale: Apply Advocate A."

The Estates comprised twelve jurats, twelve constables or mayors of parishes, twelve deputies from the parishes, and twelve rectors of the clergy. The Attorney-General and Solicitor-General had the right to attend and speak but not to vote, while the Vicomte might only attend. The Bailiff presided. There was no Government and no Opposition. The business to be transacted was referred to various Committees whose recommendations were placed before the parishes by the constables. The electorates thus discussed the proposals before the Estates.

English Acts as such had no legal effect unless the Island was designated therein, or unless the Acts by Order-in-Council were registered in the Records of the Island. However, even that power of the English Legislature was denied by some.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"There is a tendency to mar, and occasionally to obliterate, the strict and clear line of demarcation between the executive and the magistracy and to substitute tribunals uncontrolled by any salutary rules of evidence obtaining in the Courts."

—Mr. Justice Eve.

Vol. V. Tuesday, September 17, 1929 No. 15.

Solicitors' Fidelity Guarantee Fund.

The Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Bill, introduced in the Legislative Council by the Attorney-General (Hon. T. K. Sidey) has passed its third reading in that Chamber and has appeared in the House of Representatives under the charge of the Minister of Justice (Hon. T. M. Wilford). There seems every prospect that the Bill will this year become law. Through the good offices of the Attorney-General this year's Bill was drawn by the Crown Law Draftsman, Mr. James Christie. It is in several respects an advance upon the Bill of last year, which in its way was well designed. The present Bill seems to be a model of clear and correct draftsmanship for the purposes intended, and it sets out, in greater detail than the previous Bill, the scheme and purpose of the measure and the machinery for carrying it into effect.

Two important amendments to the measure as introduced have been made in the Upper House. In the first place, claims on the fund established cannot be made by a solicitor to whom the Act applies (that is to say, a solicitor practising on his own account or in partnership with another solicitor), or a practising barrister; and, in the second place, provision is made for consideration of the relative degrees of hardship suffered by claimants on the fund and for priority to claims for amounts not exceeding £500.

Shortly put, the effect of the Bill is to establish a fund to be known as "The Solicitors' Fidelity Guarantee Fund," to be vested in trust in the New Zealand Law Society, and to be administered by the Council of the New Zealand Law Society. The fund is to be accumulated from annual contributions made by solicitors engaged in the practice of the Law, either on their own account or in partnership with others, and from levies, if required, made upon such solicitors in accordance with the provisions of the Act. The annual contribution is to be not less than £5 or more than £10. In addition, if at any time the fund is insufficient to satisfy the liabilities, the Council may make a levy of a further sum. The levy must be authorised by resolution of the Council, can be imposed only when the fund is not sufficient to satisfy the liabilities for which it is established, must not exceed £10 in any one year, and no solicitor shall be required to pay by way of levies more than £50 during the whole period of his practice as a solicitor. When the fund reaches the sum of £100,000, and so long as it remains at that level, no further contributions are payable.

The purpose of the fund is to reimburse all who suffer pecuniary loss by reason of the theft by a solicitor or his clerks of any money or other valuable property entrusted to him or his clerks in the course of his practice as a solicitor, including any money or other valuable property entrusted to him as a solicitor-trustee. A fund so constituted and subject to such liability should in practice meet the cases of lamentable hardship that inevitably follow in the wake of a defaulting solicitor.

The fact that the fund is provided at its own expense, by the Profession as a whole, not only to assuage cases of hardship, but to meet, as far as possible, the reproach levelled at the whole Profession when one of its members defaults, should go far to restore public confidence in the integrity of a Profession which has to some extent been shaken by the wide publicity given in recent years to a few cases of breaches of trust by solicitors. The effect on the Profession itself of the establishment of such a fund should also prove beneficial, inasmuch as certain powers of investigation and audit of solicitors' trust accounts given to the Council are bound to re-act on the method in which those accounts are kept and to prevent in a great degree the incipient muddle, which has occasionally been known to lead to disaster.

A useful power given to the Council is that under which it may enter into contracts of insurance with companies carrying on fidelity insurance, whereby the Law Society will be indemnified against liability for claims under the Act. Contracts so entered into may prove of the greatest value to the stability of the Fund, and if they can be secured at reasonable premiums, will render it reasonably certain that the limit of £100,000 placed upon the Fund will be sufficiently high to meet all emergencies.

Although the Act provides that the annual contributions shall not be less than £5 or more than £10, the exact amount, within those limits, is to be settled by regulation.

If the success looked for by the promoters of this Bill is attained, the promotion of similar Bills throughout the various units of the Empire will inevitably follow, because the same problems confront the Profession in other parts of the Empire as have confronted the Profession here. Such criticism as may be directed against the Fund on the ground that its establishment presupposes a lower standard of ingegrity in the Profession in New Zealand than obtains elsewhere is not well founded. Compared with the Profession elsewhere, either in England or in the other Dominions, such statistics as are available relating to breaches of trust by solicitors show New Zealand solicitors to have maintained the trust placed in them not less well or carefully than those in any other country, and to the critics who infer that the establishment of such a Fund argues ill for the standard of integrity maintained by one section of the community as compared with others, the answer is that the necessity of the Profession demands not merely a high standard but the highest standard, and that it is to secure the maintenance of the highest standard in the Profession as a whole, and to mitigate the hardship that arises from any deflection from that standard, that the Profession has promoted the Bill. The establishment of the Fund not only binds closer its members but also protects the public.

Supreme Court

Myers, C. J.
MacGregor, J.

July 29, 1929.
Wellington.

HERDMAN v. C. DICKINSON & CO. LTD.

Practice—Order—Appeal from Magistrates Court to Supreme Court—Informal Application for Leave to Appeal to Court of Appeal—Leave Refused in Chambers—Order Refusing Leave Not Sealed—Motion for Review—Court Order and Not Judge's Order—Sealing Unnecessary—Order Refusing Leave Not Reviewable—Judicature Act, 1908, Section 67—Code of Civil Procedure, Rules 416 and 417.

Motion by respondent for review and rescission of an order made by MacGregor, J., refusing leave to appeal to the Court of Appeal from a decision of the Supreme Court (reported (1929) N.Z.L.R. 432; 5 N.Z.L.J. 148) allowing an appeal from the Magistrates Court; and in the alternative for an order that the respondent be granted leave to appeal. Immediately after the judgment of the Supreme Court allowing the appeal had been delivered counsel for the respondent asked for leave to appeal to the Court of Appeal, but MacGregor, J., stated that he would hear counsel at a later date to be arranged. Application was subsequently made in Chambers and leave to appeal was refused by the learned Judge. No formal motion or other form of application for leave to appeal was filed, and no formal order refusing leave to appeal had been sealed. The Registrar of the Supreme Court had forwarded to the Magistrates Court at Wellington a certificate that the appeal had been allowed, but that certificate contained no reference to the refusal of leave to appeal.

Cornish and James in support of motion.
O'Leary contra.

MYERS, C. J. (orally) said that Section 67 of the Judicature Act, 1908, enacted that the determination of the Supreme Court on appeals from inferior Courts should be final unless leave to appeal from the same to the Court of Appeal were given. In His Honour's opinion that necessarily meant that the leave to appeal must be granted by the Court that heard the appeal from the Magistrate, that was to say the Supreme Court. If the application in the present case had been made to the Court, as it generally was made, immediately after the judgment was delivered, and leave had been refused, it was difficult—and Mr. Cornish admitted the difficulty—to see how there could be any application to review the decision of the Court refusing the leave. If an application of the kind were not made immediately, but were subsequently made, then the proper procedure was to apply to the Court by motion as was done in **Hughes v. Hanna,** 12 G.L.R. 451, and **Gaynor v. Lacy,** (1920) N.Z.L.R. 745. That was the only way, in His Honour's view, in which an application for leave to appeal could properly be made after the judgment had been delivered, assuming that leave to appeal was not applied for there and then. His Honour was unable to see how a party could be in a better position by moving on motion a week or some time after the judgment was delivered dismissing an appeal than if he applied immediately without any formal motion. If in the one case the decision refusing leave to appeal was not reviewable, His Honour failed to see how it could be reviewable in the other.

Rules 416 and 417 of the Code did not affect the matter in the least. It did not matter whether, on an application of that kind, which was made on a formal motion, the application was actually heard in Court or in Chambers for Court. The decision on the application was a decision not of a Judge but of the Court. It was quite true that a decision of a Judge in Chambers was reviewable by motion subsequently in Court, or in Chambers for Court, but that procedure did not, in His Honour's opinion, apply to an order or decision which was really an order or decision of the Court whether actually made in Court or in Chambers for Court. The mere fact that as a matter of convenience a proceeding which ought primarily to be heard in Court was heard in Chambers for Court did not convert the order which might be made thereon from a Court order into a Judge's order. In His Honour's opinion the decision refusing leave was not a decision of the Judge in Chambers. It was a judgment or decision of the Court. Reference had been made to the case of **Lazarus v. Morrison,** 8 G.L.R. 719, but that, it seemed to His Honour, was no authority in the present case, because the point which had been argued before their Honours was not argued in that case.

His Honour thought that the decision of the Court in refusing to grant leave was not reviewable. It had been said that no order was taken out, but it was not necessary to take out an order. If leave had been granted it might have been necessary to take out an order because that would have been the foundation of the proceedings in the Court of Appeal, but even then it probably would not have been necessary if there had been added to the judgment of the Court appropriate words to show that leave to appeal had been granted. His Honour thought it was not necessary where leave was refused to take out any order refusing leave. It was not necessary that the refusal of leave should form part of the record which went back to the Magistrate's Court. The Magistrate's Court was in no way concerned with that. As His Honour had said, His Honour did not think the matter was reviewable, and, if it was not reviewable, then the decision stood, and, His Honour did not see that the Court could then deal with the second part of the application and grant leave to appeal to the Court of Appeal.

MACGREGOR, J., concurred. Motion dismissed.

Solicitors for appellant: **Bell, Gully, Mackenzie and O'Leary,** Wellington.
Solicitors for respondent: **Webb, Richmond, Cornish and Swan,** Wellington.

Myers, C.J.

June 13; August 2, 1929.
Napier.

IN RE NAPIER HARBOUR BOARD AND FAULKNER.

Landlord and Tenant—Lease—Provision for Ascertainment of Annual Ground Rent by Two Valuers or Their Umpire in Case of Disagreement—Submission to Arbitration Within Meaning of Arbitration Act, 1908, Although No Prior Dispute Between Parties as to Value to be Determined—Ground Rent to be an Even Annual Sum Equal to Five Per Centum on Value of Land at Time of Valuation "Without Taking Into Account any Buildings Thereon"—Basis of Valuation—Existence of Lease Not Factor for Consideration—Unimproved Value of Land and Not Value of Lessor's Interest to be Determined.

Motion by above-named Board to set aside an umpire's award or remit it back for consideration. By memorandum of lease the Napier Harbour Board leased certain land for a period of 21 years, with provision for renewal from time to time for periods of fourteen years. Clause 9 of the lease provided as follows: "That within the first six of the twelve calendar months immediately preceding the expiration of the term hereby granted . . . . two separate valuations shall be made one of such valuations to be made of all the buildings then on the said piece of land hereby demised and the other of the annual ground rent of the said land only without any buildings for a further term of fourteen years from the expiration of the term hereby granted such ground rent to be an even annual sum equal to five pounds per centum on the value of the land at the time of such valuation being made without taking into account any buildings thereon and such ground rent shall not be increased or decreased during the said further term of fourteen years." It was provided by clause 10 that any valuation or valuations to be made for the purposes of clause 9 should be made by two indifferent persons to be appointed in writing, one by the Board and one by the lessee; that each valuer should make a separate valuation; and that the valuers should before entering upon their valuations together appoint in writing a third valuer who should be umpire between them. The lease further provided that the decision of the two first appointed valuers if they, or in such respects as they, agreed, or of such third valuer or umpire if they did not agree, or in such respects as they did not agree, should be binding on both parties, and that the duty of such third valuer or umpire on reference to him of any question should be to analyse the respective valuations of the two first appointed valuers in the matter in which their valuations should not agree and then to make an independent and substantive valuation which said last-mentioned valuation should be the decision of the third valuer or umpire. There was a proviso that in making such decision on any question referred to him the said third valuer or umpire should in every case be bound to make a valuation not exceeding the higher, nor less

than the lower, of the valuations made by the other valuers respectively.

In pursuance of clause 9 of the lease the Board and the lessee duly appointed their respective valuers, who in turn appointed an umpire. The valuers agreed upon a valuation of the buildings but were unable to agree upon the value of the annual ground rent for the period of fourteen years following upon the original term of tweny-one years and that question was accordingly referred to the umpire. On 13th May, 1929, the umpire made his valuation or award, addressed to the valuers, in which he stated that as the land was freehold land restricted by continuous lease it, therefore, had not so great a value as an unencumbered freehold but no definite rule had been laid down for the guidance of valuers. He was, therefore, of opinion that a reduction of one-third would be a fair and reasonable allowance. He accordingly fixed the unimproved value of the land without regard to the lease at £450 and made a reduction of £150 because of the existence of the lease

Grant for Napier Harbour Board.

Lusk for Faulkner.

MYERS, C.J., said that the point was taken by Mr. Lusk on behalf of the lessee that the arbitrators and umpire respectively were purely and simply valuers or appraisers appointed by reason of their expert knowledge to make the valuations themselves without the necessity for hearing evidence, and he contended in effect that the present proceeding was not open to the Board. That point was however in His Honour's opinion disposed of by **In re Bryant and others,** 16 G.L.R. 676; **Inglewood County v. Controller and Auditor-General,** (1922) N.Z.L.R. 32, and **Hamill v. Wellington Diocesan Board of Trustees,** (1927) G.L.R. 197. It was contended by Mr. Lusk that the provisions of the Arbitration Act did not apply to the case where a valuation was required to be made under an agreement where there had been no prior difference or dispute between the parties as to the value to be determined. But in **Drapery and General Importing Co. v. Mayor, etc., of Wellington,** 31 N.Z.L.R. 598, where the material provisions of the lease were (so far as that point was concerned) the same as in the present case, the Court of Appeal must be regarded as having held the contrary.

The real point in the case arose on Mr. Lusk's contention that the case was indistinguishable from the **Drapery and General Importing Co. v. Mayor, etc., of Wellington** (*cit. sup.*) and **In re Brechin and D.I.C. Ltd.,** (1928) N.Z.L.R. 241. His submission was that, on the true interpretation of the lease, the valuers in valuing the ground rent were to find the unimproved value of the land taking into consideration the provisions of the lease for fourteen years, and that having found such value the valuers were to assess the ground rental at 5 per cent. of that value. Since **Brechin's case** was decided two further cases had come before the Court in which there fell to be decided the question of the construction of a clause in a lease dealing with the method of valuation of ground rental for a renewal term: **New Plymouth Borough Council v. Bonner,** (1929) N.Z.L.R. 217; **Ziman v. Auckland Grammar School Board,** (1929) G.L.R. 208. In His Honour's opinion, however, the present case was distinguishable from all the reported cases previously decided on that point. The distinction lay in the fact that in the present case there appeared a definition of the rent, or of the method of computing it, which did not appear in any of the other cases. That definition lay in the words: "such ground rent to be an even annual sum equal to 5 per cent. on the value of the land at the time of such valuation being made without taking into account any buildings thereon." But for those words the requirements of clause 9 would have been (1) a valuation of the buildings (which was required only to meet the possible event of the lessee electing not to accept or refusing to execute, a lease for the further term, in which event a new lease was to be put up to auction and the purchaser was to pay the Board for the lessee's benefit the value of the buildings); and (2) a valuation of the ground rent of the land only without buildings for the renewal term of fourteen years. If the clause had ended there, the case would, His Honour thought, have been precisely the same in effect as **Brechin's case** (*cit. sup.*); and it would then have been the duty of the valuers to ascertain and determine what a prudent lessee would give as a ground rent for a lease of the land without any buildings thereon and subject to the obligations imposed on the lessee by the terms of the lease. But clause (9) then proceeded to define what was meant by the words "ground rent of the land only without any buildings." The clause said that that rent shall be an annual sum equal to 5 per centum on the value *of the land* at the time of the valuation without taking into account any buildings thereon. In **Brechin's case** (*cit. sup.*) and similar cases the arbitrators might very well have come to the conclusion as to what was a fair ground rental without any definite ascertainment of the unimproved value of the land, although in all probability it would have been at least advisable for them to determine the unimproved value of the land because it might well be one of the factors which they might require to consider. In the present case it was essential for the valuers to ascertain and decide what was the unimproved value of the land because their valuation of the ground rent depended upon the prior ascertainment of the unimproved value and was in fact merely an arithmetical computation at the rate of 5 per centum of that unimproved value. The question then was what was meant by the words "Such valuation being made without taking into account any buildings thereon." Those words meant merely in His Honour's opinion the unimproved value of the land. The valuers were required to determine, not the value of the lessor's interest in the land (exclusive of buildings) but the value of the land exclusive of buildings. The "unimproved value" of land was a well known and well recognised expression in New Zealand. In **Cox v. Public Trustee,** (1918) N.Z.L.R. 95, at p. 103 "unimproved value" of land was spoken of by the Court as "the value at the date of valuation of land in its existing natural state—that is to say the value in its natural state as for the time being affected by extrinsic circumstances—but not what has been done to it or upon it in the shape of improvements of any kind." Substituting the word "buildings" for the words "improvements of any kind" in the extract that His Honour just cited, His Honour thought that the words used by the Court supplied a correct definition of the words "the value of the land at the time of such valuation made without taking into account any buildings thereon" used in clause 9. The existence of the lease was not such a matter as the Court in **Cox v. Public Trustee** (*cit. sup.*) had in mind as being included in the expression "extrinsic circumstances," which were defined in the judgment (at p. 99) as "circumstances such as public roads or railways, public systems of drainage, increased settlement in the neighbourhood, public services brought within reach, or other causes to which the tenant does not contribute." In other words what His Honour thought clause 9 required the valuers to do was (1) to value the buildings, and (2) to assess the value of the land exclusive of buildings and then fix the annual ground rental at 5 per cent. of such assessment. The umpire's view was that the unimproved value of the land (without regard to the existence of the lease) was £450, but he reduced his valuation to £300 because of his view that the unimproved value for the purpose of clause 9 must be reduced by reason of the restrictions of what he called a "continuous lease." In His Honour's opinion his award was based upon a wrong view of the construction of the clause. The award was, therefore bad in law, and, the error being apparent on the face of the award, it was reviewable by the Court. The award must be remitted back to the umpire for re-consideration in accordance with what His Honour had given as the meaning of clause 9 If £450 was the umpire's assessment of the unimproved value of the land in accordance with that meaning, it would be his duty so to find and to value or assess the ground rental at 5 per centum of that amount.

Award remitted back for amendment.

Solicitors for Board: **Sainsbury, Logan and Williams,** Napier.
Solicitors for lessee: **Kennedy, Lusk and Morling,** Napier.

Her.

August 6; 12, 1929.
Auckland.

UNION STEAMSHIP CO. OF N.Z. v. CHEVIS.

Practice—Trial—Jury—Worker Injured in Course of Employment—Employer Ordered to Pay Compensation by Court of Arbitration—Claim by Employer for Indemnity Against Allegedly Negligent Third Party—Claim Not One for Damages—Sole Issue Question Whether Defendant Negligent—Notice of Desire for Trial by Jury Not Given Before Commencement of Sittings—Action Not "More Conveniently Tried Before a Jury"—Workers Compensation Act, 1922, Section 50—Rules 254, 255, 257 (a) Code of Civil Procedure.

Motion by defendant for an order for trial before a jury. In the action the plaintiff company sought to recover from the defendant under Section 50 of the Workers Compensation Act, 1922, the amount which it had been ordered to pay by the Court of Arbitration in proceedings taken against it under the Workers Compensation Act by one Yates who had been injured while in the company's employment. It was claimed that the injury

which Yates sustained was due to the negligence of the defendant, and that the plaintiff company was accordingly entitled pursuant to the said Section to be indemnified by the defendant in respect of the compensation paid by it to Yates.

Singer in support of motion.
Bagnall to oppose.

HERDMAN, J., said that the present action did not arise out of tort or out of contract but owed its origin to a right to claim indemnity created by statute. Rule 254, supplemented by Rules 255 and 257 (a), excluded from trial before a Judge and jury claims for damages in respect of causes of action which arose from breach of contract and causes of action which might be regarded as arising either out of contract or out of tort. In the case of other actions in which damages were claimed, such as claims founded on pure tort, His Honour read the rules to mean that they were to be tried before a Judge and jury provided that eight days' notice was given before the commencement of the sittings and the costs of the jury were paid. But the present case was not a claim for damages. It was a claim for a sum payable under an obligation to indemnify created by statute. The quantum of the plaintiff's claim was really not in issue. The sole substantial question for determination was whether the injury which Yates sustained was due to the negligence of the defendant. If it were the law that if no damages could be claimed no jury could be got, no jury could be had in the present case. Assuming, however, that the action was one for damages no steps had been taken to get a jury as required in Rule 254, so his case fell within Rule 257 (a) the early part of which provided: "All other actions shall be tried by a Judge without a jury, but if it appears to the Court, either before or at the trial, that any action or any issue therein can be more conveniently tried before a jury, the Court may direct that the action or such issue be so tried." Applying that Rule there was nothing before His Honour which justified a decision that the action or any issue therein could be more conveniently tried before a jury. The question in issue was a simple one and could be quite conveniently tried by a Judge.

Motion dismissed

Solicitors for plaintiff: **Russell, McVeagh, Bagnall and Macky,** Auckland.
Solicitor for defendant: **R. A. Singer,** Auckland.

Smith, J. June 19; August 22, 1929. Christchurch.

IN RE KERR.

Administration—Trustee—Commission— Incidence—Commission of Executor or Administrator a Testamentary Expense Payable out of Capital—Incidence of Commission Granted to Trustees in Discretion of Court Subject to Directions of Will—Trustees Allowed Percentage Commission on Capital and Percentage on Income—Incidence Accordingly as Between Capital and Income—Originating Summons Proper Procedure for Determination of Incidence of Commission—Application for Future Commission to be Made by Petition—Administration Act, 1908, Section 20—Code of Civil Procedure R. 538 (1)—Administration Rules, 1913, Rule 8.

Originating summons taken out by the trustees of the will of one Margaret Kerr, deceased, to determine whether an amount of £367 10s. 2d. allowed to the trustees by the Court as commission was properly payable out of the capital or income of the estate, or out of both, and if so, in what proportions or amounts. The summons also asked that the trustees be allowed an annual commission, until the further order of the Court, of 5 per cent. on all income collected from 28th June, 1928, and on all future income collected by them, upon their duly filing their accounts annually in the Court, and that they be authorised to retain for themselves each year the amount of such commission. The facts were as follows: The executors and trustees appointed by the will were Henry Slater and Dr. Symes. Henry Slater died on 12th August, 1917. On 24th November, 1917, Dr. Symes appointed Mr. F. W. Johnston, one of the present plaintiffs, to be a trustee in the place of the said Henry Slater. Dr. Symes died on 10th April, 1928. On 28th June, 1928, Mr. Johnston appointed Mr. Kerr, the other of the present plaintiffs, to be a trustee in the place of Dr. Symes. Neither Mr. Johnston nor Mr. Kerr had ever been an executor. On 22nd September, 1916, the executors and trustees appointed by the will obtained an order for executors' commission, covering the period of 17 years from the death of the testatrix to 28th October, 1915, allowing them £86 15s. (being at the rate of 2½ per cent. on £3,470 15s., the total amount of capital received), and the sum of £455 8s. 4d. (being at the rate of 5 per cent. on the sum of £9,163 6s. 3d., the total amount of income received), making a total sum of £545 3s. 4d., as remuneration for their pains and trouble. They paid the whole of that amount to themselves out of capital. The Court's order described that commission as commission paid to the executors for their pains and trouble. It did not take account of their character as trustees. No further application for commission was made until one pursuant to which on 19th February, 1929, the Court allowed the present trustees the sum of £367 10s. 2d. for their pains and trouble in administering the estate for the period from 24th November, 1917, to 28th June, 1928. No claim was made in respect of the period elapsing between 28th October, 1915, and 24th November, 1917. The allowance of £367 10s. 2d. was made up of a sum of £119 8s. 7d. (being 2 per cent. on purchase money realised—£5,971 13s. 6d.) and £248 1s. 7d. (being 5 per cent. on income collected—£7,061 11s. 5d.—viz.: £353 1s. 7d., less a deduction of £105, which had been paid to solicitors over a period of 10 years as a fee in respect of the collection and disbursement of the income). The Court's order described that commission as commission paid to the trustees for their pains and trouble.

F. W. Johnston for plaintiff.
Twyneham for Ansley family beneficiaries.
Sargent for remaining beneficaries.

SMITH, J., said that the first question which arose was one of procedure. That there was power to make an order for future commission was clear: Section 20 (2) of the Administration Act, 1908; **Re Wilkie,** 3 G.L.R. 278; **Re Kennedy,** 9 N.Z.L.R. 305; and **In re Sharland,** 17 N.Z.L.R. 729. But proper application for such an order must be made by petition under the Administration Rules. That procedure involved a reference to the Registrar for report: Rule 17 of the Rules of 1913. In His Honour's opinion, therefore, he should not deal with such an application upon the present proceedings. It was appropriate, on the other hand, that the application to determine the incidence of the payment should be made by originating summons, for it was a question which affected the rights and liabilities of the respective beneficiaries, and arose in the administration of the estate: Rule 538 (1). The procedure by originating summons was adopted in **In re Powell,** 7 N.S.W. S.R. 874, and in **Perpetual Trustees Co. Ltd. v. Tasker,** 13 N.S.W. S.R. 322. In New Zealand, the question whether the Court could order the executor's remuneration to be paid out of a particular bequest was raised in **In re Rathbone,** (1929) G.L.R. 31, on a motion for an order adopting and confirming the Registrar's report, but the question of procedure was not discussed. As the question concerned the beneficiaries, and not the executors in their personal capacity, the procedure by originating summons ought, His Honour thought, to be followed. It might be very important in any case in which commission had been allowed upon a petition under Section 20 of the Administration Act, 1908, in respect of which compliance with the Rules as to service had been dispensed with. If thereafter a question as to the incidence of that payment was raised, the beneficiaries should be served with the appropriate proceedings to determine the matter. His Honour accordingly proceeded to deal with the question of the incidence of the payment.

It was necessary to consider in the first place the nature of an allowance to an administrator or trustee under Section 20 of the Administration Act, 1908. Under that Section, the Court might out of the assets of a deceased person allow to his administrator or trustee in passing his accounts such commission or percentage, not exceeding 5 per cent., for his pains and trouble, as was just and reasonable For that purpose, the assets included both the corpus and the income: **In re Proctor,** 3 N.Z. L.R.S.C. 126. It followed that the Court might allow in all a commission not exceeding 5 per cent. on the corpus and 5 per cent. on the income. Under the Section, the allowance was to be made to the administrator or trustee. In **In re Proctor** (*cit. sup.*) Williams, J., referred to the distinction between an allowance to an executor and an allowance to a trustee in respect of the time at which an application or applications for commission should be made. His Honour thought a distinction also existed in respect of the incidence of the payment of the commission. If received by the executors or administrators as such, it appeared to be a testamentary expense and payable out of capital the only persons affected being in general the residuary legatees: **In re Rathbone, deceased,** (1929) G.L.R. 31; In **In re Beck,** 20 N.Z.

L.R. 633, 635. In **In re Allan McLean,** 31 N.Z.L.R. 139, which was a petition by executors for further remuneration, only the residuary legatee was represented before the Court of Appeal. His Honour stated that in New South Wales, a corpus commission payable to a trustee company as an executor was regarded as a testamentary expense, and it had been held that such a commission, so far as it was a commission on personal estate, was to be paid in the ordinary course of administration, out of the assets in the ordinary order; and so far as it was a commission on the corpus of real estate, pro rata: **Perpetual Trustees Co. Ltd. v. Tasker** (*cit. sup.*) applying **Re Betts,** (1907) 2 Ch. 149, and **Patching v. Barnett,** 51 L.J. Ch. 74. If, however, commission was granted to trustees, as trustees, its incidence was, His Honour thought, in the discretion of the Court, subject to any specific direction in the will. In New South Wales, where corpus commission was payable to a trust company as a trustee that view seemed to have been adopted: **In re Powell,** 7 N.S.W. S.R. 874. In that case, the Court directed that such a commission was not payable primarily out of the residuary estate, but was chargeable against the respective component parts of the estate, including specific devises. The judgment in **Perpetual Trustees Co. Ltd. v. Tasker** (*cit. sup.*) expressly pointed out (p. 329) that the commission dealt with in **In re Powell** (*cit. sup.*) was a commission payable to a trustee as such.

The commission which was the subject of the present proceedings was applied for by trustees and was awarded to them as such. It was contended that as most of the pains and trouble of the trustees had been expended on safeguarding the capital assets during the "slump" period of 1921 and the following years, the capital should bear its due proportion, on that basis, of the total remuneration allowed. His Honour had, however, no material before him upon which to reach a conclusion upon such a basis. Nor did His Honour think it should be adopted in the present case. Under Rule 8 of the Administration Rules, 1913, the petitioners must set forth the amount which was claimed, and must show the basis or principle by which the same was arrived at. The petitioners had complied with that rule. They prayed for an allowance on capital, and an allowance on income. The beneficiaries had been represented before the Registrar and the Court. The Registrar had recommended a percentage on capital, and a percentage on income (less a deduction), and the Court had approved of that recommendation. His Honour thought he ought to hold that the Court had already allocated the respective amounts of commission to capital and income. If trustees thought it desirable to have their commission allocated to capital and income in particular proportions corresponding to the pains and trouble expended on each, they should specifically submit such a basis in their petition in accordance with the requirements of Rule 8. The Court was not asked to determine the incidence of payment except as between capital and income. Accordingly the question determined in **In re Powell** (*cit. sup.*) as to the incidence of a trustee's corpus commission upon the corpus, and the question determined in **In re Bentley,** (1914) 2 Ch. 456 as to the incidence of an income fee upon the income, did not arise for decision. An order would be made that the amount of the commission payable on the capital, viz., £119 8s. 7d., was payable out of capital; and that the amount of the commission payable on income, viz., £248 1s. 7d., was payable out of income.

Solicitors for plaintiffs: **Johnston, Mills and White,** Christchurch.

Solicitors for defendants: **R. Twyneham, and Slater, Sargent, Dale and Connal,** Christchurch.

Kennedy, J. August 22; 26, 1929. Invercargill.

GRIBER v. PRENDEVILLE.

Negligence—Collision—Motor-vehicle Going to Wrong Side of Road to Pass Another Proceeding in Same Direction—Cyclist Proceeding in Opposite Direction on Proper Side of Road—Cyclist Swerving Towards Wrong Side of Road to Avoid Collision—Duty of Driver of Motor-vehicle Overtaking and Passing Vehicle Proceeding in Same Direction.

Action claiming damages in respect of injuries suffered by plaintiff on 16th October, 1928, and alleged to have been due to the defendant's negligent driving of a motor car whereby it collided with the plaintiff's bicycle and injured the plaintiff and damaged his bicycle. The plaintiff was proceeding on his bicycle along the North Road towards Invercargill. A bitumen track eighteen feet wide and a tramline four feet wide were laid on the roadway. The bitumen track and tramline were separated by a space of two feet. The plaintiff was proceeding on his proper side of the bitumen track at a distance of not less than two or three feet from the middle line of the bitumen. Proceeding in the opposite direction and about to meet him were two cars, the first one driven by a man named Sycamore, the second by the defendant. When Sycamore's car was about a chain from the plaintiff's bicycle the position of the cars upon the bitumen was that Sycamore's car was about four feet from its left edge and the defendant's car was about two feet from Sycamore's car and almost abreast so that the defendant's car was at that time on the extreme right of the bitumen directly in the track of the cycle. Sycamore's car was about to slow down but was still proceeding at about 10 miles per hour, while the defendant's car was going about 15 to 20 miles per hour and was passing Sycamore's car. The plaintiff, who had previously had his head down, had his attention drawn by the tooting of the horn of Sycamore's car. The cyclist moved over to the extreme left of the bitumen, that is, to the outer edge of the bitumen on his proper side, but the defendant's car bore down upon him while he was so on his proper side and the cyclist then swerved to the right in an endeavour to avoid the oncoming car. He came into collision with the left lamp or mudguard of the defendant's car and, after the impact, he was picked up between the bitumen and the tram rails on his left and his bicycle was thrown across the tram rails.

Hogg for plaintiff.

Reed for defendant.

KENNEDY, J., said that the evidence showed that at no time was the plaintiff on his wrong side and that, even after he swerved in his endeavour to avoid the car bearing down upon him, he was still upon his proper side of the road. His Honour was satisfied that the plaintiff's account of the collision was the correct one and that the swerve taken by the plaintiff to the right was taken in the stress of the moment when the defendant' scar appeared to be bearing down upon him and when a collision was inevitable. The collision took place on the plaintiff's proper side of the road and on the defendant's wrong side. While it was not improper for a car to go on to its wrong side of the road for the purpose of passing another car, yet it must perform such a movement with care. It must be prepared to find and to meet oncoming traffic on that part of the road on to which it elected to pass, and it should be prepared to adjust its movements accordingly. It should not take up such a position or proceed at such a pace that, when such traffic was found as might be expected on its own proper side, it could not, with such brakes as it had, slacken speed sufficiently or otherwise adjust its movements to prevent danger to those properly on that side of the road. It should rather feel its way out, the driver anxiously observing to see if any traffic was ahead which he would meet when he made his movement, and which might have been concealed for the time being by the car immediately in front. More care was required when the preceding car was slowing up because, if the passing car should discover traffic near the middle line but still on the proper side, it would not be so easy as it would be, when the preceding car was maintaining its pace, to resume a position on the left and to pass on its correct side and thus avoid a collision. Such a passing car was bound in the words of Alderson, B., in **Pluckwell v. Wilson,** 5 C. & P. 375, "to use more care and diligence and keep a better lookout, that he may avoid any concussion than would be requisite if he were to confine himself to the proper side of the road." His duty was not to exceed a speed at which he could, by pulling up or swerving, avoid collision with others using the highway without negligence. He should not, when such other traffic was seen on its correct side but in his track, continue on if he could only just go through without collision or by running it, as it is said, very fine: *c.f.* **Wallace v. Bergius,** (1915) S.C. 205. Certainly he should not attempt to pass when it must appear to other traffic that he was bearing down so directly upon it that the driver, on his proper side, had a reasonable apprehension that if he did not change his position a collision would result.

His Honour found that the defendant should have seen the plaintiff from a further distance back and that he should have adjusted his movements accordingly. He should not have continued on and endeavoured to pass Sycamore's car, with Sycamore's car in the position in which it was, with little of the bitumen road available except on the extreme left. If the defendant elected to proceed without letting the cyclist first pass him, he should have proceeded only if his brakes, to his knowledge, were sufficiently powerful to have enabled him

promptly to pull up his car to avoid a collision. He should not, under the circumstances, have continued at the speed at which he passed Sycamore's car. In fact the brakes of his car were inefficient. Such inefficiency was due not to a mechanical defect recently developing, but to long use and wear and tear, and the defendant must have known the condition of his brakes. It followed accordingly that the plaintiff had proved that the injuries which he suffered were caused by the negligent driving of the defendant.

The defendant pleaded contributory negligence on the part of the plaintiff in that he was not keeping a proper lookout and was riding his cycle with his head down at a time when he should have expected traffic and in that he swerved to the right. The plaintiff was at all times upon his correct side and he had discovered the defendant as soon as was reasonably to be expected, and he had prior to the collision passed over to the extreme left of his own proper side. The defendant on the other hand was on his wrong side, pursuing a course in which he should have expected traffic and proceeding at a pace at which he could not adjust his movements when, with such lookout as he kept, he became aware of such traffic. If he could have adjusted his movements, he should not have driven as he did towards the plaintiff at speed on his wrong side. The defendant himself placed the plaintiff in such a position of danger and rendered a collision so extremely likely that the plaintiff took the swerve to avoid danger. Under such circumstances the plaintiff could not be held to have been guilty of contributory negligence in swerving to the right. His Honour found, therefore, that the defendant's negligence was the sole cause of the accident, and awarded the plaintiff £130 15s. special damages and £600 general damages.

Solicitors for plaintiff: **Hogg, Raines and Hodges,** Invercargill.

Solicitors for defendant: **J. Reed,** Invercargill.

Court of Arbitration.

Blair, J. July 30; August 8, 1929. Wellington.

GOUGH v. CHAPMAN.

Workers Compensation—"Domestic Service"—Handyman Engaged to do Work Generally In and About Residence—Work Comprising Gardening, Odd Jobs In and About House and Going Messages—Death by Accident While Cutting Off Branch of Tree—Worker Engaged in "Domestic Service"—Workers' Compensation Act, 1922, Section 3 (2).

Claim by widow of a deceased workman, Gough, for compensation in respect of the death of her husband. The deceased was in the permanent employment of defendant on a weekly wage of £4 10s. He did not live on the premises and his hours were forty-eight a week with half-day off on Saturdays. He did not work on Sundays. He had been constantly employed by defendant for four years and was originally engaged to "do everything he was required to do during working hours." About two-thirds of his time was taken up in work about defendant's garden and the remaining work comprised odd jobs in and about the house and going messages into the town. The defendant in his evidence said that the deceased was not a professional gardener but that he would carry out instructions and was the kind of man he required rather than the ordinary professional gardener. The deceased was killed while engaged cutting a branch off a large lime tree which grew on the side of the driveway into defendant's premises. The deceased had mounted a ten-foot step ladder with a hand-saw to cut a large branch which hung over this driveway. The ladder fell and the deceased clutched the branch he was about to saw but could not hold on and fell to the ground receiving injuries from which he died the same night. There was no doubt that he died as the result of an accident arising out of and in the course of his employment.

Bunny for plaintiff.

C. A. L. Treadwell for defendant.

BLAIR, J., delivering the judgment of the Court, said that it was not claimed on plaintiff's behalf that the deceased was employed "for the purposes of any trade or business" carried on by the defendant, and Section 3 (2) (a) of the Act was not invoked on plaintiff's behalf. The defendant was a retired manufacturer and admittedly he carried on no business or trade. The Court decided in **Allison v. Milsom,** (1923), G.L.R. 57, and in **Christie v. Will,** 5 N.Z.L.J. 151, (1929) G.L.R. 262, that work in connection with a garden appurtenant to a house occupied by a doctor in which house he had a surgery was not an employment in connection with a trade or business. The case was stronger where, as in the present case, there was no trade or business which could be suggested.

The plaintiff's whole case rested upon Section 3 (2) subsection (b) of the Act and it was claimed that the deceased was within two of the occupations specified in the first schedule, those being (a) the cutting of standing timber, and (b) domestic service in which the employment or engagement was for a period of not less than three days. As regards the latter alternative, it was not disputed that if the employment was "domestic service" the requirement as to the three days was satisfied. The whole question, therefore, was whether the deceased was at the time of his death in "domestic service." In **Allison v. Milsom** (*cit. sup.*) and also in **Christie v. Will** (*cit. sup.*) the Court addressed itself to the question as to whether the plaintiff was a "domestic servant" and His Honour apprehended that there was some distinction in a question whether a person was a domestic servant and whether the work he was doing was domestic service. Allison was a mere casual worker employed two days a week and the Court pointed out that he was without the statute for that reason. Although the report did not specifically so state, His Honour's colleagues in the present Court (both of whom comprised part of the Court in **Christie's case**) informed His Honour that Christie also was a mere casual worker and the Court rightly found that **Christie v. Will** (*cit. sup.*) was covered by **Allison v. Milsom** (*cit. sup.*). The precise question for decision in the present case was whether a permanent general "handyman" as Gough was, engaged one-third of his time on work within or connected intimately with the work of the house and the remaining two-thirds of his time engaged in the garden was occupied in "domestic service" within the first schedule. His Honour, after referring to certain dicta from the judgment of Frazer, J., in **Allison's case** (*cit. sup.*), where the distinction between a "menial" and a "domestic" was discussed, said that the learned Judge was there discussing the apt term to apply to a servant performing certain duties. The real enquiry in the present case was whether the work performed by Gough was "domestic service." There had been many cases in England arising from gifts in wills to servants where an enquiry had been made as to whether one or another class of servant was covered. Those cases mainly depended on the intentions of the testator and did not appear to His Honour very helpful in deciding what the Legislature meant when it used the words "domestic service" in the schedule to the Act. Some of the English cases turned on the question whether a servant was or was not a resident servant. It was well known that in New Zealand there were hundreds of purely domestic servants who lived at their own homes but were all day in "domestic service." Residence, therefore, could not be the test. The word "domestic" in its common adjectival sense meant "of or belonging to the home, house or household; pertaining to ones place of residence or family affairs, household or family." The word had varied meanings such for instance as pertaining to ones country or nation, but that was not the sense in which it was used in the Act. The words "persons engaged in domestic service except where employed in any trade or business for the purpose of gain," which constituted one of the exemptions under The National Insurance (Unemployment) Acts (Imperial) had been the subject matter of many decisions in England. His Honour referred to **In re application by Junior Carlton Club,** (1922) 1 K.B.166; **In re applications by Vellacott,** (1922) 1 K.B. 466; **Ex parte Berkshire County Council: ex parte Ffooks,** 38 T.L.R. 255, and **Re Fox,** (1923) 1 K.B. 215, and said that those cases showed that the words "domestic service" had a much wider meaning than that contended for by the defendant. Gough the deceased was really a handyman whose duty it was to administer to the wants of defendant's household. He performed whatever pure house duties were required of him and filled in the balance of his time in the garden. He was engaged to do whatever was wanted of him without regard to its character and what he did was apparently unlimited as to variety. The defendant made it plain that Gough was not engaged as a gardener nor was he a qualified gardener. Gough was there to do his master's bidding whatever it was, and his duties, therefore, were to administer to the wants of his master. In **In re Jackson,** (1923) 2 Ch. 365, it was held that a chauffeur, a coachman and a gardener were entitled to legacies to "domestic servants."

Looking at the terms of Gough's engagement and the nature of his work, His Honour had no doubt that he was in "domestic service," and it not being disputed that his death happened during and in the course of his service to his master, his widow was entitled to compensation for his death on the basis of total dependency.

Judgment for plaintiff.

Solicitor for plaintiff: **E. P. Bunny**, Wellington.
Solicitors for defendant: **Treadwell and Sons**, Wellington.

Blair, J. July 29; 30, 1929. Wellington.

AYLING v. WELLINGTON CITY CORPORATION.

Workers Compensation—Accident—Whether Arising Out of and In Course of Employment—Hernia Not Causing Death—Previous Hernia—Medical Evidence Showing Condition Consistent with Recent or Old Hernia—Accident Including any Unexpected Personal Injury Arising from Physiological Condition Set Up by Ordinary Course of Work—Sudden Strain Not Essential Ingredient—Claimant Failing to Discharge Onus of Proof.

Claim for compensation under the Workers Compensation Act, 1922, by a worker in respect of a rupture alleged to have been caused by an accident arising out of and in the course of his employment. The plaintiff was working shovelling earth and stones into a truck. He had worked full time for three and a-half days in the previous week and on the date of the alleged accident also worked up to finishing time at 4.30 p.m. He said that at about 4 p.m. he was feeling sick and vomited behind the truck. In examination-in-chief he said nothing about feeling any pain. But in cross-examination he said he felt pain. The plaintiff had been operated on for hernia nine years previously to this occurrence. He admitted in cross-examination that he had always had a swelling at the site of the cicatrix from that operation, but not quite so large as the one complained of. He explained that the lump he referred to was at the top of the wound, and the swelling complained of moved about two inches lower down the groin. A fellow workman deposed to the fact that the plaintiff slowed down, vomited a couple of times, and said that he had a pain in his stomach. Plaintiff went the same evening to the hospital and his complaint was diagnosed as hernia and an operation advised. The next day plaintiff told the foreman that he would be away for a time as he was going into hospital. He did not tell the foreman what he was going for. No suggestion of a claim for compensation was made until after plaintiff had been operated upon and had come out of the hospital a month after the alleged accident.

Dr. Lynch of the Wellington Hospital who operated on plaintiff two days after the accident, found a wide-mouthed thin-walled sac with weak musculature in the region. The bowel had got about two inches outside the inguinal canal and had reached the upper limits of the scrotum. He said the hernia was easily reduced—quite easily. Dr. Lynch said that the condition he found was not inconsistent with plaintiff's story and that vomiting was one symptom of the sudden descent of a hernia, but he was not able to express a definite opinion as to whether the present hernia was a new one or one of long standing. Two doctors for the defendant expressed a strong view that the circumstances showed that the hernia was of long standing and they stressed the significance of the fact of the absence of acute pain at the time of the alleged accident.

P. J. O'Regan for plaintiff.
J. O'Shea for defendant.

BLAIR, J., delivering the judgment of the Court, said that the Court of Appeal in England in **McFarlane v. Hutton Bros.**, 96 L.J.Q.B. 357, carried the law as to the meaning of "accident" a step further than as laid down in **Fenton v. Thorley and Co.**, (1903) A.C. 443. In **McFarlane's case** the deceased had advanced heart trouble and while at work exerting some pressure to an ore tub but without any sudden or undue strain he became ill and shortly afterwards died. The Court rejected the contention that it must look for an accident in the form of a sudden strain exercised on the workman—something more than that ordinarily used by him. The principle laid down was that if there was an unexpected personal injury arising from some physiological condition set up in the course of the work, that might be described as an accident even although there was, at the moment nothing unusual or particular which set it up. That principle was applied by Frazer, J., in **Muir v. Hutton**, 5 N.Z.L.J. 22, (1929) G.L.R. 140, and he there discussed various cases on the point, and put to himself the question put in **Clover Clayton v. Hughes**, 3 B.W.C.C., 275: "Did he die from the disease alone or from the disease and the employment taken together." The cases would appear to establish that if a workman was so advanced in a disease that he was—so to speak—poised on the trigger of death, then if the work that he was doing pulled that trigger, then his dependants were entitled to compensation for an "accident." In such a case it was the disease and the employment taken together that caused his death. In death cases there was present the fact of death, which fact constituted the conclusive evidence that the disease had made a marked advance. But where, as in the present case, the case was not one of death, but one where the "accident" alleged was the passing of a definite and distinct milestone in the progress of a disease, the Court had not the advantage of the irrefutable evidence present in a death case. The Court had to ask itself whether the plaintiff had proved that an unexpected personal injury had occurred arising from some physiological condition set up in the course of the work. In other words had the plaintiff established that the hernia, which admittedly might have happened at any moment, did happen as the result of the physiological condition set up by his work on that day? The Court had the admitted facts, that he had a lump in his groin before, that he had always had a swelling there but not so big as the present one, that the hernia sac was wide-mouthed and thin-walled, that the hernia was reducible quite easily, and finally that in his evidence of the alleged accident he made no mention of feeling the pain of the hernia going down into the top of the scrotum. The only medical evidence called by the plaintiff carried the matter no further than that his condition was consistent either with a recent or with an old hernia. Under those circumstances and in view also of the medical testimony called by the defendant the Court came to the conclusion that plaintiff had not established his claim.

Want of notice of accident had also been pleaded by the defendant. The facts showed that that defence in the present case was a serious one, but in view of the finding of the Court on the main issue it was not necessary to decide the point.

Claim dismissed.

Solicitor for plaintiff: **P. J. O'Regan**, Wellington.
Solicitor for defendants: **J. O'Shea**, City Solicitor, Wellington.

Value of Training in Accountancy.

Views of Chief Justice.

Our contemporary *The Accountants' Journal* has in its latest issue collected various expressions of opinion of leading men on the value of a knowledge of accountancy in their respective walks of life. Among these expressions of opinion there is one as to the value of such knowledge to members of the Legal Profession by His Honour the Chief Justice who says:—

> "A knowledge of commercial business and of the methods of commercial men is of the greatest value to the practising lawyer. Until comparatively recently it has been difficult to acquire that knowledge except to the extent to which it might be acquired by contact and association with commercial men. This state of affairs has been altered by the modern course and methods of training in accountancy; and in my opinion such a training must be of the greatest possible value to any legal practitioner—particularly if he desires to specialise in commercial law."

Land Transfer Mortgages.

The Effect Thereon of Some General Rules of Law.

By C. R. Fell, LL.B.

During recent years the Courts in New Zealand have had before them a number of interesting cases on the rights and liabilities of mortgagors and mortgagees, and as the Land Transfer (Compulsory Registration of Titles) Act, 1924, will shortly make obsolete the Deeds Registration System it may be of interest to discuss the effect of these decisions and the rules of law not to be found in the Land Transfer Act but which vitally affect rights and liabilities of parties to mortgages under that Act.

It is elementary, though fundamental, that a memorandum of mortgage under the Land Transfer Act does not convey or transfer the estate of the mortgagor but operates as a security only (Section 102 Land Transfer Act) with a power of sale of the mortgaged property upon default (Paragraph (7) Fourth Schedule). In addition there is, except in rare cases, a covenant by the mortgagor either expressed or implied to pay the principal and interest in accordance with the terms of the mortgage. Most of the general rules affecting the rights of parties under mortgages have been formulated by Courts of Equity striving to regard mortgages as securities only, though originally operating on mortgages which actually conveyed the estate of the mortgagor, and it might well be suggested that these rules can have no application to mortages under the Land Transfer Act. Some of these rules have been either incorporated into or abolished by the Property Law Act so that in dealing with this matter it is necessary to consider how far the provisions of the latter Act affect mortgages under the Land Transfer Act.

The rules of law and provisions of the Property Law Act with which I propose to attempt to deal in this article may be briefly enumerated under the following headings :—

(1) Novation as operating to release the original mortgagor.
(2) The mortgagor's right of redemption.
(3) The application of Sections 70 (right to redeem) and 71 (right to require assignment instead of reconveyance) and Section 68 (three months notice in case of overdue mortgage) of the Property Law Act to the Land Transfer Act.

(1) Novation as Operating to Release the Original Mortgagor.

When the report of Chapman, J.'s decision in *Robertson v. White*, (1923) N.Z.L.R. 1275, was published it startled quite a number of conveyancers to think that in obtaining extensions of mortgages from a purchaser of the equity of redemption they had lost for their mortgagee the personal covenant of the original mortgagor. Three defences were raised by the original mortgagor in this case : (a) that the relationship of principal and surety existed between the owner of the equity and the original mortgagor, and that by the mortgagee giving time to the owner of the equity the liability of the surety (the original mortgagor) was discharged in accordance with the rule in *Rouse v. Bradford Banking Co.*, (1894) 2 Ch. 32, on appeal (1894) A.C. 586 ; (b) by their dealings the parties effected a novation so releasing the original mortgagor ; (c) by entering into the extension the mortgagee had prevented himself from restoring the original mortgagor to his position if he paid. Upon payment the mortgagor was entitled to a transfer of the mortgage which the mortgagee could not give in its original form, thus under *Kinnaird v. Trollope*, 39 Ch. D. 636, the original mortgagor was released.

Chapman, J., decided the case against the mortgagee on the first ground and he also thought the extension had the effect of novation, but he did not express any opinion on the third ground of defence.

The question did not come before the Court of Appeal until 1926 when *Nelson Diocesan Trust Board v. Hamilton*, (1926) N.Z.L.R. 342, was decided. Skerrett, C.J., Sim, MacGregor and Alpers, JJ., upheld Chapman, J.'s decision in *Robertson v. White*, not on the ground of suretyship which they disagreed with, but on the ground of novation. No reference was made in the judgment of the Court of Appeal to the third defence though this was argued. The *Nelson Diocesan Trust Board case* was followed in *Paterson v. Irvine*, (1926) N.Z.L.R. 352. In both cases the extensions were entered into with the purchasers of the equities of redemption without the consent of the original mortgagors. Had the original mortgagors been parties to the extensions by apt words the mortgagee's rights against the original mortgagors might have been preserved.

(2) The Mortgagor's Right of Redemption.

Bearing in mind the provisions of the Land Transfer Act already referred to, there is technically no equity of redemption under a mortgage under the Land Transfer Act, but the mortgagor's right is very commonly so referred to, and notwithstanding the provisions of the Land Transfer Act the Courts have applied the equitable doctrines relating to this subject to mortgages under that Act. Under the rule the right of redemption was lost to a mortgagor who had assigned his equity of redemption, but upon the mortgagee taking proceedings against the original mortgagor upon his personal covenant a new equity of redemption was created in the original mortgagor. The mortgagee was then under an obligation on payment to hand over the security, and if he was unable to do so he was not entitled to judgment for his debt. The difficulties facing a mortgagee under this rule are well illustrated in *Williams v. Kendall*, (1928) G.L.R. 114. The facts were that Kendall sold and transferred a property, the title to which was under the Land Transfer Act, to Williams, subject to a mortgage to B. Brothers, and took a second mortgage from Williams to secure the balance purchase money in which Williams covenanted with Kendall to pay principal and interest owing under the first mortgage. Williams then sold and transferred the property to B. subject to the first and second mortgages. Later an extension of the first mortgage was entered into between B. and B. Brothers, Kendall joining in and consenting. Williams was not a party to the extension. B. later abandoned the property and Kendall demanded from Williams the amount of the second mortgage and interest and also interest paid under the first mortgage. Reed, J., following *Nelson Diocesan Trust Board v. Hamilton*, decided that Williams was not liable to Kendall in respect of the first mortgage and he also held, following *Mortleman v. Public Trustee*, (1927) N.Z.L.R.642, based on *Kinnaird v.Trollope*, that Kendall, having put it out of his power to return the identical

security, was debarred from suing Williams for principal and interest under the second mortgage. It should be noted that the second mortgage itself had not been altered; on its face it remained the same but it was subject to a varied and different first mortgage. The average purchaser would probably think the second mortgage was of more value after the first mortgage had been extended, but as against Williams the second mortgagee, Kendall, did not find it so. *Mortleman v. Public Trustee* went to the Court of Appeal—(1928) N.Z.L.R. 337—where on another point the Full Court was reversed but without affecting the answer to the first question which Reed, J., followed. It is submitted that the reasoning of Skerrett, C.J., on the first question in *Mortleman's case* supports the third ground of defence raised in *Robertson v. White* and *Nelson Diocesan Trust Board v. Hamilton*, and that these cases might have been decided not only on the ground of novation but also on the ground that the mortgagee could not return the original security.

Suppose in *Williams v. Kendall* the second mortgagee, Kendall, had instead of suing Williams, sold the property under the power of sale in the second mortgage, could he then have sued Williams for any deficiency? It is submitted he could. The equitable rule as to returning the security cannot apply when the equity of redemption is destroyed by exercise of the power of sale. The Court of Appeal in *Mortleman's case*, following *Gordon Grant and Co. Ltd. v. Boos*, (1926) A.C. 781, decided that after sale the deficiency could be sued for. We thus have this curious but logical position that before the exercise of the power of sale Kendall could not sue Williams on her personal covenant because of her right of redemption which Kendall could not satisfy, but after the exercise of the power of sale, the right of redemption being gone, Kendall could have sued Williams for the deficiency on her personal covenant.

The change in the rights of mortgagees where the equity of redemption is gone is further illustrated in *Official Assignee v. Jarvis*, (1923) N.Z.L.R. 1009, though in this case the change was to the disadvantage of the mortgagee. Jarvis purchased from Parsons a property subject to three mortgages and covenanted to indemnify Parsons against non-payment of the principal and interest. Jarvis sold the land subject to the mortgages to Sinclair, who defaulted. The second mortgagee sold the land under the power of sale, the proceeds being insufficient to satisfy the second mortgage. In the meantime Parsons became bankrupt and his Official Assignee sued Jarvis under his covenant to indemnify Parsons. Had the equity of redemption still existed the amount recovered from Jarvis would have been held in trust to discharge the third mortgage, but as the land had been sold under the power of sale in the prior mortgage and the equity of redemption did not exist neither Jarvis nor his successors had any interest in having the third mortgage satisfied, consequently the Official Assignee distributed the amount of the judgment amongst the general creditors and did not pay it to the third mortgagee alone.

(3) The Application of Sections 70, 71 and 68 of the Property Law Act to the Land Transfer Act.

The Land Transfer Act appears to contain a complete code dealing with all land subject to its terms. Section 1 (4) of the Property Law Act says the Act shall be read so as not to conflict with the Land Transfer Act but the Courts have laid it down that certain Sections of the Property Law Act contain substantive rules of law applicable to all classes of real and personal property.

In 1913 Chapman, J., held in *Daveney v. Carey*, 33 N.Z.L.R. 598, that the right to redeem before due date upon payment of interest to the due date given by Section 70 of the Property Law Act applied, for the above reason to a mortgage under the Land Transfer Act.

In 1926, Ostler, J., held in *Bowen v. Redmond*, (1926) N.Z.L.R. 644, that Section 71 of the Property Law Act, giving the right to call for a transfer of a mortgage on payment instead of a release, applied to the Land Transfer Act. Had he decided otherwise the doctrine of *Kinnaird v. Trollope* discussed above would in effect have been excluded from applying to Land Transfer mortgages. It would be well for conveyancers inclined to adopt the short form of increase of mortgage provided by Section 104 of the Land Transfer Act to bear this decision in mind should they be tempted to so increase a mortgage when there is another mortgage already registered behind them as they might on repayment of only the original amount advanced have to transfer the increased mortgage and rely for their security for the increase on an implied trust against the transferee.

Section 68 of the Property Law Act requires three months' notice of calling up or repayment of an overdue mortgage on which interest has been accepted. There is no similar provision in the Land Transfer Act and there is no direct decision stating that this Section applies to Land Transfer mortgages but it has in *Miles v. Hussey*, 28 N.Z.L.R. 382, and *Knuckey v. Baddeley*, 29 N.Z.L.R., at p. 712, been assumed to apply, and on the reasoning in *Daveney v. Carey* and *Bowen v. Redmond* it can be safely said that, should the point ever come before the Courts, the Section will certainly be held to apply to mortgages under the Land Transfer Act.

Anonymous Juries.

Proposed Legislation in Irish Free State.

Novel features are, it is anticipated, to be incorporated in a bill which the Free State Government proposes to introduce with the object of putting an end to attempts at intimidation of jurors. Examples of interference with jurors in certain cases have been frequent during the past twelve months. One man who served on a jury was shot dead by assailants who are still unknown, and another man attacked in similar circumstances was dangerously wounded.

The main idea underlying the new bill is said to aim at preventing the names of jurors in particular cases becoming known. Names of jurors will no longer be called out in Court, and the right of the accused person to obtain the names and addresses of jurors will be withdrawn. Jurors in Court will be identified by means of numbers. The complete jury list will not be available to the public. Copies will not be on sale, and the possession of a jury panel by an unauthorised person may be made an offence.

"If women cannot get their lunch in three-quarters of an hour they are not fit to be jurors."

—Mr. Justice Horridge.

Solicitors' Fidelity Fund.

Full Provisions of New Bill.

The Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Bill, introduced in the Legislative Council under the sponsorship of the Attorney-General, has now passed in that Chamber and has been transmitted to the House of Representatives for its concurrence. The provisions of the Bill differ considerably from those of the measure introduced last year and it is thought that a reprint in full of its provisions will be of interest to the Profession.

A BILL INTITULED

AN ACT to make Provision for the Establishment and Administration of a Solicitors' Fidelity Guarantee Fund, and for Matters incidental thereto.

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled and by the authority of the same, as follows :—

1. (1) This Act may be cited as the Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Act, 1929, and shall be read together with and deemed part of the Law Practitioners Act, 1908 (hereinafter referred to as the principal Act).

(2) This Act shall come into force on the first day of January, nineteen hundred and *thirty*.

2. In this Act, unless the context otherwise requires,—

"Committee" or "committee of management" means the committee to which the powers of the Council in relation to the fund may be delegated pursuant to section *ten* of this Act :

"Council" means the Council of the New Zealand Law Society :

"Fund" means the Solicitors' Fidelity Guarantee Fund established under this Act :

"Prescribed" means prescribed by this Act or by rules made under the authority of this Act.

3. This Act shall apply with respect to every solicitor who is for the time being engaged in the practice of the profession of law either on his own account or in partnership with any other person or persons, but shall not apply to any solicitor who is not so engaged.

Solicitors' Fidelity Guarantee Fund.

4. (1) There is hereby established a fund to be known as "The Solicitors' Fidelity Guarantee Fund" (hereinafter referred to as "the fund").

(2) The fund shall be the property of the New Zealand Law Society, and shall be held in trust for the purposes hereinafter appearing.

5. All moneys belonging to the fund shall, pending the investment or application thereof in accordance with this Act, be paid into a bank for the time being carrying on business in New Zealand, to the credit of a separate account to be called the Solicitors' Fidelity Guarantee Fund Account.

6. The fund shall consist of—

(*a*) All sums paid to or on account of the fund by solicitors, either as annual contributions or as levies, in accordance with the provisions of this Act in that behalf :

(*b*) The interest from time to time accruing from the investment of the fund, as hereinafter provided :

(*c*) All moneys recovered by or on behalf of the New Zealand Law Society in the exercise of any right of action conferred by this Act :

(*d*) Any other moneys that may be lawfully paid into the fund.

7. There shall from time to time be paid out of the fund, as required,—

(*a*) The amount of all claims, including costs, allowed or established against the fund as hereinafter provided :

(*b*) All legal expenses incurred in defending claims made against the fund, or otherwise incurred in relation to the fund :

(*c*) All premiums payable in respect of contracts of insurance entered into by the Council pursuant to section *twenty* hereof :

(*d*) All refunds made to solicitors or to their personal representatives pursuant to section *twenty-two* hereof :

(*e*) The expenses involved in the administration of the fund, including allowances to members of the Council or the committee of management in respect of their services and their reasonable travelling-expenses incurred in connection with the management of the fund :

(*f*) Any other moneys payable out of the fund in accordance with this Act or with rules made under the authority of this Act.

8. (1) The accounts of the fund shall be audited annually by a registered accountant appointed for the purpose by the Council. No person shall be so appointed to audit the fund unless he is authorised to audit solicitors' trust accounts in accordance with the regulations for the time being in force relating to the audit of such accounts.

(2) Every person acting as auditor under this section shall in respect of the fund have the same powers and duties and be subject to the same responsibilities and obligations, with such modifications as may be necessary, as he would have in respect of the audit of solicitors' trust accounts.

9. Subject to the provisions of the *next succeeding* section, the fund shall be administered by the Council on behalf of the New Zealand Law Society.

10. The Council may by resolution delegate its powers in relation to the fund or any of such powers to a committee of management, consisting of not less than *three* nor more than *five* persons being members of the New Zealand Law Society. Any member of that Society may be appointed a member of the committee of management, notwithstanding that he may not be a member of the Council. Any resolution as aforesaid may be at any time in like manner rescinded or varied.

11. (1) Except as provided in the *next succeeding* section, every solicitor with respect to whom this Act applies, on making application in any year for a certificate under section forty-five of the principal Act, shall, in addition to all other fees then payable by him, pay such fee as may from time to time be prescribed for the purposes of this Act, being not less than *five* pounds or more than *ten* pounds in any year, and no such certificate shall be issued unless and until the prescribed fee is paid.

(2) If any solicitor with respect to whom this Act is not applicable at the time of his application for a certificate under section forty-five of the principal Act thereafter in the year for which such certificate is issued commences to practise as a solicitor on his own account or in partnership with any other person or persons, he shall thereupon become liable to pay to the fund the amount of the prescribed fee for that year.

(3) All fees payable under this section shall be paid in the same manner as fees payable under section forty-five of the principal Act are paid, and the person receiving such fees shall forthwith pay them into the fund.

12. No further contributions in accordance with the *last preceding* section shall be made to the fund established under this Act at any time while the amount of the fund, including any investments thereof, and after deducting the amount of all unpaid claims and other liabilities outstanding against the fund, is not less than *one hundred* thousand pounds.

13. (1) If at any time the fund is not sufficient to satisfy the liabilities of the New Zealand Law Society in relation thereto the Council may by resolution impose on every solicitor in respect of whom this Act applies, for payment into the fund, a levy of such amount as it thinks fit, not exceeding *ten* pounds.

(2) The amount of such levy shall become payable on a date and in a manner to be fixed by the Council, and if not theretofore paid shall be paid together with the next annual fee payable to the fund pursuant to the provisions of section *eleven* hereof.

(3) No solicitor shall be required to pay by way of levy under this section more than *ten* pounds in any one year or more than *fifty* pounds during the whole period of his practice as a solicitor.

14. (1) Any moneys in the fund that are not immediately required for the purposes thereof may be invested in any manner in which trustees are for the time being authorised to invest trust funds, or otherwise as the Council thinks fit.

(2) The income derived from the investment of the fund at any time while the fund amounts to or exceeds *one hundred* thousand pounds may be paid into and form part of the general account of the New Zealand Law Society, and shall then be available for any of the purposes of the society.

15. (1) Subject to the provisions of this Act, the fund shall be held and applied for the purpose of reimbursing persons who may suffer pecuniary loss by reason of the theft by a solicitor with respect to whom this Act applies, or by his servant or agent, of any money or other valuable property entrusted to him, or to his servant or agent, in the course of his practice as a solicitor, including any money or other valuable property as aforesaid entrusted to him as a solicitor-trustee :

Provided that no solicitor to whom this Act applies nor any person practising as a barrister shall have any claim against the fund in respect of thefts committed by any solicitor to whom this Act applies.

(2) No person shall have any claim against the fund in respect of any theft committed before the commencement of this Act, and, in respect of any theft that may be committed after the commencement of this Act, no person shall have a claim against the fund unless notice of such claim is given in writing to the Council or committee of management within *twelve* months after the claimant has become aware of the theft.

16. (1) The Council may receive and settle any claim against the fund at any time after the commission of the theft in respect of which such claim arose, but no person shall be entitled, without leave of the Council, to commence any action in relation to the fund unless and until the claimant has exhausted all relevant rights of action and other legal remedies available against the defaulting solicitor or any other person in respect of the loss suffered by him.

(2) No person shall be entitled to recover from the fund by action as aforesaid an amount greater than the balance of the loss suffered by him after deducting from the total amount of such loss the amount or value of all moneys or other benefits received or receivable by him from any source other than the fund in reduction of such loss.

(3) No amount shall be paid or payable out of the fund as interest on the amount of any judgment obtained or of any claim admitted against the fund.

(4) No right of action shall lie in relation to the fund in respect of any loss suffered by any person by reason of any theft that may be committed by a solicitor at any time after the claimant or his privies have received a notification from the Council or committee of management warning him or them against the employment or continued employment of such solicitor.

(5) No action for damages shall lie against the New Zealand Law Society or any member or servant of the Council or committee of management for any notification given in good faith and without malice for the purposes of the *last preceding* subsection.

17. In any action brought against the New Zealand Law Society in relation to the fund, all defences which would have been available to the defaulting solicitor shall be available to the Society.

18. On payment out of the fund of any moneys in settlement in whole or in part of any claim under this Act the New Zealand Law Society shall be subrogated, to the extent of such payment, to all the rights and remedies of the claimant against the solicitor in relation to whom the claim arose, or, in the event of his death or insolvency or other disability, against his personal representatives or other persons having authority to administer his estate.

19. (1) No moneys or other property belonging to the New Zealand Law Society other than the fund shall be available for the satisfaction of any judgment obtained against the society in relation to the fund, or for the payment of any claim allowed by the Council ; but if at any time the fund is not sufficient to provide for the satisfaction of all such judgments and claims they shall, to the extent to which they are not so satisfied, be charged against future accumulations of the fund.

(2) The Council may in its absolute discretion, having regard to the rules hereinafter set forth, determine the order in which the judgments and claims charged against the fund as aforesaid shall be satisfied, and may, if the amount accumulated is not sufficient to satisfy all such judgments and claims in full, satisfy any such judgment or claim in whole or in part.

(3) Without limiting the discretion of the Council, it shall, in applying the fund towards the settlement of such judgments and claims as aforesaid, have regard to the following rules :—

(*a*) It shall take into consideration the relative degrees of hardship suffered or likely to be suffered

by the several claimants in the event of their claims against the fund not being satisfied in whole or in part :

(*b*) Claims for amounts not exceeding *five hundred* pounds shall, unless in special circumstances, be satisfied in full before claims for amounts exceeding *five hundred* pounds are satisfied to a greater extent than *five hundred* pounds :

(*c*) Where all other considerations are equal, claimants shall have priority as between themselves according to the dates of the judgments or the dates when the claims were admitted by the Council, as the case may be.

20. (1) Notwithstanding anything to the contrary in the foregoing provisions the Council may in its discretion enter into any contract or contracts of insurance with any person or company carrying on fidelity insurance business in New Zealand, whereby the New Zealand Law Society will be indemnified to the extent and in the manner provided by such contract or contracts against liability to pay claims under this Act.

(2) Any such contract of insurance may be entered into in relation to solicitors generally or in relation to any solicitor or solicitors named therein.

(3) No action shall lie against the New Zealand Law Society, or against any member or servant of the Council, or against any member of the committee of management, for injury alleged to have been suffered by any solicitor by reason of the publication in accordance with fact of a statement that any contract of insurance entered into under this section does or does not apply with respect to such solicitor :

Provided that in the event of any contract of insurance being entered into in respect of any specified solicitor or solicitors, the Council shall on the application of any other solicitor enter into a like contract of insurance in respect of such last-mentioned solicitor if the insurer signifies his or its willingness to enter into such contract on like terms and conditions.

21. No claimant against the fund shall have any right of action against any insurance company or other person with whom a contract of insurance is made under this Act in respect of such contract, or have any right to claim any moneys paid by the insurer in accordance with any such contract of insurance ; but all such moneys shall be paid into the fund and shall be applied in or towards the settlement of relevant claims.

22. In the event of the death or on the retirement from the practice of his profession of any solicitor in respect of whom no claim has been made under this Act or, if any such claim has been made, in respect of whom such claim has not been sustained, the Council may in its discretion pay to him, or to his personal representatives, as the case may be, a sum not exceeding the aggregate amount of his contributions to the fund.

Supplementary Provisions.

23. (1) For the purpose of safeguarding the fund established under this Act the Council of the New Zealand Law Society or of any District Law Society may at any time appoint a registered accountant for the time being qualified to conduct the audit of solicitors' trust accounts to examine the accounts of any specified solicitor or firm of solicitors, whether a member or members of any District Law Society or not, and to furnish to it a confidential report as to any irregularity in the accounts of such solicitor or solicitors that may be disclosed by such examination, or as to any other matter that in the opinion of such accountant should, in the interests of the fund, be further investigated.

(2) Every appointment made under this section shall be in writing and shall be signed on behalf of the Council by the President or two members thereof.

(3) Upon production by such accountant of the instrument of his appointment as aforesaid he may require the solicitor or solicitors in respect of whom the appointment has been made, or any servant or agent of such solicitor or solicitors, to produce to him all books, papers, accounts, securities, or other documents relating to the business or accounts of such solicitor or solicitors, and to give all information in relation thereto that may be reasonably required of him or them, and if any such person, without lawful justification or excuse, the proof whereof shall lie on him, refuses or fails so to do, or otherwise hinders, obstructs, or delays the accountant in the performance of his duties or the exercise of his powers under this section, he shall be guilty of an offence and shall be liable accordingly.

(4) No accountant appointed to make any examination of accounts for the purposes of this section shall communicate any matter which may come to his knowledge in the course of such examination to any person except in the course of his report to the Council that appointed him.

(5) The Council receiving such report shall consider the same in committee and not otherwise, and it shall not be lawful for any member of that Council or of any of its officers to publish to any person any information disclosed in such report except in the performance of his duty.

(6) Every person who commits a breach of any of the provisions of this section shall be liable on summary conviction to a fine of *ten* pounds.

24. (1) For the purposes of this Act the Council may make rules for all or any of the following purposes :

(*a*) Prescribing the amount of the annual contributions to the fund to be paid by solicitors with respect to whom this Act applies :

(*b*) Providing for the investment of so much of the fund as is not immediately required for the purposes thereof :

(*c*) Prescribing forms of notice to be given to the Council in relation to claims against the fund, and the conditions subject to which and the extent to which the Council may settle any such claims without recourse being had to legal proceedings :

(*d*) Prescribing the duties of accountants appointed to conduct an examination of any accounts pursuant to section *twenty-three* hereof ; and prescribing also the duties of the solicitor or solicitors concerned in relation thereto, and the circumstances in which such solicitor or solicitors may be required to pay the cost of such examination :

(*e*) Generally, for such other matters as may be considered necessary for the purpose of giving full effect to the intent of this Act.

(2) The rules made under the authority of this section shall not come into force unless they are approved by the Governor-General in Council.

London Letter.

Temple, London,
4th July, 1929.

My dear N.Z.,

I dined, last night, next to a distinguished lawyer, politician and business man—all three capacities in one vital and vivacious personality—and he had, not so many years or even months ago been over in your country, dealing with your Eminents and arguing with your Notables. You would have given much to hear his conversation, I feel sure ; for you, no doubt, are like the rest of us of our race, very modest and self-depreciating in your inward demeanour but very sure at heart, and glad to be occasionally informed, that we are the best people in the world, we who speak the King's English and are His Majesty's liege subjects ? My man spoke with a measured enthusiasm of which I have rarely heard the like from the lips of a shrewd man of affairs used to weighing his words ; and particularly he spoke with affection and admiration of your profession. I almost felt that I had known them, and I certainly wished most profoundly that I had known them, when he spoke of your late Chief Justice and your late Mr. Justice Alpers. . . . . But the charm of the former and the courage of the latter and the achievement and qualities of both must have been something past any appreciation capable of being conveyed by the written word. Forgive this digression ; but I am compelled by a conceit in my association with your brotherhood and I fancy you will not resent my refreshing of your memory of your great men.

At this end, the Lord Chancellor has taken the title of Baron Sankey of Moreton in Gloucestershire, which, if I have the right Moreton in mind, recalls the edge of the Cotswolds and the yellow stone houses of a delightful country. The Attorney-General has insisted upon re-fighting his constituency ; and the minds of us all are set wondering whether the whole of the uproar at his affair, which has hit him very hard I am told, was not brought about by his foolishly disingenuous manner of proceeding, rather than by any disgraceful and unscrupulous matter as his hostile critics allege. Of course, I (possibly standing alone) regard our present Prime Minister as quite the most stupid man who ever reached a height, capable of mismanaging anything and definitely bound to ruin the Labour Party before he has finished reforming the world ; from a material point of view I, following wiser opinions than my own, am thankful that the brain of Sir William Jowitt is to be in guidance of this arch-mismanager ; and it has for long been suspected that if Jowitt's support had been of a less misguided man, a Prime Minister rather less wrapped up in his own conceit and rather more susceptible to others' views, there might never have been half the bother and a very much worse thing might have been done with very much less fuss as sequel. However that may be, the Preston Election is to be refought, and the whole affair is likely soon to be forgotten.

We were refreshed lately by an episode before a tribunal of which you may not have the type in New Zealand : the Ministry of Health Inspector, who tours the country conducting enquiries into matters of Local Government and who, in latter years, has made a great name for his class of amateur judge by his good sense and courtesy and sweet reasonableness. The episode is thus the more difficult to understand ; and so high is our opinion of these laymen (who find themselves involved in semi-judicial work to which they were never trained) that I shall assume that something had happened previously which is not reported and which had provoked the man. However that may be, he said he should not adjourn at all for lunch ; he had his lunch brought to him ; he took exception to counsel's following of his example ; and a rattling altercation followed, both counsel and tribunal (as I love to think) arguing between the bites, with blown out cheeks and angrily pointing contemptuous rolls at each other. . . .

Our Metropolitan Magistrates Committee has reported to no very interesting point, though there is much in their report which, touching upon juvenile courts, is of a human interest. An aptness is given to its publication by a contemporaneous discussion, conducted in the columns of the "*Times*," as to the proposed segregation for life of old offenders, as being people mentally inferior and best kept apart. Sir Arthur Conan Doyle promotes the idea, but I do not know that we think the more highly of it on that account ; I value my own little opinion far more than his, for really these matters cannot be usefully discussed except by those who have had and are having a constant experience of the criminal. In my jurisdiction I happen to have the most admirable prison governor ; he sits by me at my own Quarter Sessions, and we discuss together the cases which, in other Courts, I prosecute or defend ; I learn much from him, and my learning tends to this conclusion, that the utterly irreclaimables are of a small enough number to make the task of reclamation one worth pursuing, even among the hardened practitioners. Mr. Justice McCardie had occasion to deal with the subject, at an affair of the great reform organisation, and I think he put the hopeless proportion at something like 10 per cent. The striking point of the whole subject to my thinking is this : to sit in judgment in the larger, non-summary, jurisdictions, is always progressively to mature to a wider outlook and a more sympathetic attitude : among reasonable men, the sentences become more merciful as the experience lengthens and the other side more impresses itself on the love-of-order mind. This is so universally the case, that I think it is not going too far to say that Sir Arthur Conan Doyle may be presumed to be mistaken, from the outset, whether or not some sense may have accidentally come from his mistaken pen. Make him a Recorder, and leave him at his jurisdiction for ten years, and then anything he may have to say upon the subject may be worth listening to.

The result of *Service v. Sundell* may be of use to those who find themselves in a similar situation as did the counsel for the plaintiff and defendant here. It was a running down case ; the finding was that both sides were guilty of negligence ; but the jury were unable to agree as to which side's negligence was the greater and the more effective. The authority of *Dowell v. General Steam Navigation Company Ltd.*, 5 E. & B. 195, was, of course, prayed in aid by defendant, asking for judgment in his favour. But no, said the Lord Chief Justice ; modern decisions have blown upon the dictum of Lord Campbell in that much cited case (page 206) and the position now is that upon such a verdict as the foregoing it is not possible to give judgment to either side.

There is a further case for whose report you may be well advised to be on the alter: *Automobile and General Finance Co. Ltd. v. Morris.* It re-discusses that time-honoured theme of the past: what is the kinship, or the degree of identity (if any) between a hire purchase agreement and a bill of sale?

And lastly, Romer, J., has, thank goodness, at last decided with finality that question, what is a bungalow and may it have an upper storey and still be a bungalow? It may. The decision arose in the case of *Ward v. Paterson;* and let me tell you this, that, whether it was Ward or whether it was Paterson and I shall not say which it was, the case has been the bugbear of my life for the last many weeks by reason of the party professing to be a friend of mine and insisting upon discussing the controversial subject every time we travelled together in our common train. As, during the General Election this happened every week-day for three weeks on end, you will, I feel, understand and excuse my "thank goodness!"

Yours ever,

INNER TEMPLAR.

Bench and Bar.

Mr. George Boutflower Davy, in his ninety fourth year, died recently at Wellington. Mr. Davy was born in Devonshire and came to New Zealand in 1862. After having qualified as a barrister and solicitor he was, in 1869, appointed Warden and Resident Magistrate at Thames. Two years later he became District Land Registrar at Auckland, and in 1875 was promoted to the office of Registrar General of Lands. On the retirement of Mr. H. G. Seth Smith, in 1894, Mr. Davy became chief Judge of the Native Land Court, still retaining his position as head of the Land Transfer Department. He retired in 1904. He was for some time District Judge at Wellington, until that office was abolished in 1880.

Mr. Thomas Hutchison died recently at Oamaru. He was the son of Mr. William Hutchison, a one time member of the Wellington Provincial Council and of the House of Representatives, and was born at Dundee, in 1855. He came to New Zealand a few years later with his parents. After receiving his legal training under his brother, Mr. George Hutchison, he was admitted to the Bar in 1876. Mr. Hutchison practised at Wellington and Hawera and was appointed Stipendiary Magistrate at Masterton in April, 1893. In 1908 he was transferred to Oamaru and he held that position until his retirement in 1919.

We regret to record the death of Mr. Arthur Stubbs, at the age of sixty six. During the whole of his forty years in the Civil Service Mr. Stubbs was associated with the Supreme Court. His training was received in the Supreme Court Office at Napier, and from there he was promoted to be Deputy Registrar of the Wellington Supreme Court. He had been only three years in this position when he was transferred to Dunedin, to be Registrar of the Supreme Court there. Fifteen years later he was transferred to Auckland, and held the office of Registrar there until his retirement.

Forensic Fables.

THE CALLOW YOUTH, THE BRIEF IN THE DIVORCE COURT AND THE WEEPING LADY.

A Callow Youth Shortly After Call Caused his Name to be Inscribed on the Roll of Counsel Desirous of Representing Poor Persons. He was Soon Rewarded with Instructions to Appear on behalf of a Female Petitioner in the Divorce Court. The Callow Youth Perused the Brief and Learned that the Female's Husband Had been Going On Anyhow. Not Only had he Preferred the Society of Two Other Ladies to that of the Female Petitioner, but on Various Occasions he had Treated her with Physical Violence. The Case, which was to be Tried on the Morrow, Appeared to be Plain Sailing. After Dining Quietly at "The Cock"

the Callow Youth Returned to his Chambers to have a Final Look at the Brief. Turning Up the Light he Observed a Middle-Aged Lady Seated in the Arm-Chair. She Wore a Straw Boater and a Macintosh, and she was Weeping Quietly. The Callow Youth saw At Once what had Happened. It was Clear that his Client had Come for a Conference about the Case. Approaching the Arm-Chair the Callow Youth Begged the Weeping Lady to be Calm and Spoke a Few Tactful Words of Sympathy. The Weeping Lady with a Slight Hiccup Said Something about "a Couple." She then Sank into Complete Unconsciousness. The Callow Youth Redoubled his Attentions and, Recalling the First Aid Lectures he had Once Attended Did What he Deemed Necessary to Restore her to Life. As he was Engaged upon his Work of Mercy a Furious Cry Assailed his Ear. Turning Round, the Callow Youth Found himself in the Grasp of a Gigantic Male. While the Callow Youth was Staunching the Flow of Gore from his Injured Nose he Gathered that the Weeping Lady was the Laundress in charge of the Chambers, that she was Intoxicated, not for the First Time, and that her Husband (the Gigantic Male) had Come to Take her Home. The Callow Youth Retired to Rest a Poorer but a Wiser Man.

MORAL: *Don't Jump to Conclusions.*

Bills Before Parliament.

Imprest Supply (No. 3). (Rt. Hon. Sir Joseph Ward). Authorizing imprest grants of £2,442,000 out of funds and accounts in First Schedule and of £305,000 out of accounts in Second Schedule.

Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund). (Hon. Mr. Sidey). The provisions of this Bill are stated elsewhere in this issue.

Otaki Borough Adjustment and Farm-Lands Rating. (Hon. Mr. de la Perrelle). While nominally a public Act this Bill is only local in its operation. S. 18 provides: "The Governor-General may from time to time, by Order in Council, make all such regulations as may *in his opinion* be necessary or convenient for giving full effect to the provisions of this Act."

Pacific Cable Sale Authorization. (Hon. Mr. Donald). Governor-General in Council, or any person appointed by the Governor-General in that behalf authorized to consent on behalf of His Majesty's Government in New Zealand to the sale of the Pacific Cable undertaking as provided for in the Imperial Telegraphs Act, 1929 (Imperial) and on behalf of the Government to approve of the terms of such sale. Share of purchase-money received by New Zealand Government to be paid into Public Account to the credit of the Ordinary Revenue Account of the Consolidated Fund. On the completion of the sale Part XII of the Post and Telegraph Act, 1928, and Fourth Schedule to that Act deemed to have been repealed.

Shops and Offices Amendment. (Mr. McKeen). S. 3 of Act of 1921-22 relating to hours of employment repealed and substitution therefor.—Cl. 2. S. 7 of principal Act amended by repeal of subsection (1) and substitution therefor.—Cl. 3. S. 8 of principal Act amended.—Cl. 4. S. 10 of principal Act amended.—Cl. 5. S. 11 of principal Act amended by repeal of paragraphs (a) (b) (c) and (d) and substitution therefor.—Cl. 6. S. 12 of principal Act amended.—Cl. 7. S. 14 of principal Act, amended.—Cl. 8. S. 21 of principal Act amended.—Cl. 9. S. 31 of principal Act amended by repeal of subsections (1) and (3) and substitution for subsection (1).—Cl. 10. S, 32 of principal Act amended.—Cl. 11. S. 38 of principal Act amended by adding subsection after subsection (3).—Cl. 12. First Schedule to principal Act amended.—Cl. 13. S. 4 of Act of 1927 amended.—Cl. 14. S. 6 of Act of 1927 amended by repeal of subsection (1) and substitution therefor.—Cl. 15. S. 17 of Act of 1927 amended.—Cl. 16. Sections 5, 26 (2), 26 (3), and 31 (3) of principal Act and sections 3, 5, 7, 9, 11, 17, 19, 20, 21, and 22 of Act of 1927 repealed.—Cl. 17 and Schedule.

Summer Time. (Hon. Mr. Sidey). Providing for advance of time for general purposes in New Zealand by half an hour during period of summer time which is defined as the period beginning at 2 a.m. on the second Sunday in October in any year and ending at 2 a.m. on the third Sunday in March of next succeeding year. Where any reference to point of time in any Act, Order in Council, order, regulation, rule, by-law, deed, notice, or other document whatsoever to be deemed to be time as fixed by Act. Reference to any point of time in award or industrial agreement relating to workers employed in threshing of grain or shearing of sheep to be deemed reference to New Zealand standard time provided that any employer and workers employed by him may at any time, by mutual agreement, elect that such reference shall for any period or particular purpose be deemed reference to summer time—any such election being revokable at any time in like manner. Nothing in Act to affect use of New Zealand standard time for purposes of astronomy, meteorology, or navigation, or affect construction of any document mentioning or referring to point of time in connection with any of those purposes.

Urban Farm-Lands Rating. (Hon. Mr. de la Perrelle). "Urban farm-lands" defined as meaning "lands that are principally used for agricultural, horticultural, or pastoral purposes, or for the keeping of bees or of poultry or other live-stock, and that being situated either within or without a borough, are for the time being subject to any general, special, or separate rates made and levied by a Borough Council."—S. 2. Act not to apply to any urban farm-lands to which Otaki Borough Adjustment and Farm-lands Rating Act, 1929, applicable.—Cl. 3. Classification of urban farm-lands for rating purposes.—Cl. 4. Governor-General may appoint Commission to inquire into subject-matter of petition and to classify rateable property into three classes: (1) urban farm-lands that have no prospective or potential value for building purposes; (2) urban farm-lands that have a prospective or potential value for building purposes; (3) all other rateable property.—Cl. 5. Commission to prescribe provisional scale of differential rates.—Cl. 6. Commission to furnish interim report to Minister of Internal Affairs.—Cl. 7. Objections to be forwarded to Commissioner and considered by him; decision of Commissioner with respect of any such objection to be final.—Cl. 8. Classification and scale of rates to be open for objection.—Cl. 9. Final report of Commission.—Cl. 10. Date of commencement of operation of classification.—Cl. 11. Provisions for determination and amendment of classification.—Cl. 12. Effect of classification.—Cl. 13. Where one property is classified in more than one class, values to be apportioned and apportionment recorded on district valuation roll.—Cl. 14. Act, with necessary modifications, to apply to town districts not forming part of any county.—Cl. 15. Every Commission appointed for purposes of Act to have powers of a Commission under Commissioners of Inquiry Act, 1908.—Cl. 16. Clause 17 provides: "The Governor-General may from time to time, by Order-in-Council, make all such regulations as may *in his opinion* be necessary or convenient for giving full effect to the provisions of this Act."

Local Bills.

Hawke's Bay County, Hastings Borough and Havelock North Town Board Empowering.

Hawke's Bay River Amendment.

Wellington City and Suburban Highways Construction and Hutt Road Amendment.

Wellington City and Suburban Water-Supply Amendment.

Rules and Regulations.

Fisheries Act, 1908. Amended regulations re size of blue cod.—Gazette No. 58, 22nd August, 1929.

Hospital and Charitable Institutions Act, 1926. Revocation of regulation 7 of general regulations and substitution of additional regulations in lieu thereof.—Gazette No. 58, 22nd August, 1929.

Municipal Corporations Act, 1920. Order-in-Council revoking regulations authorising investment of Reserve Funds and Renewal Funds in certain securities.—Gazette No. 58, 22nd August, 1929.

Music Teachers Registration Act, 1928. General Regulations.—Gazette No. 58, 22nd August, 1929.

Sale of Foods and Drugs Act, 1908. Amended regulations relating to smoked fish.—Gazette No. 58, 22nd August, 1929.

Shipping and Seamen Act, 1908. Amended rules for life-saving appliances for ships.—Gazette No. 58, 22nd August, 1929.

Cold Courts.

Views of Lord Hewart.

Lord Hewart, presiding recently in Court with a jury of twelve on a morning when the consignment of hot air from the remote basement had not arrived, and when the ventilators were functioning to their fullest extent as an entrance for the outer air, appealed in vain to the jury for a satisfactory answer to the simple question: "Are you cold?" "I seem," he said, "to be sitting in a refrigerator, with half a gale of wind blowing round me." After half-an-hour the Lord Chief Justice could endure it no longer and adjourned the Court until such time as the heat arrived from the cellars. The nature of the outspoken Lord Chief Justice's remarks, had he been sitting on such an occasion in one of the Courts of this country, can only be a matter for surmise.

Procedure in Germany.

An Experiment with Cross-Examination.

On June 7th an experiment with cross-examination procedure, as followed in England and the Dominions, was made for the first time in Germany at the trial of a young man for forgery and fraud, and great interest was taken in the proceedings by all concerned in the administration of justice. There are two paragraphs in the German code of judicial procedure which, for some fifty years, have provided for cross-examination if desired, but recourse has never been made to them. The code being about to be revised, it was suggested that the system should be given a proper trial, in order that it might be decided whether the paragraphs were worth embodying in the new code or even extending.

In the ordinary German procedure the judge, or president of the Court, himself conducts the examination of the defendant and witnesses on the principle of getting at what the Court requires to know in order to reach a decision. Counsel interrupt with questions when they are anxious to bring out a particular point. At the opening of the hearing of the case referred to the judge examined the accused himself. Then the public prosecutor rose to apply, in agreement with the counsel for defence, for the right of cross-examination under the paragraphs in question. This having been granted, he called experts and witnesses for the prosecution, examined them, and then turned them over to the counsel for the defence, who took the same course with experts and witnesses. In each case the judge put additional questions afterwards. At one point he intervened in the English manner, not hitherto adopted in Germany, to inform counsel for defence that the examination could not go on on the lines it was taking or they would lose themselves in the infinite.

Experts are fairly evenly divided for and against the system. It is generally admitted that it enabled the trial to be conducted more thoroughly, but it is complained that it takes up much more time. In the ordinary way the case would have taken an hour in the German Court, whereas that day it took three hours, though that may perhaps be attributed partly to inexperience.

New Books and Publications.

Law for Printers and Publishers. By B. M. Cloutman and F. W. Luck. (J. Bale, Sons and Danielsson Ltd.). Price 20/-.

The Present Juridical Status of the British Dominions in International Law. By Baker. (Longmans Green & Co.). Price 24/-.

Palmer's Company Law. 13th Edn. By A. F. Topham, K.C. (Stevens & Sons Ltd.). Price 29/-.

Outline of Local Government and Local Taxation. Seventh Edn. By Wright and Hobhouse. (Sweet & Maxwell Ltd.). Price 15/-.

English Constitutional History. Ninth Edn. 1929. By Taswell-Langmead. (Sweet & Maxwell Ltd.) Price 24/-.

Problems in Peace and War. Volume 14. Grotius Society. (Sweet & Maxwell Ltd.). Price 9/-.

Wellington Law Students' Society.

The following case was argued recently before Mr. A. Gray, K.C. :—

M. Motors sold a motor car to one W. under an unregistered hire-purchase agreement. A garage proprietor X., knowing nothing of this agreement, had at W.'s request carried out certain repairs to the car. The purchaser W. failed to pay the instalments under the hire-purchase agreement and the company claimed repossession of the car. X. refused to deliver up the car when requested to do so, contending that he had a worker's lien over it for the cost of the repairs he had effected.

M. Motors sued for possession of the car. The facts in the case were taken from *Moyes v. Magnus Motors Ltd.*, (1927) N.Z.L.R. 906, (1927) G.L.R. 555, from which decision the case was deemed an appeal.

Hollings for appellant. Respondent claims common law lien. There must be express or implied authority of party against whom lien claimed: *Pennington v. Reliance Motor Works Ltd.*, (1923) 1 K.B. 127. Agreement expressly negatives hirer's right to create a lien and states method by which repairs to be executed. *Albemarle Supply Co. Ltd. v. Hind and Co. Ltd.* (1928) 1 K.B. 307, is distinguishable on grounds: (1) There plaintiff knew or had known for three years that hirer garaged his cabs with defendant and that latter executed repairs; (2) There was no clause setting out method by which repairs were to be executed. Submitted plaintiff there indicated by its conduct that hirer had authority to have repairs executed, and was estopped from denying such authority. Authority will be implied where obligation on hirer's part to repair without more, but not where expressly withheld.

Larkin in support. A lien must be derived from some legitimate authority: *Hiscox v. Greenwood*, (1802) 4 Esp. 174. *Associated Motors Ltd. v. Hawke and Co. Ltd.*, (1924) N.S.W. S. R. 592, which followed *Pennington v. Reliance Motor Works Ltd.*, (*cit. sup.*) is a case almost on all fours with present case. Claim of lien there refused. In *Auto-Finance Co. of Australia Ltd. v. Fisher*, (1928) V.L.R. 131, the *Albemarle case* was distinguished, and some of the statements in the latter case were considered too sweeping. Mere possession of a moveable does not give authority to create lien: *Lamonby v. Foulds*, (1928) S.C. 89.

Bannister for respondent. Agreement is one for sale and purchase within meaning of *Helby v. Matthews*, (1895) A.C.—. It contemplates the property in the chattel passing to the purchaser, subject to re-vesting in certain circumstances, and subject to Section 57 of Chattels Transfer Act, 1924. Respondent acquired a common law possessory lien. Lawful possession enables hirer to create lien without authority, even contravening a provision in the agreement: *Green v. All Motors Ltd.*, (1917) 1 K.B. 625, and the *Albemarle case* (*cit.sup.*). Latter case is binding on the Court. Repairer had and could have had no knowledge of the agreement, and his common law rights may not be abrogated by restrictive covenant *inter alios*. No point of estoppel was raised in the *Albemarle case*.

Foot in support. The right to a common law lien derived by the lienor not from the hirer but against him. The instrument makes purchaser liable for all repairs. It provides that the purchaser "shall where practicable allow the owner alone to execute the repairs at the conditional purchaser's expense." Submitted express terms of instrument permit purchaser to allow third parties to acquire a lien. Plainly contemplated that some person other than owner will have repairs executed.

Mr. A. Gray, K.C., delivering "judgment," said that it was remarkable that in this class of contract so universally used such conflict in the decisions should arise. There was no doubt that the earlier cases decided that a right of lien depended on authority of the owner given to the hirer, but the Courts have modified the rule. MacGregor, J., had decided that the case must be governed by the authority of *Albemarle Supply Co. Ltd. v. Hind and Co., Ltd.* (*cit. sup.*). Mr. Gray was impressed by the Scottish and Australian cases cited by "counsel" for appellant, but these, he considered, were not of controlling authority, and, moreover, had been decided on the authority of older cases. The judgment of McCardie, J., quoted by counsel for appellants, was not binding on New Zealand Courts, and *Pennington's case* was not in point. Notwithstanding the New South Wales and Scottish cases he was bound by the decisions in *Green v. All Motors Ltd.*, and *Albemarle Supply Co. Ltd. v. Hind and Co. Ltd.* The appeal would be dismissed.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"The smallest case that comes before a lawyer is worth his entire devotion."

Lord Atkin.

Vol. V. Tuesday, October 1, 1929 No. 16.

Liability for Fire.

The New Zealand Court of Appeal has laid it down in *Kelly v. Heyes*, 22 N.Z.L.R. 429, that "the law in New Zealand has ever been that if a person lights a fire on his own land he must at his peril prevent it spreading to the land of his neighbours and there is nothing in the Land Act abrogating this law." Land owners who improve their property, even when the improvement is one specified as an improvement under the Land Act, by felling bush and then burning it are always liable for damage done to neighbouring lands if the fire spreads to them, however careful they may have been, and whatever warning they may have given their neighbours.

Such an unmodified liability upon those who take up bush land does not appear to be in the best interests of settlement, and in laying down this rule the Court of Appeal did not pretend that it was founded on any such interests. The learned Judges laid down the rule upon the ground that they had in this respect to follow the principles of the Common Law. The opinion expressed by the late Sir John Salmond in his work on *Torts* does not accord with the Court of Appeal's finding as to what the rule of the Common Law is. Sir John Salmond came to the conclusion that there must be negligence before liability attaches for the result of fire spreading, and that liability for fire is not absolute and independent of negligence. It seems that the view expressed by Sir John Salmond is in agreement with decisions in Canada to the effect that if a man, in order to clear his land, burns his felled timber he is not liable if it spreads to adjoining lands and does damage provided that he has made his burn at a proper time and in a proper season, having reference to wind and weather, and after having given due warning to adjoining owners. The Canadian rule seems set out in the headnote to *Buchanan v. Young*, (1873) 23 C.P. 101, 33 E. & E. Dig. 55: "Persons have a right to set out fire on their land for the purpose of clearing it, and if the flames spread under the influence of a wind suddenly arising, and cause damage to a neighbour, no action will lie without proof of negligence." When the normal course of agricultural improvement and husbandry demands burning, as it does in New Zealand, the Canadian view seems in the general interest preferable to the rule which the Court of Appeal has declared prevails in New Zealand. In South Africa it appears that where a fire starts on a person's open veldt and spreads to his neighbour's property and does damage, direct proof of negligence is required before the neighbour can recover damages.

The Common Law of England is set out by Thirning, as follows: "Every man shall answer for his fire which by misfortune burns the goods of another," and this statement is adopted, in effect, in Rolles' Abridgement. In the Supreme Court of Victoria, Chief Justice Stawell came to the conclusion that the English Common Law on the subject of fires was local and did not apply to that Colony. Mr. Justice Richmond, however, in *Hunter v. Walker*, 6 N.Z.L.R. 690, came to the conclusion that the English Common Law on the subject of fires did apply to New Zealand and that the provisions of The Metropolitan Building Act of George the Third's reign relating to fires were applicable to bush fires in the Colony. The decision of Mr. Justice Richmond is the ground of the later decision of the Court of Appeal in *Kelly v. Heyes*. South Africa, Canada and Victoria, according to Chief Justice Stawell, seem to have escaped from the English rule on the ground that it related to local conditions and not to the conditions of those respective Colonies. The circumstances which dictated the declaration of the English Common Law by English Judges were so different from the circumstances to which it has been applied in New Zealand that one cannot help wondering whether the language in which the rule has been stated would have been so inflexible had it been conceived that it would be applied to such different circumstances of husbandry as obtain in the various Dominions. For New South Wales, as long ago as 1866, an Imperial Statute was passed dealing with bush fires. In New Zealand no effort has been made to escape the consequences of an ancient and rigid rule of Common Law so inapplicable to our circumstances that grave injustice can be done by its application. Settlers in New Zealand who fell and burn, whatever precautions they may take, are liable for damage done to adjoining owners if the fire spreads. Claims are constantly made by owners for damage resulting from a neighbour's fire to their fences and pasture, damages usually being detailed as cost of posts, wire, labour required to repair, cost of grass seed and expenses of sowing, although when all is said and done the property of the person claiming may have been cleaned up and considerably improved by the fire. Unless some farmer is prepared to contest the decision of the New Zealand Court of Appeal by taking his case to the Privy Council and there obtains a decision overruling the Court of Appeal, no precautions taken by him to prevent his fire from spreading will save him from liability for damages.

There is an enormous area of bush country in New Zealand still to be felled, cleared and burnt. If farmers wish to be relieved from liability for burning, which is essential if their lands are to be profitably occupied, they must look to the Legislature to remedy the present state of the law in New Zealand as to liability for fire. For negligence the settler should always remain liable, but it is quite feasible for the Legislature to sanction the framing of regulations under which, if complied with, a settler entitled to a burn should be liable for damage to neighbours resulting from his negligence. Such regulations would vary according to local conditions. At the present time a great number of farmers are under the impression that if they give notice to adjoining owners of an intended burn, and the burn is planned for the proper time of year, they are under no liability. Their confidence, however, in this respect is due to a misconception of the law relating to fires that prevails in New Zealand.

Supreme Court

Herdman, J. February 18, July 10, 11; August 13, 1929.
Wellington.

HARRIS v. RICHARDSON.

Undue Influence—Sale by Bankrupt with Consent of Official Assignee of Life Interest in Capital Sum—Official Assignee Not Party to Assignment—Ignorance of Vendor—Pressure by Creditors—Sale at Undervalue—No Independent Advice—Act of Vendor After Knowledge That Transaction of Doubtful Validity in Effecting Insurance on Life in Name of Purchaser Held Not in Circumstances to Amount to Affirmation—No Acquiescence or Laches Owing to Ignorance of Facts Until Shortly Before Action Brought—Title of Plaintiff to Sue—Transaction Set Aside.

Action by plaintiff to set aside on the ground of undue influence an assignment to the defendant of a life interest in a capital sum of £7,250 to which the plaintiff was entitled under his father's will. The plaintiff was a farm labourer, described by His Honour as of weak character and possessing an intelligence which was not of a high order. From his father's estate he received in addition to the life interest above mentioned, the sum of £4,000 in cash, which he invested in a farming property. This venture was disastrous, and on 15th May, 1916, he became bankrupt. At the instigation of the Official Assignee the plaintiff took out a policy of insurance on his life for £1,000 in the National Mutual Life Association and assigned the policy to the Official Assignee on 10th August, 1916. Between the date of the bankruptcy and January, 1918, pressure was brought to bear upon the plaintiff to raise funds upon the security of his life interest for the purpose of satisfying the claims of his creditors. About July, 1928, further pressure was brought to bear upon him by creditors to settle up his affairs, with the result that he decided to seek the help of the defendant Richardson, a moneylender in Wellington, with whom he had had previous dealing. Harris and his wife stated that Richardson was informed by Harris that he wanted to borrow £1,000 upon the security of his life interest, but Richardson's evidence was that Harris wanted to sell it. Harris stated that Richardson, after looking at the relevant papers, said that he could not lend on the life interest but offered to purchase it for £1,500; Harris maintained that it was worth £2,000 anyhow and eventually Richardson, after making some calculations, offered £1,750, to which Harris agreed as he was afraid he might not get a better offer. Richardson made the offer on condition that Harris took out a second policy of £1,000 in the National Mutual Life Association. The insurance was effected on or about 10th July, 1916, the policy maturing on 10th July, 1930, or on the prior death of the life assured. The policy was transferred to the defendant on 10th July, 1918, and on that date plaintiff and defendant attended at the office of the defendant's solicitor, where a deed assigning his life interest in the trust fund of £1,750 which had been prepared by the solicitor under instructions from the defendant was executed by the plaintiff. The document was read over and explained to the plaintiff by the solicitor, but it was never suggested that the latter should have independent advice. Evidence was given of two transactions prior to 10th July, 1928, between the plaintiff and the defendant which resulted in profit to the latter. In 1917 he purchased a life policy for £500 from the plaintiff subsequently making a profit of £100 with interest at 10 per cent., and later in 1917 he lent £50 on the security of a motor car. On 4th August, 1928, the defendant effected further insurance on the plaintiff's life, in the Temperance and General Insurance Office; the plaintiff's conduct in relation to this further insurance was relied upon as an affirmation of the transaction, and is stated in detail in the report of the judgment.

February 2, 1929.

Macassey and Lawson for plaintiff.

Myers, K.C. and D. Perry for defendant.

July 10, 11, 1929.

Macassey and Lawson for plaintiff.

D. Perry and James for defendant.

HERDMAN, J., said that without the support of the insurance policies the plaintiff had little of value to offer the defendant. He might have died at any moment. If the defendant had purchased the bare interest of the plaintiff in the income arising from the trust fund for £1,750 alone, it was of course obvious that he ran the risk of losing perhaps the whole of his money immediately; but what was a security of little value when it stood alone was converted into a security of considerable worth when coupled with insurance policies. The element of mortality was eliminated as soon as the life policies became the property of the defendant. If plaintiff had died immediately after the execution of the assignment the defendant would have become entitled immediately to the proceeds of two policies which would have amounted to £2,000 at least, and to any interest on the £7,250 which might have become payable to the plaintiff before he died. If the plaintiff had died in July, 1918, the defendant would have become entitled to a profit of not less than £250. But the plaintiff had survived, and since 1928 about £400 per annum, some £4,000, had been received by the defendant from the trustees against a certain outlay for insurance premiums. During next year, 1930, he would be entitled to the proceeds of one policy for £1,000 plus accrued bonuses. Mr. Talbot gave evidence that by 17th August, 1930, Richardson would have received back his £1,750 with interest at 10 per cent. and in addition would have made a profit of £2,275 8s. 3d. Mr. Gostellow, the Government Actuary, gave evidence that the fair market price of the annuity which Richardson purchased was £3,992 and that to ensure the repayment of the capital invested with a reasonable rate of interest it would be necessary to take out a policy covering the life of the annuitant for £4,342. In an endeavour to ascertain with some degree of certainty whether the plaintiff's annuity was sold at an undervalue His Honour had considered **Vaughan v. Thomas,** 1 Bro. C.C. 556, where it was held that to take an annuity worth nine years purchase at five years purchase was an unconscientious bargain, and **Heathcote v. Paignon,** 2 Bro. C.C. 179, where an annuity worth £500 was sold for £200. From the evidence given at the trial His Honour stated that certain facts definitely emerged. First it had been proved with certainty that in July, 1928, when the sale of the annuity was effected, the plaintiff was in financial straits and was being pressed to raise funds upon the strength of his life interest. Secondly it had been proved that when he effected the sale he was not independently advised. Thirdly the history of the man's career showed that he was an incompetent bucolic who possessed no business ability. Fourthly from the defendant's previous experience of the plaintiff and his family he must have been well aware that the family had been struggling against adversity. Fifthly the annuity was bought at an undervalue. The defendant knew that the plaintiff was financially embarrassed and that he could make himself secure by arranging to have the life interest supported by life insurance, and on the whole His Honour thought that—to use the words of the Master of the Rolls in **Evans v. Llewellin,** 1 Cox, 340—Harris was in a situation "in which he was not a free agent and was not equal to protecting himself." His Honour could not believe that the shrewd, experienced moneylender when he agreed to purchase the plaintiff's annuity for £1,750 was not perfectly well aware that he was handling an interest in property the true value of which was much in excess of the sum that he proposed to give for it.

The plaintiff to succeed had to bring himself within the principle stated in **20 Halsbury's Laws of England, 760.** The plaintiff must show, to begin with, that the defendant stood in such a relation of superiority towards him and was in a position to exercise such domination and influence over his will and judgment that the law imposed upon the defendant an obligation to establish that he had not abused that influence or taken undue or improper advantage of the plaintiff's subjection, distress or necessities. That obligation could only be discharged by establishing not only that the defendant made full disclosure of all relevant facts and of the rights to which they gave rise, but also that the plaintiff had independent and competent advice from a person having full knowledge of those facts and rights, and, in the present case, it being a case of purchase, that he received adequate value. The conduct of the parties and the circumstances of the particular case might give rise to the relation from which arose the presumption of undue influence. His Honour referred at length to **Chesterfield v. Jannsen,** 2 Ves. Senr. 124, 155; **Evans v. Llewellin** (*cit. sup.*) **Wood v. Abrey,** 3 Madd. 417, **Baker v. Monk,** 4 De G.J. & S. 388, **Sinclair v. Elderton,** 21 N.S.W.L.R. (Eq.) 21, **Brusewitz v. Brown,** (1923) N.Z.L.R. 1106, **Aylesford v. Morris,** L.R. 8 Ch. 490, and **Harrison v. Guest,** 8 H.L.C. 482, and, after reviewing the evidence, said that it had been satisfactorily proved that a relation existed between the parties to the present action when the contract for the sale of the plaintiff's life interest was made which gave rise to a presumption of what the law called "influence." It was, therefore, for the defendant to rebut that presumption. He could do that by proving that defendant had independent

advice. In the present case he could not do that. He might be able to discharge the onus by proving that the plaintiff was a capable and experienced business man, but in the present case he was unable to do that; nor could he prove that the consideration was fair and reasonable. Indeed, neither the evidence as to value given by Mr. Gostellow nor the figures of Mr. Talbot were challenged. It was no doubt true that inadequate consideration alone was not sufficient to give rise to a presumption of influence: **Moth v. Attwood,** 5 Ves. 845; **Griffith v. Spratley,** 1 Cox 383. But considering the whole of the evidence carefully His Honour had come to the conclusion that the plaintiff was very much in the hands of the defendant. The case, in His Honour's opinion, came within the principle stated in **Fry v. Lane,** L.R. 40 Ch. D. 312, 322, that: "Where a purchase is made from a poor ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction."

It had, however, been argued on the defendant's behalf that the plaintiff confirmed the transaction by agreeing in August, 1928, to effect a further insurance upon his life. Under the direction of the defendant, Mr. Marquis, manager of the T. & G. Insurance Co., saw the plaintiff and got him to sign the necessary proposal and submit to the customary medical examination. Mr. Marquis said that the plaintiff remarked to him speaking about the proposed insurance: "I suppose it is all right. Richardson has been very decent to me." Mr. Marquis gave the date of the interview as 4th August, 1928. On the 28th August, 1928, the solicitors of Harris, Messrs. Card and Lawson, wrote to Richardson threatening to issue a writ in an action to have the deed of assignment set aside. In **Welles v. Middleton,** 1 Cox 112, Lord Thurlow said that mere general expressions of satisfaction were no proof of an intention to confirm, and in **Murray v. Palmer,** 2 Sch. & Le Fr. 474, Lord Redesdale, L.C., (at pp 485 & 486) said that to establish an intention to confirm, it must be shown that the servient party was aware that the act he was doing was to have the effect of confirming an impeachable transaction. Assuming that the plaintiff made the statements to which Mr. Marquis testified, could that be said in the present case? No doubt the lapse of a long period of time during which the servient party remained inactive was an element of importance in such a case as the present one. In May, 1928, the plaintiff might have suspected that he had been wronged. When he saw Mr. Marquis he might have had doubts about the validity of the assignment. But there was nothing to show that he did any act knowing that it was to have the effect of confirming the assignment. There was nothing to show that he acted with his eyes open. His Honour doubted very much whether he had any sound ground for believing that the transaction was assailable until just before 28th August when his solicitors wrote their letter. His Honour distinguished **Allcard v. Skinner,** 36 Ch.D. 145. It was not necessary for the defendant to prove a positive act of confirmation. Acquiescence might be proved by acts which established it or by proof of a long period of time during which a transaction had survived impeachment, but, as was pointed out in **La Banque Jacques-Cartier v. La Banque D'Epargne de la Cite et du District de Montreal,** 13 App. Cas. 118: "Acquiescence and ratification must be founded on a full knowledge of the facts." In the present case the ignorance of the plaintiff prevailed until he went to his solicitors. His Honour distinguished **Wright v. Vanderplank,** 8 De G. M. & G. 147, and **Knight v. Marjoribanks,** 11 Beav. 349.

Complaint had been made about laches and delay and the defendant had relied upon the Statute of Limitations. The evidence was, however, that the plaintiff did not know that he had been wronged until 1928 and as he was seeking equitable relief His Honour did not think that in the circumstances his suit was barred. His Honour referred to **Maloney v. Trustees Coy.,** 24 V.L.R. 297, **Beynon v. Cook,** L.R. 10 Ch. 389, and **Fry v. Lane,** 40 Ch. D. 312.

It was contended that as the plaintiff was an undischarged bankrupt he was not entitled to assign his life interest to the defendant. It was plain that when a person was adjudicated a bankrupt the Official Assignee acquired the bankrupt's property absolutely but, subject to Section 120 of the Bankruptcy Act, 1908, paragraph (f) of which provided that the surplus moneys remaining in the hands of the Assignee after making all the payments prescribed in paragraphs (a) to (e) should be paid to the bankrupt. In the present case the Assignee although not a party to the deed of assignment was cognisant of the transaction and acquiesced in it. He, with Harris, executed the transfer of the life insurance policy on 11th July, 1918. He no doubt handed over the policy in exchange for the moneys which satisfied the claims of all the creditors but he took no part in the negotiations leading up to the sale of the annuity and he was not a party to the deed of assignment. The Assignee had been released from the administration of the estate. He was *functus officio* and all creditors had been paid in full. It seemed to His Honour that what in effect Harris did when he signed away his annuity was to dispose of his right to what he believed to be the surplus coming to him, a disposition which, according to **Bird v. Philpott,** (1900) 1 Ch. 822, he had a right to make notwithstanding that it was made during the pendency of the bankruptcy. But whether the disposition of property which the plaintiff made was or was not in effect a disposition of the surplus of his estate the defendant could hardly be allowed to say that the assignment under which he had enjoyed such handsome benefits for eleven years was invalid. His Honour understood the argument to be that the plaintiff could not give title and therefore could not now sue. The defendant was well content with the title which he had been given, so apparently was his solicitor. But now when the transaction was attacked because the part he played in it was said to be unconscientious he submitted in defence the invalidity of the assignment. His Honour accordingly declared that the transaction which was the subjectmatter of the present suit and the assignments effecting the same were void as they had been obtained by undue influence and ordered the assignment to be cancelled and the policies to be delivered to the plaintiff, an account to be taken by the Registrar of all moneys received and paid by the defendant in connection with the transaction, the action to stand adjourned until the account be taken.

Solicitors for plaintiff: **Card and Lawson,** Featherston.
Solicitors for defendant: **Perry and Perry,** Wellington.

Adams, J. June 4, 5; August 19, 1929. Christchurch.

MERCANTILE FINANCE CORPORATION LTD. v. FRANCIS & TAYLOR LTD.

Company—Agency—Borrowing Powers—Authority of Director—Company Composed of Two Members Acquiring Business of Motor Agent—Both Members Directors—Conduct of Business Left to One Director—Agreement of Directors *inter se* to borrow from Named Company Only—Managing Director Forging Documents and Obtaining Without Authority Advances From Company Other Than That Authorised—Directors Empowered Under Articles to Delegate Borrowing Powers to One Director—No Such Delegation in Fact—Lender Advancing Money Without Knowledge of Contents of Memorandum or Articles or Making Enquiries as to Authority of Director—Lender Not Entitled to Assume That Transaction Within Director's Authority—Company Not Liable to Repay Moneys Lent.

Action to recover £1,996 17s. 6d. alleged to be owing in respect of two transactions made between the plaintiff company and one Francis purporting to act on behalf of the defendant company. The defendant company was a private company consisting of two members, Francis and Taylor; it was formed in August, 1926, to take over the business of Francis, a motor agent, part of whose business was to dispose of motor vehicles on hire-purchase terms. Francis and Taylor each signed the memorandum of association for 5,000 £1 shares. Francis and Taylor were the directors of the company. Francis was the manager of the business and Taylor, who resided in Invercargill, paid monthly visits to Dunedin to supervise the books and accounts. On the registration of the company it was agreed between the directors that all the financing business of the defendant company should be transacted through the Southland Guarantee Co. at Invercargill, Taylor being a director of that company. On 11th June, 1926, Francis had disposed of two motor-omnibuses to one Emms under hire-purchase agreements. On the security of these documents and certain collateral promissory notes Francis obtained an advance from the Otago and Southland Finance Co. On 10th July, 1926, Francis disposed of a motor-car to Emms, on hire-purchase terms, taking a motor-car in satisfaction of the deposit and inducing Emms to sign a printed form of hire-purchase agreement and a number of promissory notes in blank, which Francis was to complete by filling in the correct particulars and amounts. The price payable under the hire-purchase agreement was to be £365, but Francis fraudulently inscribed as the total liability the sum of £1,914 0s. 6d., and altered the promissory notes accordingly. He obtained an advance on the instrument and promissory notes from the Otago and Southland Finance Co. When the fraud was dis-

covered Emms refused to meet the promissory notes, but Francis ultimately induced Emms, on 6th June, 1927, to assist him by signing a new hire-purchase agreement and new promissory notes for the two omnibuses and the car. Francis promised to "square off" the fraudulent transaction with the Otago and Southland Finance Co. and to replace the fraudulent documents with the new agreement and promissory notes. The new hire-purchase agreement purported to be made between Francis and Taylor Ltd., and was signed "Francis & Taylor Ltd., F. B. Francis, Director." Francis & Taylor Ltd. had, however, no interest in either the vehicles affected or the hire-purchase agreement, for Francis & Taylor Ltd. had not agreed to take over from Francis his interest in motor-vehicles disposed of by him under hire-purchase agreements or his liabilities in respect of moneys borrowed thereon. The vehicles belonged to Francis subject to the rights of Emms under the hire-purchase contract and of the Otago and Southland Finance Co. in respect of its advances.

In April, 1927, Francis agreed to buy Taylor's shares in Francis & Taylor Ltd., and Taylor thought that thereafter he had no connection with the company and left matters entirely to Francis. There was no meeting of directors from April, 1927, until October, 1928, and there was no evidence of any informal meeting or arrangement between the directors during that period as to any matter relating to the company's business. On 25th May, 1927, Francis, on behalf of the defendant company, and within his authority, disposed of an omnibus to the Inter City Omnibus Co., in Christchurch, on terms of hire-purchase. He was introduced to Mr. Stewart, the secretary of the plaintiff company in Christchurch, on 30th May, 1927, and obtained an advance of £2,000 from that company on pledge of the hire-purchase contract and indorsement of the relative promissory notes. It appeared from the evidence of Stewart that on this occasion Francis was introduced to him by a person whose name he did not know, but said to be a salesman in the employ of Maclaren & Co., a responsible firm in Christchurch. Mr. Stewart knew nothing about the defendant company; he had no knowledge of its memorandum or articles of association, and made no enquiries of any kind as to the position of the defendant company, financial or otherwise, or as to the authority of Francis to borrow money and pledge its securities. On 6th June, 1927, Francis applied to the plaintiff company for an advance upon the documents in the transaction between Emms and the defendant company of that date, and two days afterwards obtained an advance of £2,018 15s. 8d. thereon. In each case an instrument in the plaintiff company's usual form of security signed "Francis & Taylor Ltd. F. B. Francis, Director," was executed. At the request of Francis the first of those advances by the plaintiff was paid by cheque payable to the order of McLaren & Co. Ltd. The second was paid by cheque payable to the order of the defendant company. The cheques were not crossed and Francis obtained cash for the second cheque, in Christchurch. No record whatever of the transaction with Emms was made in any of the defendant company's books, and Taylor had no knowledge of it or of either of the two transactions with the plaintiff until after the defendant company went into liquidation. The transaction with the plaintiff company, relating to the business between the Inter-City Bus Co. and the defendant company, was genuine but unauthorised.

Donnelly and **Thomas** for plaintiff.
F. B. Adams for defendant.
Mills for defendant Emms.

ADAMS, J., said that it was hopeless to contend that Francis had any real authority to use the name of the defendant in the contract of hire-purchase of 6th June, 1927, between the defendant and Emms, or in the agreement of the same date purporting to be made between the defendant company and the plaintiff company. The defendant company never had any property or interest in the chattels described in and dealt with by the documents. Those documents were, therefore, false documents within the meaning of Section 288 (a) of the Crimes Act, 1908, being documents the whole of which purported to be made by or on behalf of the defendant who did not make or authorise the making thereof. They were made by Francis, with knowledge of their falsity, and with the intention that they should be acted upon as genuine by the plaintiff company, and that the plaintiff company should be induced by the belief that they were genuine to advance money upon them. Both documents were, therefore, forgeries.—S. 290, Crimes Act—and were simply null and void: **Ruben v. Great Fingall Consolidate,** (1906) A.C. 439; **Kreditbank Cassell G.M.B.H. v. Schenkers,** (1927) 1 K.B. 826. The indorsement of the promissory notes was infected with the same vice: S. 24, Bills of Exchange Act, 1908; **Kreditbank Case** (*cit. sup.*). In the circumstances counsel for the plaintiff very properly intimated that he did not rely upon either the agreement or the indorsement of the promissory notes. He urged, however, that those instruments were ancillary to the borrowing of the money which was the real transaction, and which, in the circumstances, apart from the documents, was within the real or ostensible authority of Francis. The only real authority shown, however, was limited to borrowing on such securities from the Southland Guarantee Co. The reason of that restriction was plain. Taylor was a director of that company and was, therefore, in a position to approve or disapprove of any application which might come before the directors of that company. The ostensible authority set up was based upon the facts that Francis was left in full control of the company's business; that under Article 95 of Table "A" the defendant's directors could delegate their borrowing powers to him; that the plaintiff company was entitled to assume that those powers had been delegated to Francis, and, therefore, was not bound to inquire as to whether he had in fact power to borrow on the defendant's behalf. The ostensible authority of an agent was based upon the doctrine of estoppel. The classic exposition of the application of the principle of estoppel to such cases as the present was found in the judgment of Parke, B., in **Freeman v. Cooke,** 2 Exch. 654, 663, which was adopted by the Judicial Committee in **Miles v. McIlwraith,** 8 App. Cas. 120. After quoting a passage from the judgment delivered by Lord Blackburn in the latter case (at p. 133), His Honour said that it was sufficient to say that, in order that a person or company might be bound by an unratified contract of an agent without real authority, it must appear that his supposed authority was ostensible to the other contracting party and relied on by him when he made his contract: **13 Halsbury's Laws of England,** 390.

The evidence of Mr. Stewart, the plaintiff company's secretary, showed that he knew nothing about the defendant company, had no knowledge of the provisions of its memorandum or articles of association, made no enquiries of any description as to the position of the defendant, financial or otherwise, or as to the authority of Francis to borrow money and pledge its securities on its behalf. He did not know who were the defendant's directors, and it was a fair inference from his evidence that he was not aware of the fact that it was registered as a private company. He was, however, sufficiently acquainted with company law and practice to know that companies generally had more directors than one, and also a secretary, and that generally it was the practice of private companies to require that one director and the secretary should sign contracts. The absence of the secretary's signature should have put him on immediate inquiry in the course of which he would have discovered that under Article 100 (p) Table "A" the signature by the secretary was essential. Nevertheless he accepted the signature of Francis alone to the documents in both transactions. There was no evidence of any representation or conduct upon which estoppel could be supported.

The question raised as to delegation by the directors of their power to borrow money was covered by recent authorities. His Honour referred to a passage from the judgment of Sargant, L.J., in **Houghton and Co. v. Nothard, Lowe and Wills Ltd.,** (1927) 1 K.B. 246, 266, a judgment in which Atkin, L.J., concurred, in which this question was discussed. Referring to the opinion of Wright, J., in the Court below, that the plaintiffs were entitled to assume that anything necessary to delegate any of the functions of the board to one director or two directors had been done as a matter of internal management, the learned Lord Justice in that case said that, in his opinion, that was to carry the doctrine of presumed power far beyond anything that had been decided, and placed limited companies, without any sufficient reason for so doing, at the mercy of a servant or agent who should purport to contract on their behalf, and that on that view not only a director of a limited company with articles founded on Table "A," but a secretary or any subordinate officer, might be treated by a third party acting in good faith as capable of binding the company by any sort of contract, however exceptional, on the ground that a power of making such contracts might conceivably have been entrusted to him. **Houghton and Co. v. Nothard, Lowe and Wills Ltd.** (*cit. sup.*) was discussed and followed in **Kreditbank Cassell G.M.B.H. v. Schenkers,** (1927) 1 K.B. 826. With great respect to the observations of Scrutton, L.J., in the latter case, His Honour ventured the comment that it would be difficult to satisfy the Court that a person had acted in reliance on a power of which he had no knowledge. **Houghton and Co. v. Nothard, Lowe and Wills Ltd.** (*cit. sup.*) was affirmed on appeal in the House of Lords, (1928) A.C. 1. There was nothing in the judgments indicating dissent from the observations of Sargant, L.J., to which His Honour had referred. The rule of law laid down

in **Mahoney v. East Holyford Mining Co.**, L.R. 7 H.L. 869, and similar cases, did not apply. As His Honour had already shewn, there never was in fact a valid delegation by the directors of their powers to borrow generally, and the plaintiff's case could not be supported by reference to the particular delegation. There was the further point, also taken by counsel for the defendant, that Article 100 (p) Table "A," which authorised the directors to "make and execute all such assurances and instruments as might be necessary, provided that they were signed by the directors, or by one director and the secretary" was not complied with.

Judgment for defendant.

Solicitor for plaintiff: **C. S. Thomas**, Christchurch.

Solicitors for defendant: **Meredith, Hubble and Ward**, Auckland.

Solicitors for defendant Emms: **McCallum, Mills and Co.**, Blenheim.

Ostler, J. August 14; 15, 1929. Auckland.

WHITE v. SAMSON.

Mortgage—Novation—Transfer of Land Subject to Mortgage—Purchaser Executing Memorandum of Extension of Mortgage—Original Mortgagor Not Party to Extension—Purchaser Personally Liable Under Covenants of Mortgage—Land Transfer Act, 1915, S. 104.

Action for principal sum and interest due under a mortgage. On 19th May, 1917, one Sheen executed a mortgage to the plaintiff to secure the repayment to her on 11th May, 1921, of the principal sum of £3,500 with interest at 6½ per cent. per annum. The mortgage, which was secured on certain land under the Land Transfer Act, was duly registered. On 11th May, 1921, Sheen transferred the land to the defendant, subject to the mortgage. On 3rd September, 1925, the plaintiff and the defendant executed a memorandum of extension of the term or currency of the mortgage in the form provided by Section 104 of the Land Transfer Act 1915. The memorandum of extension was in the following words: "The term or currency of the annexed mortgage is hereby extended to the 31st day of March, 1927." It was signed by the defendant as "mortgagor," and was duly registered. The defendant made default in payment of the principal upon the extended date and also in payment of interest. The plaintiff commenced the present action on 15th March, 1929, claiming the principal and interest due upon the mortgage from defendant. The defendant filed a statement of defence in which the above facts were admitted, but he claimed that he had entered into no covenant either express or implied to pay the money and, therefore, he could not be sued personally for it. By consent a question of law was ordered to be argued as to whether the statement of claim disclosed any cause of action. Defendant's counsel admitted that if he could not succeed on the point of law he had no other defence, therefore Ostler, J., intimated that he would hear argument on the point of law and also hear and determine the action.

Johnstone for plaintiff.

Sullivan for defendant.

OSTLER, J., said that the point was well settled by authority that where the transferee of land subject to a mortgage entered into a memorandum of agreement with the mortgagee for the increase of the rate of interest, or for the extension of the term of the mortgage and for an increase in the rate of interest, the agreement amounted to a novation, and a new contract was thus formed compounded of the terms of the original mortgage and the new memorandum, under which the transferee of the land became primarily liable to the mortgagee for payment of both principal and interest: see **Re Goldstone's Mortgage**, (1916) N.Z.L.R. 489; **Robertson v. White**, (1923) N.Z.L.R. 1275; **Perpetual Trustees v. Elworthy**, (1926) N.Z.L.R. 621; **Nelson Diocesan Trust Board v. Hamilton**, (1926) N.Z.L.R. 342; **Paterson v. Irvine**, (1926) N.Z.L.R. 352; **Williams v. Kendall**, (1928) G.L.R. 114. It was argued that because all that the defendant agreed to was an extension of the term, the case could be distinguished from the line of cases cited. But the principle upon which those cases were decided was that the new composite contract was a novation, under which the original mortgagor was let out and a new mortgagor substituted. That principle applied whatever variation was made in the original contract, whether it was an increase in the rate of interest, or an extension of the term, or both. In any of such cases it was equally a novation, the mortgagee being able to look only to the new party with whom he had made the new agreement to perform all the terms of the original mortgage as so varied. It was argued that in the present case there could not be a novation because Sheen was not a party to the new agreement. The answer to that contention was to be found in the judgment of the Court of Appeal in **Nelson Diocesan Trust Board v. Hamilton** (*cit. sup.*) at p. 350. The consent of Sheen must be presumed unless the contrary was proved. His Honour was unable to distinguish the present case in principle from the cases cited, and, therefore, held that the defendant by signing the memorandum of extension of term of the mortgage made himself personally liable for the payment of principal and interest.

Judgment for plaintiff.

Solicitors for plaintiff: **Stanton, Johnstone and Spence**, Auckland.

Solicitor for defendant: **J. J. Sullivan**, Auckland.

Ostler, J. August 13; 15, 1929. Auckland.

BASTER v. COMMERCIAL UNION ASSURANCE CO. LTD.

Insurance—Life and Accident Policy—Policy Not Covering Death or Disablement to Insured "While Engaged in Motor-cycling"—Insured Killed While Riding in a Side-car Attached to Motor-cycle—Insurer Not Liable under Policy—No Ambiguity in Terms of Policy.—Court Not Entitled to Create Ambiguity by Departing from Ordinary Meaning of Words—Rule of Construction *contra proferentem* Not Applicable.

Action by administratrix of the estate of one Baster, deceased, to recover from the defendant the sum of £500 alleged to be due upon a policy of life and accident insurance taken by the deceased with the defendant. The policy provided that if the assured should sustain any bodily injury by violent, accidental, external and visible means, and such injury should within 90 days cause the death of the insured, the defendant would pay the sum of £500 to his executor or administrators. The policy contained the usual provisions that the insurance should be subject to the conditions and memoranda endorsed on it in like manner as if the same were respectively repeated and incorporated in it, and provided that "compliance with such conditions and memoranda, and each of them, should be a condition precedent to the right of the insured to sue and recover hereunder." One of the conditions endorsed on the policy was in the following terms: "This policy does not cover death or disablement resulting from accidental injuries sustained by the insured while engaged in steeplechasing, racing including reliability trials (whether on horseback or wheels), boxing or wrestling in public exhibitions, hunting, motor-cycling, mountaineering, playing polo or football, or whilst in or through falling from any form of aerial conveyance." On 9th January, 1927, the insured was anxious to go from his home to Avondale on a matter of business. One Allen who owned a motor-cycle and side-car offered to take him there in the side-car. He accepted the offer, and on the way a collision occurred with another vehicle which injured the insured, and he died from his injuries the same day.

G. P. Finlay for plaintiff.

A. H. Johnstone for defendant.

OSTLER, J., said that the defence raised was that the insured was engaged in motor-cycling at the time he met with the accident. In order to construe the words of a document the cardinal rule was to read the whole document in order to discover by its terms the object of the parties. In so reading it the ordinary popular meaning of the words used must be adopted. The object of the condition quoted above was quite clear. It was to except from the policy certain named occupations, some of which were indulged in only as pastimes, which were considered to be extra hazardous and peculiarly liable to produce accidents. The words were not "engaged in riding a motor-cycle," but "engaged in motor-cycling." Could it be doubted, if a man took his wife for an outing in a motor-cycle and side-car, that in ordinary and popular language they would be correctly described as both engaged in motor-cycling, just as a person who sat in the back seat of a motor-car during a drive was correctly stated in popular language to be engaged in motoring. Counsel for the plaintiff admitted that a girl who rode pillion-wise behind the rider of a motor-cycle was "en-

gaged in motor-cycling." The reason given for that admission was that the pillion rider had to help in the balancing of the machine by swaying her body at the curves. It was true that the attachment of a side-car made a motor-cycle more stable inasmuch as it then had three wheels instead of two, but its stability was still far from ideal, and the passenger in a side-car when taking curves at speed had also to assist by swaying his body in order to prevent a capsize. If, therefore, a motor-cycle when it had a side-car attached still remained a motor-cycle, His Honour thought there could be no doubt that in ordinary and popular language the passenger in the side-car was engaged in motor-cycling equally with the rider of the cycle.

Counsel for plaintiff however contended that when a motor-cycle had a side-car attached it ceased to be a motor-cycle. He based that contention upon some remarks of Chapman, J., in **Perrin v. Gardiner,** 29 N.Z.L.R. 448. But there was nowhere in that decision any suggestion that "motor-cycle" was confined to a machine having two wheels only. If a motor-cycle ceased to be a motor-cycle as soon as a side-car was attached, what did it then become? It could not be described accurately as a motor-car. That term was confined to motor-vehicles with four wheels. His Honour knew of no other term which had been popularly adopted to describe such a three-wheeled vehicle, except that of a "motor-cycle." There was nothing in the word itself which limited "motor-cycle" to a vehicle with two wheels. His Honour referred to **Mehaffy and Dodson on Motor Cars,** 2nd Edn., 17, and said that in his opinion a motor-bicycle remained a motor-cycle notwithstanding that a side-car was attached to it.

Something was said during the argument about the rule of construction of an insurance policy. His Honour agreed that where there was an ambiguity in the words used in the policy they must be construed *contra proferentem*, but in the present case His Honour could find no ambiguity. The Court had no right to create an ambiguity by giving a meaning to the words used which was different from their ordinary meaning, in order to apply the rule: see **Coles v. The Accident Assurance Co.,** 5 T.L.R. 736; **In re United London and Scottish Insurance Co.,** (1915) 2 Ch. 167.

It was somewhat remarkable that the point in the present case did not seem to have come up for decision either in New Zealand, or in England, or in Australia. Certain American decisions were referred to, but those were in conflict with each other and, therefore, were of little assistance. But even there it seemed that what might be called the better opinion was in accord with the view His Honour had taken. **Bew v. Travellers' Insurance Co.,** 14 Amer. L.R. 983, decided that a passenger in an aeroplane was within the exception of an accident insurance policy which provided that it should not cover injuries sustained while "participating in aeronautics." The reasoning used in that case seemed to His Honour unanswerable. In **Benefit Association v. Hayden,** 37 Amer. L.R. 622, the Supreme Court of Arkansas took the contrary view although one of the Judges dissented from the judgment. But the learned editor of the reports added a note to the judgment to the effect that it was contrary to the rule adopted in a number of other jurisdictions.

Judgment for defendant.

Solicitor for plaintiff: **G. P. Finlay,** Auckland.

Solicitors for defendant: **Stanton, Johnstone and Spence,** Auckland.

Kennedy, J. August 27; 31, 1929.
Invercargill.

IN RE SOUTHLAND WOOLLEN MILLS LTD. (IN LIQUIDATION).

Company—Winding-up—Application for Removal of Names from List of Contributories on Ground of Misrepresentation—No Prompt Repudiation of Shares or Prompt Application for Removal of Name from Share Register After Discovery of Misrepresentation—Notice of Intention to Defend Action for Calls in Magistrates' Court Not Amounting to a Repudiation—No Proceedings for Rescission Instituted Before Winding-up—Notice of Intention to Defend Action for Calls in Magistrates' Court Not Amounting to Proceeding for Rescission—Removal of Names from List Refused.

Application by certain shareholders that their names be removed from the list of contributories. Each of the shareholders applied for and was allotted shares in the above-named company in 1924, and each alleged that he was induced to take shares in reliance upon untrue representations, made by brokers soliciting subscriptions, to the effect that some one or other named persons of substance in his district had already taken a large number of shares. His Honour found (if it were necessary to decide the point) that there had been misrepresentation such as each plaintiff alleged. It was not until July, 1928, that the plaintiffs first became aware that the representations made were untrue. Each was in that month sued in the Magistrates' Court for calls on shares standing in his name in the register of members. A notice of intention to defend was in each case filed and evidence was taken on commission at Naseby in September, 1928, when the defence was indicated by the evidence taken. The actions were called on for hearing in December, 1928, after the company had been ordered to be wound up by the Court on a petition presented on 16th October, 1928. In August, 1929, the Official Liquidator made out and left at the Supreme Court Office a list of the contributories of the company, and in that month, on receiving notice of the appointment to settle the list, the plaintiffs applied to have their names removed.

Lloyd for plaintiffs.

Barrowclough for Official Liquidator.

KENNEDY, J., said that in his opinion the applications must be refused. A contract to take shares, even though it had been induced by misrepresentation, was voidable and not void. A shareholder might affirm or avoid a voidable contract but, until he elected to avoid it, it remained good. **Oakes v. Turquand,** L.R. 2 H.L. 325. That right, however, to avoid the contract must be exercised, if at all, promptly after the discovery of the misrepresentation, and would be lost if a winding-up commenced before the contract was effectually avoided. The question to be determined was whether the plaintiffs, after discovering the misrepresentations, promptly took the proper steps to avoid their contracts. Not only did they not apply for rectification of the register or take any proceedings for rescission, but they did not, so far as the affidavits showed, even promptly formally repudiate. The reason for the requirement of prompt action was that shareholders' names were on the register and they were accordingly held out to the public as members and persons might be induced to act on the faith of that membership. The books contained many cases in which the necessity for prompt action was discussed. His Honour referred to **Scholey v. Central Railway Co. of Venezuela,** L.R. 9 Eq. 266n., and **Sharpley v. Louth and East Coast Rail,** 2 Ch.D. 663. When the summonses were first received, the various applicants knew there was a proposal by some to petition for the winding-up of the company. The fact that they were sued was a further circumstance that must be taken into account in considering whether they promptly avoided their contracts. In His Honour's opinion they did not. Merely filing notice of intention to defend an action for calls in the Magistrates' Court was no sufficient avoidance. The defence might well be on grounds other than on grounds involving repudiation of the shares. It was not, so far as the affidavits filed showed, till about two months after the plaintiffs had knowledge of the misrepresentation that their attitude was in some manner disclosed by the evidence taken at Naseby. Such a delay was, under the circumstances, unreasonable, and consequently the plaintiffs, having failed promptly to avoid their avoidable contracts, had by that delay lost their right to rescission. It might further be observed that the plaintiffs could not in any event, while they still permitted their names to remain on the register of members, successfully defend actions in the Magistrates' Court for calls on the ground that they had been induced to take shares by misrepresentation. It was not a sufficient defence to an action for calls that a shareholder had repudiated because of misrepresentation. In order to succeed he must show not only that he had repudiated the contract, but also that he had, after discovering the misrepresentation complained of, taken prompt steps to have his name removed from the register of members: **First National Reinsurance Company Limited v. Greenfield,** (1921) 2 K.B. 260; **Components Tube Company v. Naylor,** (1900) 2 Ir. R. 1. The rule illustrated by the two decisions cited was correctly stated in **Buckley's Companies Acts,** 10th Edn., 580.

There was, however, a further reason (and it applied even though the plaintiffs promptly formally repudiated their shares) why the share register might not be rectified and why the names of the shareholders could not be removed from the list of contributories, and that was that, before any proceedings were taken by the shareholders for rescission or for rectification of the register, a winding-up supervened. Once a winding-up supervened, avoidance was not possible unless either proceedings

were instituted before the commencement of the winding-up or an agreement had been made that the shareholders should be bound by the result of other proceedings which were being taken for the avoidance of the contract to take shares. There was no agreement between the company and the shareholders that the shareholders should not take action but should wait the result of a test action, nor did the company assent to the repudiation, so that there was no reason for the shareholders to refrain from taking proceedings to have their names removed from the register. His Honour referred to **Whiteley's Case,** (1900) 1 Ch. 365, and **First National Reinsurance Co. v. Greenfield** (*cit. sup.*) at p. 277, and said that it could not be properly contended that the defence to each action for calls in the Magistrates' Court amounted to the taking of proceedings for the rescission of the contract, for the Magistrates' Court had no jurisdiction to rescind the contract or to rectify the register. The shareholders applying did not, prior to the commencement of the winding-up, take proceedings to rectify the register and it was too late at that stage for them successfully to apply: **Fleming v. Eclipse Laundry Company,** (1928) N.Z.L.R. 598. The plaintiffs' names would accordingly remain in the list of contributories.

Summons dismissed.

Solicitors for plaintiffs: **Callan and Galloway,** Dunedin.
Solicitors for Official Liquidator: **Ramsay, Barrowclough and Haggitt,** Dunedin.

Kennedy, J. August 7, 8, 14, 1929. Dunedin.

HEFFERMAN v. O'NEILL AND SMITH.

Landlord and Tenant—Partnership—Practice—Claim for Rent for Premises Demised to One of Two Partners Personally Before Commencement of Partnership—Premises Subsequently Used For Business of Firm—No Evidence That Person to Whom Premises Let Acted as Agent for Firm—Acts of Other Partner Recognising Landlord Not Sufficient to Substitute Partners as Tenants—Other Partner Not Liable for Rent—Defendants Having Common Solicitor and Common Counsel—Plaintiff Ordered to Pay Half Costs of Defendants.

Action claiming from the defendant the sum of £50 2s. 9d. alleged to be rent due from 18th February, 1928, to 10th October, 1928, in respect of certain premises let by the plaintiff to the defendants on 1st March, 1927. The defendants denied that any rent was due inasmuch as they were never tenants of the plaintiff and they alleged that the tenant of the premises was one Graham Fox O'Neill and his father Graham Fox O'Neill. The Court upon consideration of the evidence found that the premises were let to the defendant W. E. O'Neill and rejected the defendant's contention that they were let to Graham Fox O'Neill for himself alone. The question remaining for consideration was whether the defendant A. H. Smith was jointly liable with the defendant W. H. O'Neill. The case is reported on this question only. The facts relative thereto are sufficiently set out in the judgment.

Neill for plaintiff.
Sinclair for defendant.

KENNEDY, J., said that the plaintiff alleged at the trial that the defendant A. H. Smith was, at all material times, a partner with the defendant W. H. O'Neill and his counsel submitted that if he could show that, at any time prior to 18th February, 1928, and continuing thereafter during the period of occupation of the garage premises, a partnership subsisted between the defendants, then the defendant A. H. Smith would be equally liable with the defendant W. E. O'Neill and **Pocock v. Carter,** (1912) 1 Ch. 663, was relied on as supporting that proposition. That case was not, however, an authority for the proposition for which it was cited. If in fact the defendant W. E. O'Neill was, when the premises were taken, a partner with the defendant A. H. Smith, and acted accordingly for himself and as agent for A. H. Smith in taking the premises from the plaintiff, then the defendant A. H. Smith would be equally liable with the defendant W. E. O'Neill to the plaintiff. But if in fact the defendant W. E. O'Neill was not a partner with the defendant A. H. Smith at the time when the premises were taken by the defendant W. E. O'Neill, and if W. E. O'Neill did not take and did not purport to take the garage premises for himself and the defendant A. H. Smith, then the defendant A. H. Smith would not become liable to the plaintiff merely by his subsequent occupation of the premises with the defendant W. E. O'Neill even though the defendants might then be partners. The contract of tenancy would in that event have been made with W. E. O'Neill alone. It would be a tenancy at will and would continue until terminated by one month's notice in writing by either side. A subsequent partnership between W. E. O'Neill and A. H. Smith, although it might affect the rights *inter se* of W. E. O'Neill and A. H. Smith, would not, without more, result in the substitution for the tenancy theretofore subsisting between the plaintiff and the defendant W. E. O'Neill, of a tenancy between the plaintiff and both defendants. The plaintiff did not frame his action as one for use and occupation but, even if he had, the plaintiff would have had to show, before the defendant A. H. Smith could be held liable, an acceptance of the two defendants as tenants in place of the defendant W. E. O'Neill. The substitution for the original tenant must be express and was not to be implied from mere acts of recognition on his part of the landlord such as promising to pay rent and so on: **Hyde v. Moakes,** 5 C. & P. 42. Had it then been proved that, when the tenancy arrangements were made, the defendant A. H. Smith was a partner with the defendant W. E. O'Neill? The plaintiff was unaware that the defendant A. H. Smith was even said to be associated with the business until after the premises were let. The evidence of Graham Fox O'Neill was that the defendant A. H. Smith did not become a partner at all events until after the tenancy arrangements had been made with the plaintiff. The evidence of the defendant A. H. Smith was not very clear but on the whole His Honour thought it followed from his evidence that, whatever arrangements were made with the defendant W. E. O'Neill and Graham Fox O'Neill, they were not concluded until after the premises had been let to the defendant W. E. O'Neill. The first receipt for moneys paid by the defendant A. H. Smith was dated 3rd March, 1927, while rent was charged for and paid from 1st March, 1927. It was improbable that rent commenced to run until a date subsequent to the agreement to take the premises and it was highly improbable that the rent commenced to run from a date prior to the actual agreement to take the premises. Whatever then might subsequently have been arranged between the defendants, the plaintiff had failed to prove that, when the premises were taken by the defendant W. E. O'Neill, the defendant A. H. Smith was then, in fact, his partner. There was no evidence that the defendant W. E. O'Neill was authorised by the defendant A. H. Smith to conclude the tenancy arrangements nor did the defendant W. E. O'Neill, if unauthorised, purport to act as agent so that his acts might subsequently be ratified. Nor, finally, had the plaintiff shown, in addition to the consent of W. E. O'Neill and A. H. Smith to be tenants, that the plaintiff had put himself in such a position that he could no longer sue W. E. O'Neill alone, but must sue them jointly.

In the result the plaintiff's claim succeeded against the defendant W. E. O'Neill but it failed against the defendant A. H. Smith.

The defendant A. H. Smith had a common solicitor and common counsel with the defendant W. E. O'Neill and following the rule illustrated in the cases of **Isbister v. Mackinnon and Others,** 5 N.Z.L.R.S.C. 489, and **Stevens v. Florence and Harry Parkin,** (1924) N.Z.L.R. 619, the plaintiff would be ordered to pay the defendant A. H. Smith for costs one half the total costs of the action as on the Magistrates' Court scale with one half the witness allowances for the attendance of the defendants' witnesses.

Solicitors for plaintiff: **A. G. Neill,** Dunedin.
Solicitor for defendants: **Leslie G. Cameron,** Dunedin.

The highest income earned by the most fashionable silk during the past year did not greatly exceed £20,000; and the statement that £40,000 was earned has no foundation in fact. Apart from the income tax officials, who disclose no secrets, the clerks are the best informed people on the subject of a barrister's income; and when a thousand guinea brief is delivered in the Temple or in Lincoln's Inn everybody knows about it next day. Four of such briefs per term in the whole Temple is a high average for the past four years; and briefs of higher denomination are still more rare.—"Outlaw" in the "Law Journal."

Tampering with Witnesses.

By W. E. Leicester, LL.B.

"Much truth is spoken," says Mr. Justice Darling, in one of his lighter moments, "that more may be concealed." And true it is that most witnesses, consciously or unconsciously, eliminate from their testimony those elements which support the opposing contentions or which do not lend weight to their own. To what extent, then, is counsel entitled, apart from cross-examination, to probe into the mental recesses of the stolid witness and to endeavour to show the partisan one that his damaging conclusions are based upon insufficient premises?

Text-books throw very little light on this subject and prosecutions, against either lawyers or laymen, have been rare. From the reported cases, however, certain broad principles can be deduced. It is a misdemeanour at common law to threaten, persuade, or induce a witness not to appear, even if the threat, persuasion, or inducement fails. An attorney commits an offence if he advises the friends of the prisoner to write to the witnesses not to appear, and they write accordingly—1 *Hale* 820; nor was it doubted by the Court of King's Bench that an attorney who was concerned with the "spiriting" away of a witness (summoned even by the Commissioners of Excise) could be convicted—*Steventon and Ors.*, (1802) 2 East. 362. Where the prisoner's brother, apparently a man of morbid outlook, said to a Crown witness: "It would be better for you to bring your sheet and coffin than to prosecute my brother," it was held that he was guilty of a misdemeanour—*Loughran*, (1839) 1 Craw. & Dix 79 (Ir.). At the Swansea Summer Assizes (4th August, 1906) Jelf, J., sentenced prisoners upon a conviction obtained on an indictment for conspiracy to defeat the ends of justice by preventing a girl under sixteen years from attending to give evidence against a man charged with a criminal offence against her. She had been induced to go to the United States.

The witness approached need not have been bound to give evidence. In *Carroll*, (1913) V.L.R. 380, Cussen, J. adopts the statement made by Lord Cottenham in *Lechmere Charlton's Case*, (1837) 2 My. & Cr. 316: "All these authorities tend to the same point; they show it is immaterial what measures are adopted, if the object is to taint the source of justice, and to obtain a result of legal proceedings different from that which would follow in the ordinary course." A distinction has been made in our Courts between the act of persuading or attempting to persuade a person not to appear and give evidence at all and the act of attempting to persuade a person to give such evidence in a criminal proceeding that the accused would be acquitted: *Gray*, 23 N.Z.L.R. 52. Evidence of the latter type would support a charge under Section 138 (d) of the Crimes Act, 1908, of wilfully attempting to defeat the course of justice and it seems that the same principle applies to every attempt to influence a witness in whatever stage of the case it may be: *Webster*, (1880) 1 N.S.W. L.R. 327.

It is surprising, nevertheless, that until 1919 there appears to be no reported case of a charge of inducing a witness to alter his evidence. In that year, the Court of Criminal Appeal heard an appeal against the judgment of Horridge, J., on this point. A witness had given certain evidence against a person charged with attempting to procure her miscarriage. The indictment charged the appellant with endeavouring to persuade the witness at the trial to alter the evidence she had previously given by falsely stating that the accused was not the man in question or that she was doubtful whether he was the man. Darling, J., delivering the judgment of the Court said: "No distinction can be made between the offence of endeavouring to persuade a witness to alter evidence already given, and the offence of attempting to dissuade a witness from giving evidence of a certain character." The conviction was held good: *Greenberg*, 121 L.T. 288. Here, the persuasion really amounts to subornation of perjury, but the judgment seems to cover a case where a witness as the result of persuasion or influence modified or elaborates the evidence which he has already given or intends to give.

Anthony Trollope in his "*Phineas Redux*" pictures a scene for us:—

> "The witnesses were not called at once. Sir Gregory Grogram began the work of the day by saying that he had heard that morning for the first time that one of his witnesses had been,—'tampered with' was the word that he unfortunately used,—by his learned friend on the other side. . . . . Then there arose a vehement dispute between Sir Gregory, assisted by Sir Simon, and old Mr. Chaffanbrass, who rejected with disdain any assistance from the gentlemen who were with him. 'Tampered with!' That word should be recalled by the honourable gentleman who was at the head of the bar, or—or—' Had Mr. Chaffanbrass declared that as an alternative he would pull the Court about their ears, it would have been no more than he meant. . . . . There was a great deal said on both sides, and something said also by the judge. At last Sir Gregory withdrew the objectionable word, and substituted in lieu of it an assertion that his witness had been 'indiscreetly questioned.' Mr. Chaffanbrass would not for a moment admit the indiscretion, but bounced about in his place, tearing his wig almost off his head, and defying everyone in Court. The judge submitted to Mr. Chaffanbrass that he had been indiscreet. 'I never contradicted the Bench yet, my lord,' said Mr. Chaffanbrass,—at which there was a general titter throughout the bar,—'but I must claim the privilege of conducting my own practice according to my own views. In this Court I am subject to the Bench. In my own chamber I am subject only to the law of the land.'"

But is there any real reason why counsel should approach a witness only at such peril? In civil cases, different considerations apply; but to adopt a contrary view-point in criminal cases is to lose sight of the function of the Crown, which is not to play a series of trump-cards but to present impartially such evidence as it considers relevant. Where the issue between the King and the subject is whether the latter did or did not do some particular act, it is comparatively simple. On the other hand, where the issue is as to whether in the opinion or judgment of the witness the acts or omissions of the accused amounted in the surrounding circumstances to some criminal offence, and the Crown at the initial stages of the enquiry has assisted in the formulation of that opinion or judgment, then it does not seem unreasonable that the accused or his counsel should have the right of bringing to the attention of

the witness facts or conditions that may demonstrate the falsity of his original beliefs or soften their rigour. The evidence given by an emotional man at a coroner's inquest held immediately after an accident, although coloured understandably enough by a hostility towards the man who caused death, may be very wide of the mark. Once committed to a definite statement on oath, the witness is unlikely, after a period of months, to yield in cross-examination what he would during the course of a conversation held shortly after the event. In the box his tendency, due to temperament or a desire to avoid being trapped, is inevitably to ignore or reject any possibilities appearing to reflect upon the version he has already given. By the time he reaches the Supreme Court, he frequently regards himself not as an individual unit but as a powerful member of the Crown team. He is, in fact, ready for all comers; and, if the case is one that has excited much public comment, he wants to be on the winning side.

I am far from suggesting that counsel should themselves make, or encourage in others, a practice of seeking directly or indirectly, to affect, by means external of the Court, testimony given or to be given; but it is conceivable that cases may arise where it is unjust to deprive them of that right. There is no occasion to assume that reputable practitioners will abuse such a right or that, by its assertion, witnesses will be cajolled into perjury. The mere accident that permits the police, with the elaborate machinery at their disposal, to obtain the first statements should not, in justice to the accused, render the giver of the statement as sacred to the Crown as were those high officials in ancient Greece who had to do with the performance of the Eleusinian mysteries and whose very names could not even be mentioned without the commission of a legal offence.

Commercial Documents.

More Dicta by Lord Atkin.

We published recently, ante p. 219, some forceful comments by Lord Atkin, delivering judgment in a recent case in the House of Lords, on the careless drafting of commercial documents. The same learned Judge expressed much the same views in an address at the last annual reception of the teaching staff of the Law Society's School of Law. "My experience," he said, "of the business world is that business documents are about the most carelessly drafted documents—outside an Act of Parliament—that can be conceived. You are constantly credited, as lawyers, with using an unintelligible jargon. But I should imagine that fifty per cent. of the cases that come into Court are due to the careless and unintelligent drafting of documents by laymen. The lawyer cannot do anything better for his client, and ultimately for himself, than by inducing business men to allow their documents to be drafted by a competent lawyer."

"Those who make no mistakes, it has been said, will never make anything; and the judge who is afraid of committing himself may be called sound and safe in his own generation, but will leave no mark on the law."

—Sir Frederick Pollock.

London Letter.

Temple, London,
17th July, 1929.

My dear N.Z.,

We have a heat wave upon us, and the Bar is severely put to it to survive the last, intensified weeks of the legal year in the climatic conditions which prevail. To-day is so sultry and moist as even to remind me of old times in Singapore, where at least we worked with little but silk upon us and a hard-working fan above our heads! I could wish for these amenities now, notwithstanding the ruthless devastation the wind of the electric fan made amongst the "documents accompanying brief," if one loosed them for an instant from their container. Still, I suppose our lot is no worse than any others' lots in sweating London to-day, unless we may claim that head-work requiring concentration for long stretches is the most oppressive of all functions to discharge in the extreme heat. I shall not live, but I suppose my sons will, to see our professional dress rationalised at least to the extent of dealing with such weather as this in some appropriate material.

The appointment of Holman Gregory, K.C., to succeed the late Judge Atherley Jones in the City Court is the item of social interest of our period. Judge Atherley Jones was what is known, and is best described, as a "character," typical of which was the heavy ribbon of black silk which supported his eye-glass when not in use. He might have been, to all appearance, one of Charles Dickens' figures of fun: if he had been, and had been suitably illustrated as such, he must have become as immortal as Mr. Pickwick or Micawber. I had no experience of him as a Judge, and only recall his peers' appreciation of him in his days at the Bar; this was kindly and amused. Holman Gregory is of quite another stamp; as a junior and as a leader, distinction was always promised by him but never, somehow, materialised; at every vacancy on the Bench, his name has always been canvassed as a possible filler of it, but the suggestion arises less from his immediate claims by reason of wide practice or notable successes in the Courts than from the fact that he has so long been marked down for promotion that this time, it has been felt on each occasion, he may very likely be promoted. The City Judgeship, part of that special jurisdiction peculiar to its own locale, just about appreciates the man and his career at its due value; he is eminently fitted to the by no means little distinction of that Court and that promotion, by no means a starry one, is admirably suitable in his case. He will carry all the necessary judicial dignity, both by reason of his handsome appearance and carriage and by reason of his sonorous voice; and he will probably fill the part with complete satisfaction to all, if his temper mellows and standardises at the dominating and not at the domineering.

In the Courts, perhaps rather in prospect than in present, and behind the scenes, in interlocutory preliminaries rather than in open battle in the forum, there is much to-do over cinematograph business which now occupies its own, adequate place in the business world. There is much speculation going forward, both in the financial and the commercial side of the industry, both (that is) as to the shares and as to the undertakings of the film-producing companies. There is

much middleman work going on, much buying and selling of possible house-fillers; so that one way and another there is much going forward of the sort of contract and transaction from which litigation arises and among the class of merchant who has the means wherewith to litigate. I do not know how far the industry, and its illegitimate offspring—the "talkie"—has you, in New Zealand, by your artistic throat; but here you will already be aware of the degree of its hold upon the public and you will realise what importance there may well be in the development to which I have just referred. Mr. Justice Mackinnon, recently assuming to speak as a Judge of artistic matters as no doubt he well may, pronounced the severest and least mitigated sentence possible on all to do with the "films,' *alias* "movies," *alias* "flickers"; we have yet to hear him upon the worse and second offence of the "all-talking"; but, however true this pronouncement may be from the aspect of art, from the professional point of view we regard matters cinematographic as a very welcome subject of litigious or non-litigious business; the inherent nature of the thing leads to the most intriguing problems, especially as to the identity of the positive prints and the original negatives involved in the various contracts and as to the points which arise upon those identities; and the inherent nature of the people who have to do with the thing, which is described as universally and without exception unscrupulous, causes these and all other cinematographic problems to be presented to us in their most interesting and effective light. I do not know of any particularly enlivening actions which have as yet been tried out; I speak, rather from knowledge of the future obtained from present goings-on in what we call the "Bear Garden" and in what is, to inform the uninformed, the central hall from which open out the various Practice Masters' rooms in the High Courts in London. It is where we counsel of the junior species assemble at 1.30 p.m., if we are going before a Master, or at an earlier hour, if we are going, on appeal from a Master, to a Judge in Chambers; and the disorderly attribute suggested by the title is brought about by the daily struggles, now somewhat less ferocious than they used to be in the good old days of infinite business, which takes place in the effort to get before the Master slightly quicker than should be. It is in the "Bear Garden" I have got my impression that a subject of much litigation, pending, will be seen to be, unless the spirit of compromise spreads abroad, that of the Film World; and a very welcome relief too, say we from this incessantly overwhelming topic, "Personal Injuries," which always involves an impossible motor car, proceeding at something less than fifteen miles an hour, with all its breaks on and its hooter uninterruptedly sounding the alarm.

And then, have you women barristers at your side of the world? If so, and indeed even if not, you will be amused to hear that the difficulty long forseen has now become actual: the modest, unassuming virgin defending that particular class of criminal case which, at Assizes, is always given (if possible) a day to itself and a day when no one need be present, unless his or her "curiosity" impels. On the Western Circuit this time, there has been witnessed the (to me, thoroughly unpleasant, utterly unnecessary and absolutely damning of the wonders of our so-called modern civilisation) spectacle of such a feminine advocate going into inconceivably intimate, physical details of an alleged rape, and doing it with so unblushing a thoroughness, and, I am informed, technical ineptitude, as to alarm even the hardened Judge himself! If there are, amongst those who read, brother-lawyers who regard the coming of women into our profession (1) seriously, and (2) with approval, then I reluctantly but firmly join issue with them from A—Z of the whole claim and all the arguments with which it is supported, the truth being that only those women come to our masculine profession for whom there is no demand in their own: and man's services in this world being so much inferior to woman's, as no husband or son among us will probably deny, we have, in the Lady Barrister, the inferior type of her own species engaged in the inferior occupation and displaying, it may safely be added, invariably inferior qualifications even at this low ebb! I may be pardoned this outburst, for the reason that not a single one of our feminine recruits has gained as yet the least distinction and the whole of them have had but one achievement, organised advertisement in the press. If any one young man on a Circuit, whether by his own fault or not, had been illustrated and chatted about in the daily papers, as each of these young persons have been upon her least appearance, his guilty responsibility would have been presumed and himself damned. I do not blame the women for disregarding our unwritten laws of professional etiquette, for we all know that law instinctively means nothing to women and never will and never, in the exigencies of their existence, can. I only object to those practising law who, instinctively, care nothing for it. And if the answer be made, that these are women who have not women's instincts, I agree that the answer may be true in fact, but I reply it has no effective point, since they certainly have not man's logic.

Any news to be extracted from current proceedings in the Courts I will collect and reproduce for you in my next letter, to be written, if I calculate aright, upon the first day of the blessed Long Vacation. A new argument in favour of that institution which I have never heard put by the public (whose argument it is) is this: the suspending, for all practical purposes, of the High Court jurisdiction for two and a half months is an agreeable boon for hard-pressed financiers who just require that much moratorium, as at the end of their financial year, to meet their debts! There are now commencing before the Masters those battles peculiar to this period, the battle for time! In such battles any argument may be used, or any technicality relied upon, or anything said to the Master, except the truth: "Master, I want TIME . . . and if only I can get to the Long Vacation, I shall get it!"

Yours ever,

INNER TEMPLAR.

Guilty without Indictment.

A curious chapter of errors was revealed in the recent case of *Rex v. Yitching* before the Court of Criminal Appeal in England.

The indictment and the result of the proceedings indicated that the prisoner had been tried before Charles, J. and convicted for rape. But according to the endorsement on the back of the indictment the Grand Jury had found: "No true bill for rape. A true bill for indecent assault (aggravated)." The accused, therefore, had apparently never been indicted for rape, and he had not properly been tried for indecent assault. The conviction was accordingly quashed.

Australian Notes.

(By Wilfred Blacket, K.C.)

Law Reform is in the air, and is likely to stay there because it can never become a thing of thrilling interest to politicians. Mr. Justice Harvey, Chief Judge in Equity, put his views on this subject on the air on Sunday last by broadcasting a very interesting address. His Honour seemingly deplored the enormous increase in litigation in recent years and stated that the business of the Courts in 1926 was three times as great as in 1908. To barristers and solicitors this might seem to be a gladsome thing, and to me it seems to indicate the fact that litigants have no fault to find with the legal procedure of New South Wales, but of this more anon. In order to reduce this great bulk of litigation His Honour thinks that the system which has prevailed in Norway since 1796 might be worthy of adoption. The essential part of that system is that a case may not be litigated in the Courts of Law until it has been dealt with by a Court of Conciliation. The latter is quite an informal tribunal. The parties appear before it in person, and the conciliators endeavour to find a means of avoiding resort to law. They are able to effect an adjustment of the matter in dispute in from fifty-five to sixty-five per cent. of the cases, and the remainder then are brought before the Courts for trial; but even in these cases the hearing is frequently shortened by admissions made before the conciliators. His Honour suggests that such a form of preliminary procedure here would be equally efficacious in reducing the mass of litigation, and that it would tend to foster a conciliatory spirit in the nation.

The Victorian Supreme Court had before it recently an interesting and important point in connection with default in payment of maintenance. Carl H. Franke had been ordered by a Melbourne Court to pay weekly sums for his wife's maintenance. Some time after the order was made he went to New Zealand and lived there for some time paying nothing for his wife's maintenance. She issued a warrant against him but it was not served until he returned on a visit to Victoria. The Court held that the section of the Deserted Wives and Children's Act as to default in payments ordered could not be construed to include default by a person being then beyond the limits of the State.

At Darlinghurst (Sydney) Sessions this week a strange old legal antiquity was dug up when a Crown Prosecutor, finding that there were not enough jurors available for the last case in the day's list, "prayed a *tales*"; but his request was refused by Judge Cohen. I can remember only two precedents for this application; it was made and granted once at Dubbs Assizes, and was granted on my application in 1889 at Cobar. The Court was sitting late. There was some reason for this, not, I think, unconnected with duck shooting, and so it was that when the last case was called on all the jurors except two were out considering verdicts. His Honour having granted the *tales* the police started out at 11.15 p.m. to catch jurors. They brought them along as they got them, and the prisoner, who took a vivid interest in the game, challenged them as fast as they came. When he had exhausted his challenges and jurors were still coming along, he smilingly said that he wanted to plead guilty. Never shall I forget the appearance of the Court. Never before, nor since, have I seen pyjamas and nightgowns under ulsters in the jury box. If the prisoner had made his challenge "to the array" it might possibly have succeeded.

At Glen Innes Quarter Sessions Court, it is telegraphed, a prisoner made an attack upon the presiding Judge asserting in effect that the latter and the Crown Prosecutor had fixed up his case between them in the hotel. Judges have to be always ready for such attacks. I have several times heard them made. It is related of Judge Docker that a prisoner who had been sentenced to eighteen months imprisonment with hard labour became profanely abusive and forecasted a dreadful fate for His Honour. The Judge waited patiently until the prisoner had concluded and then said that he had reconsidered the matter and thought that a more just and proper sentence would be two years imprisonment with hard labour, and finally asked whether the prisoner wished "to say anything more." Whereupon the prisoner replied, "Oh no, I don't want to say anything more—your Honour's too good at repartee." I may mention that during my short periods of presiding at Quarter Sessions I made it a rule to state the sentence at the outset and then follow on with a few well-chosen remarks appropriate to the occasion, but I do admit that there was always a moment of intense anxiety lest the prisoner might want to say something upon hearing what he had been awarded.

In a recent suit for restitution, Mr. Acting-Justice Maxwell felt compelled to refuse relief because he did not think the petitioner was sincere in his expressed desire that his wife should return to him. He had sworn that she on one occasion had chased him round and through the house with an axe and that when he got away to cover in the bathroom she had thrown the axe through the fanlight, wounding him severely. His Honour seemed to think that there could be no happiness in their continued association—but is this really so? May it not be that in the lives of some persons incidents of this kind are pleasing diversions softening the ordinary asperities and enlivening the colourless monotony of matrimonial union? The incident was a substitute for a visit to the pictures. After starring in such a thrilling drama of modern life and adventure the husband would not want to go to the pictures for a month. Quite probably he would not be able to.

Rules and Regulations.

Animals Protection and Game Act, 1921-22.—White-backed magpie absolutely protected.—Gazette No. 62, 12th September, 1929.

British Nationality and Status of Aliens (in New Zealand) Act, 1928.—Naturalization Regulations, 1929.—Gazette No. 61, 5th September, 1929.

Defence Act, 1909—Financial Instructions and Allowance Regulations for N.Z. Military Forces amended.—Gazette No. 62, 12th September, 1929.

Fisheries Act, 1908.—Regulations for trout fishing in Feilding and District and Auckland Acclimatisation Districts.—Gazette No. 62, 12th September, 1929.

Government Railways Act, 1926; Master and Apprentice Act, 1908.—Amendments to the Regulations under the Government Railways Act, 1908, re employment of apprentices.—Gazette No. 62, 12th September, 1929.

Law Practitioners Amendment Bill.

DEBATE IN LEGISLATIVE COUNCIL.

We publish below the Hansard report of the debate in the Legislative Council on the second reading of the Law Practitioners Amendment Bill.

On the question, *That this Bill be now read the second time,*

The Hon. Mr. SIDEY (Leader of the Council) said,—Sir, this Bill is promoted by the legal profession of New Zealand, and it is as head of the profession that I have the honour to introduce it into the Council. The object of the Bill is to provide a fund for the purpose of reimbursing persons who may suffer pecuniary loss by reason of the misappropriation of moneys by a solicitor. At the outset I want, on behalf of the legal profession, to emphasize the point that this Bill is not a measure of compulsion promoted by the Government as having been rendered necessary for the purpose of protecting those who might suffer through the defalcations of a few dishonest lawyers. It is a purely voluntary effort on the part of the profession itself. The members of the profession have felt for some time that the defalcation of one member of the profession does reflect on the whole profession, and they are prepared to tax themselves for the purpose of protecting the public against any loss by reason of such defalcation. Another thing I ought to say is this, that I believe the public have got a wrong impression of the extent to which defalcations have taken place, simply because of one or two illustrations which occur now and then. When one considers the large number of solicitors who have been engaged in practice in this country since its foundation as a colony, and the enormous amount of trust funds that have been committed to their care, the proportion of those who have succumbed to temptation and proved themselves unworthy of their trust is exceedingly small. There are black sheep in every fold, and dishonest people are sometimes found in every walk of life. This, however, is a voluntary effort to protect the public in the way I suggest, and the Government is providing the machinery for the purpose. A great deal of consideration has been given for some time to this question by members of the profession. The various district societies throughout New Zealand have considered it, as well as the Council of the New Zealand Law Society, and at two conferences of lawyers from all over New Zealand resolutions in favour of legislation of this kind were passed. Last year a Bill was proposed which had for its object an exactly similar purpose as this one. It came before this Council and was passed. It went to another place, where, owing to the lateness of the session, it was held up, but this Council adopted it, and I want to say that the Bill which I now submit to the Council is, in some respects at any rate, not open to the same objection that was raised to the Bill of last year. As honourable members may recollect, an objection raised to that Bill was that it gave what was described as practically a blank cheque to the Council of the New Zealand Law Society to do what it liked to achieve its object. It was empowered to do everything by Order in Council. The Bill which I now submit is not open to that objection. There are certain limitations which I will briefly mention. One is that it does not refer to any solicitor who is simply in employment either with a private practitioner or in a public office. It only applies to those solicitors who are practising either on their own account or in partnership with other solicitors. Another limitation is that some restriction is imposed upon the extent to which fees or levies can be obtained from members of the profession. It was felt, however, that it was necessary to make these fees or levies such as to be reasonably sure that they would be adequate for the purpose. It was felt that Parliament was entitled to know that the proposals to be made were likely to be sufficient for their purpose within the restrictions which have been imposed. The limitations proposed are that in any year the fee shall be not more than £10 and not less than £5, with the additional right for the society to make a levy not exceeding £10, but not to exceed £50 during the whole period the solicitor is in practice. In order that this Council may see that these proposals are likely to be entirely adequate for the purpose for which they are provided, I shall show honourable members what has taken place in the past, and the amount of money that may be expected from these contributions. I have a list of the defalcations that have taken place in the last ten years. I have reason to believe that these are greater than those of the preceding ten years, and that over a twenty-year period the average per year is smaller than my calculation shows. Taking the last ten years, the defalcations amounted to £37,482, an average of £3,748 per annum. What sum may be expected from the contributions under this measure? There are in New Zealand 1,740 solicitors who obtain certificates. That number includes qualified clerks and persons in the Public Service, such as the Public Trust Office, who are not practising on their own account. After making what is regarded as a liberal allowance for those who would not come in under this Bill, as they are not practising on their own account, it is considered safe to say there are about one thousand five hundred solicitors who would be affected. On the basis of a fee of £5, the amount of the contributions would be £7,500 per annum, which figure is about double the average amount which has been lost by way of defalcations during the last ten years. Honourable members will see, therefore, that in all probability a very liberal allowance is being made in the Bill for any possible contingency that may arise. The proposal that the fee shall be not less than £5—that is to say that there shall be a minimum as well as a maximum—is not unreasonable. In the Bill there is a provision under which the Council of the Law Society can when a solicitor goes out of practice refund to him the contributions he has made while in business. It will enable the Council to deal more fairly with those who have contributed at the beginning of the scheme if those who come in afterwards are obliged to contribute the same amount, even although there may not be the same occasion for it. If no minimum were provided and the fund increased, as I believe it will, the Council might consider that it did not require so large a contribution, and it might decide that £2 2s. was a sufficient fee. The provision of a minimum levy is therefore fairer to those who have already contributed. An objection is sometimes raised that the present lawyers are paying for those who will come after them. This proposal will minimize although it may not remove that objection. If there are other points upon which explanation is sought I shall be pleased to give any explanation desired when I reply or when the Bill is in Committee. While there may have been differences of opinion amongst the members of the various law societies in regard to the Bill, I can assure the Council that the proposals have received a great deal of consideration from all the district law societies, and to-day there is absolute unanimity on the part of them all. I trust, therefore, that the Council will follow the course it adopted last session and pass this Bill. I move the second reading.

The Right Hon. Sir FRANCIS BELL.—On behalf of the profession, for which I have a certain right to speak, I desire to thank the Government and my honourable friend the Attorney-General for having helped to carry into effect this great reform by which the profession—an honourable profession—binds itself to insure the public against those members of the profession who may unfortunately disgrace its name. My honourable friend has been more enterprising than I, for although I supported the Bill last year I did not, I think, undertake it for the Government, a fact which, no doubt, made its passage in another place a very precarious matter. Members of the profession have long desired to have the power to do what is proposed in this Bill—namely, tax themselves to protect the honour and name of the profession. There has been a difference of opinion amongst the various district law societies not in regard to principle, but as to matter of detail, and I am delighted to hear from the Attorney-General that unanimity has been reached, and that this Bill represents the considered request to Parliament of the profession to which my honourable friend and I both belong. There is one minor point I would like to ask him to consider in Committee. It relates to clause 20, which I regard as one of the important clauses of the Bill, giving power to the Council to insure. Insurance is possible, but, probably, it would be a limited sum in the case of each individual. However, it is another safeguard to the sufficiency of the fund. Having regard to the other class limiting the purposes to which the fund may be applied, I think it would be advisable to have in clause 20 the additional

words "The Council may pay the premiums of such insurance out of the fund." No doubt that is what is contemplated; but the Council of the New Zealand Law Society has considerable funds at its disposal apart from this fund, and it might be possible to contend that the power here given to the Council is to enter into contracts of insurance, but, if it does so, to indemnify the fund and pay the premiums out of other funds. It is a mere detail, and if my honourable friend will consider it I shall be quite satisfied with the conclusion he reaches.

The Hon. Mr. McINTYRE.—I was hoping that the leader of the Council mgiht have intimated that he intended to refer this Bill to the Statutes Revision Committee to take evidence. The Bill contains some twenty-four clauses; and, while it directly affects only about fifteen hundred members of the legal profession, it indirectly affects a large number of the general public.

The Hon. Mr. HANAN.—It is for their protection.

The Hon. Mr. McINTYRE.—I admit that the intention of the Bill is to protect the public; and, although we have the assurance of the leader of the Council that the law societies are unanimously in favour of this Bill, I know that there are differences of opinion even among members of the legal profession as to the justification of this Bill—in fact, I have reason to believe that some members of the legal profession in this Council are opposed to it.

An Hon. Member.—More foolish they.

The Hon. Mr. McINTYRE.—That is merely a matter of opinion. Honest members of the legal profession regard their honesty as one of their greatest assets, for when a firm of solicitors has a long and honourable reputation for straight dealings there is no doubt that sensible people will place their trust funds and take their business to that firm instead of to an unknown firm; and it does not seem fair in principle that the honest lawyer should have to pay for the dishonest lawyer. I do not consider it to be one of my functions to stand up here and protect members of the legal profession, which is well represented in this Council; but I do think they should be given an opportunity of being heard in objection to the Bill if they wish. I myself had evidence last year that there were many objectors to a similar measure. That was shown by the very large number of congratulatory letters I received from members of the legal profession on the stand I had taken then. I think I was the only member of this Council who criticized last year's Bill, and I know my attitude met with the approval of many men in the legal profession. I admit that the present measure is in many ways an improvement over that of last year. My main purpose on that occasion was to point out the inconsistency of the Law Society in passing a resolution in conference strongly condemning the Government for legislating by Order in Council, and at the same conference drawing up a three-clause Bill which was nothing but legislation by Order in Council — in fact, was worse, because it was not even to be submitted to the Government, as the proposal was that the Law Society Council be given a blank cheque and the regulations had to be approved merely by three Judges of the Supreme Court. I strongly objected to the Judges of the Supreme Court being the lawmakers as well as administrators of the law. The present Bill has, as I say, eliminated that objection; and it also has met my objection in regard to the making of rules and regulations, in so far as any rules made by the Council of the Law Society must have the approval of the Governor-General, which means that they are simply Orders in Council, because they will then, I have no doubt, be submitted to the Attorney-General. The present is a Government measure, which places it on a very different footing to last year's Bill. I admit that in this Bill the legal profession is voluntarily endeavouring to protect the public; but, in claiming credit for it, it was making a virtue of a necessity, because the members of the profession are well aware that owing to the many defalcations of trust funds by dishonest lawyers a large amount of business is going to the Public Trust Office, and something had to be done to stop it. It is being borne home to the public week after week that at present the safest thing to do is to place trust moneys in the hands of the Public Trustee; and this is an attempt to regain the public confidence, and was a reform long overdue. I agree that under this Bill the public will have some protection, and because of that I cannot object to it; but it is not perfect by a long way, and I think that those members of the legal profession who object to it should be given an opportunity of tendering evidence before the Statutes Revision Committee. Personally, the Bill does not affect me, and it is a great improvement on the Bill of last year; but I would like the leader of the Council to carry out my suggestions to send it to a Committee. The measure is a very important one, and I think it was hardly fair to introduce it yesterday and then take the second reading to-day.

The Hon. Mr. WESTON.—Under clause 19 of this Bill there is provision whereby in the event of the fund not having sufficient funds at the time to satisfy the claims made against it such claims are to be paid subsequently out of future accumulations. I can conceive it possible that if there were a very bad defalcation in the earlier years of the fund it might be very awkward for the fund to have to satisfy those claims, plus interest, during the period they might remain unpaid.

The Right Hon. Sir FRANCIS BELL.—The insurance will help a great deal in that case.

The Hon. Mr. WESTON. — It might, but it should be remembered that the premiums are always heavy.

The Right Hon. Sir FRANCIS BELL. — There will be ample provision, with the insurance.

The Hon. Mr. WESTON.—I should like to have the assurance of the leader of the Council that that matter has been considered. There is also the question of the priority in which claims held over should be paid.

The Hon. Mr. SIDEY.—I will attend to that.

The Hon. Mr. WESTON.—I am inclined to think that the suggestion of the Hon. Mr. McIntyre that the Bill should be referred to the Statutes Revision Committee is a reasonable one, because it would give an opportunity for honourable members to satisfy themselves that minor points had not been overlooked, and it would give the framers of the measure an opportunity of showing how they were prepared to meet any questions which might arise.

The Hon. Mr. MALCOLM.—The registered accountants of New Zealand are at present holding a conference in Dunedin; and I notice, according to a newspaper report, that they propose to make suggestions in regard to this matter to the Government. Will the leader of the Council undertake that they will be given an opportunity to make these suggestions before this Bill becomes law?

The Hon. Mr. HANAN.—From some of the remarks that have fallen from the Hon. Mr. McIntyre, the inference might be drawn that the members of the legal profession have exhibited a low standard of conduct in the practice of their profession.

The Hon. Mr. McINTYRE.—Oh, no.

The Hon. Mr. HANAN.—He knows, or should know, as any other man with worldly knowledge knows, that there are "black sheep" in every class, no matter what calling or vocation in life that might be mentioned. There are men who at times will be guilty of dereliction of duty and violate principles of honour. When a clergyman does something morally wrong widespread publicity is given to the case. When a lawyer misappropriates a client's money his offence is made known throughout the length and breadth of the country. If you take a period of years and the offences of the character which this Bill deals with you will find that it is a very small percentage of the members of the legal profession who have been guilty of misappropriating funds. Now, this measure is for the benefit of the profession as a whole. It is also for the protection of the public. It does not matter what progressive measure might be formulated or projected, it will be found that there are some people who will object to it. But the question we have to consider is this: Is this a measure that is approved of by the great majority of the members of the profession in this country, and is it for the benefit of the public? The answer is Yes. Furthermore, there is the fact that men who are in practice and whose standing in the country is high are prepared to put their hands in their pockets and help to establish an assurance fund in order to protect the public against financial loss due to the action of some member or members of

the profession appropriating moneys belonging to clients. The majority of members of the profession have high standards of duty, and there is no danger of these reputable practitioners misappropriating money; but in order to maintain that high standard of professional honour and duty they are willing to subscribe towards the establishing of this fund that will protect the public against those members of the profession who might be guilty of the offence of misappropriating their clients' funds. I say that the members of the profession in this country are to be commended for formulating and supporting a measure of this character. It shows a public spirit and an earnest desire to do that which is in the public interest—in a word, it makes manifest the very fine spirit that animates lawyers to uphold the high traditions that have been and are associated, generally speaking, with the practice of the legal profession in this and other progressive countries.

The Hon. Mr. SIDEY (Leader of the Council).—I want to thank my right honourable friend Sir Francis Bell for his generous remarks in regard to myself, and honourable members for the reception given to the Bill. In reference to clause 20, which has been alluded to by my right honourable friend, I shall have that looked into to make quite sure that the insurance premiums are not to be a charge upon the ordinary funds of the society, but may be paid out of the guarantee fund. Of course, that is intended. The guarantee fund will stand by itself in every respect, and the ordinary funds of the Council of the Law Society will be entirely separate and distinct from that fund. Referring to what was said by the Hon. Mr. Weston, he will have noticed that under clause 13 of the Bill, if the fees are not sufficient—if there should be a deficiency in the fund——

The Hon. Mr. WESTON.—I do not think there would be. Supposing there was a really bad case at the start, it would be found that the fund was very much hampered, even with the levy. It is a question of figures, that is all.

The Hon. Mr. SIDEY.—Yes, it is a question of figures. I am quite sure that the honourable gentleman will see that in all probability, as far as one can humanly judge from the experience of the past, there is ample provision here to meet the possibilities of the future. There are, as I have pointed out, fifteen hundred solicitors, and £10 in fees from each of these will amount to £15,000. If a further £10 is levied, as will be possible, there will be a total of £30,000 for the fund in one year. No previous circumstance has shown it necessary to provide so much as that. But if it did so happen that there should be a large claim upon the fund in the first year, this would be covered by clause 19, to which reference was made by my honourable friend. This clause provides that—

"No moneys or other property belonging to the New Zealand Law Society other than the fund shall be available for the satisfaction of any judgment obtained against the society in relation to the fund, or for the payment of any claim allowed by the Council; but if at any time the fund is not sufficient to provide for the satisfaction of all such judgments and claims they shall, to the extent to which they are not so satisfied, be charged against future accumulations of the fund."

The Hon. Mr. WESTON.—Yes; but are they to carry interest in the meantime?

The Hon. the SPEAKER.—I think the honourable gentleman had better reserve his remarks until the Committee stage.

The Hon. Mr. SIDEY.—That is another matter, and one that might be dealt with in Committee. Now, in regard to the suggestion to send the Bill to a Committee, under ordinary circumstances that is not an unreasonable thing to ask. But I would request the Council to remember that the Bill has been introduced in this Council instead of in another place; and it is the second year that the Bill, or a Bill on these lines, has been before the Council. It must be some time yet before the Bill is finally dealt with by the Legislature, and the position is therefore not the same as if this were the only opportunity there would be to raise objections. I may say that I consulted with the Chairman of the Statutes Revision Committee with a view to seeing whether he thought the Bill ought to be referred to a Committee of the Council, and he said that he did not think that it would be necessary to do so. It was only after consulting with that honourable gentleman that I thought I would ask the Council to deal with this Bill as with last year's Bill, without its going to a Committee. There will be an opportunity of referring it to a Committee in another place. If any honourable member would prefer that the Committee stage be not taken on Tuesday I shall arrange for it to be taken at a later day. There was a question put to me by the Hon. Mr. Malcolm as to whether the society of accountants might have an opportunity of making certain representations. I shall be very pleased to see that any representations that they may make are given consideration.

Bill read the second time.

Drafting of Legislation.

Resolution of English Law Society.

The latest annual report of the English Law Society contains the following paragraph on the subject of the Council's views on the careless drafting of legislation:

"Representations were made to the Council regarding recent cases in which comment had been made by His Majesty's judges upon the difficulty of arriving at the true meaning of certain recently passed Acts of Parliament.

"The Council are persuaded that the difficulties referred to are caused by the hasty manner in which legislation is dealt with and particularly by reason of the fact that Bills are sent up from the House of Commons to the House of Lords of an exceedingly complicated nature at the end of the session when no adequate time for their consideration is available.

"It was in these circumstances that the Council passed and circulated the following resolution:—

"'The Council of the Law Society regard it as seriously to the public disadvantage that frequently insufficient time is allowed to the House of Lords properly to consider Bills sent to them from the House of Commons at the conclusion of Sessions of Parliament, and that consequently even less time is allowed to the House of Commons for consideration of amendments made in the House of Lords.

"'The Council are of opinion that not only is it essential that those who are made responsible under the Constitution for the substance of legislation should have more, rather than less, than sufficient time properly to examine and appreciate it but that with regard also to its form it is necessary that ambiguities should be avoided and meanings made clear. They venture to express the hope that some means may be found for securing careful scrutiny of all legislation, so that the Courts of Justice may be relieved as far as possible from the present burden of elucidating statutes of which varying meanings are possible and unwilling litigants spared the anxiety and expense to which too often they are subjected.'"

Court of Arbitration.

The following fixtures have been arranged by the Court of Arbitration:—

Dunedin: 4th October, 1929, at 10 a.m.
Invercargill: 7th October, 1929, at 2.30 p.m.

Forensic Fables.

THE SILK WHO KNEW HOW TO MAKE A GOOD SHOW.

There was Once a Plaintiff who Brought an Action in the Hope that the Defendant would Prefer not to Fight. But the Defendant Plucked Up Courage and Briefed a Silk whose Fame as a Cross-Examiner was World-Wide. As the Plaintiff, apart from being a Bad Egg in a General Way, had Spent Several Years in Penal Servitude, it was Clear that the Silk would have Some Material to Work Upon. A Week before the Case Came On the Silk Presided over a Consultation at which the Question of Evidence was Discussed. How was the Black Record of the Plaintiff to be Established? The Junior Suggested that the Certificate of his Conviction Duly Produced in Court would Suffice. The Silk Curtly Rejected this Proposal, and gave Other

Directions. When the Time Came for the Silk to Cross-Examine the Plaintiff the Court was Crowded with Expectant Members of the Public and Representatives of the Press. The Silk First Asked the Plaintiff whether he was in Good Health. Having Learned that the Plaintiff's Physical Condition was All that Could be Desired, the Silk Enquired where the Plaintiff Lived. After Ascertaining that he Resided in Tooting, the Silk Begged to be Informed Whether he Ever Went to the Country or the Sea-Side. If so, Which Place did he Like Best? The Silk then Took the Plaintiff Through a Long List of Inland and Marine Health-Resorts and Gathered that he Usually Spent his Holidays at Margate. Did the Plaintiff Care, by any Chance, for Devonshire? What did he Think of the Moors of Devonshire? Did he Know them Well? Had he Found them Salubrious? Had he Found them So Salubrious that he had Lived on them for Seven Years? Did he Know the Stout Gentleman Standing Up at the Back of the Court? Was the Stout Gentleman a Warder at the Dartmoor Convict Establishment? Did he Know the Gentleman with a Broken Nose Standing Up in the Gallery? Was he a Fellow-Convict with the Plaintiff at the said Convict Establishment. Were the Plaintiff and the Gentleman with the Broken Nose Employed in the Quarries at the Same Time? When the Plaintiff had Given Satisfactory Answers to these Various Queries, the Silk Resumed his Seat. Was his Reputation as a Cross-Examiner Enhanced? It was. The Daily Journals Reported his Masterly Performance Word for Word, and the Public Wondered Once More at the Amazing Skill with which the Silk Managed to Worm the Truth out of a Cunning Scoundrel.

MORAL: *Do it in style*

Success at the Bar.

Some Maxims.

Lord Alness, the Lord Justice-Clerk, addressing the Glasgow Judicial Society recently, set down three conditions as desirable for those who aspired to membership of the Bar: first, a spirit of adventure; second, financial resources to tide over the inevitable years of waiting; third, reasonable ability.

Lord Alness then read a letter from Lord Shaw of Dunfermline in response to a request for his views regarding the qualities that make for success at the Bar. Lord Shaw wrote:—

"I was once at the Bar myself but this is all I can remember about its qualities:

"(1) Go straight; rather ruin than a deviation from that.

"(2) Learn law as other people have set it down in text books. Get your terminology all right; and, as for the rest, if the law agrees with what you feel to be a straight deal, then you are getting to the hidden treasure called 'principle.' If it does not, keep a look-out for a chance to knock it on the head.

"(3) Work in the same way with what we call 'the authorities.' Let them guide your judgment, not drown it. Do not forget that truth and sense are occasionally found in decided cases.

"(4) Be a cultured man as well as a lawyer; therefore let your love for letters always grow. So you will be a man with a vision and a penetration which will guide you in labyrinths and stony places, and bring illumination and effectiveness into the daily task.

"(5) Be brave amid disappointments, and let these inspire you to greater knowledge and greater accuracy.

"(6) Have command of yourself, knowing that there are stages of law which bring no comfort with them. A practising lawyer, forgetful of self-command, loses his temper, then loses his head, and then loses his case.

"(7) Finally, while relevance and effectiveness are your aims, have a wide charity towards those whom you address, and be patient with the Judges."

Bills Before Parliament.

Land and Income Tax Amendment. (Rt. Hon. Sir Joseph Ward). "Farm Lands" defined as including all lands used or capable of being used for agricultural or pastoral purposes but not lands regularly used for any purpose that renders impracticable their use for agricultural or pastoral purposes. Special land tax payable by all persons who on 31st March preceding year for which tax payable were owners of farm lands of a total unimproved value of more than £14,000: provided that not to apply to lands owned by or in trust for any society or institution established exclusively for charitable, educational, religious, or scientific purposes of a public nature and not carried on for private pecuniary profit.—Cl. 2. Provision in relief of hardship arising from imposition of special land tax: S. 169 of principal Act to have no application to special land tax.—Cl. 3. S. 42 of principal Act amended by omitting from subsections (1) and (2) words "timber or flax (other than the roots of flax-plants)" and substituting words "or trees."—Cl. 4. As from 1st April, 1930, Ss. 43 and 46 of principal Act repealed; S. 44 amended by omitting from subsection (1) words "or the subsidiary roll"; S. 45 amended by omitting from subsection (1) words "either on the district valuation roll or on the subsidiary roll" and substituting words "on the district valuation roll."—Cl. 5. S. 49 of principal Act amended by repealing paragraphs (a) and (b) and substituting paragraphs providing for special exemption up to £7,500 where total unimproved value does not exceed that sum and, where it does exceed that sum, of £7,500 diminished by £1 for every £1 of that excess. S. 65 of principal Act amended by adding proviso to effect that in each of five years of assessment immediately following year in which mortgagee entered into possession Commissioner shall, if satisfied that mortgagee in possession solely for purpose of furthering realization of his security, assess him separately in respect of estate or interest of which he is deemed to be beneficial owner. S. 25 of Finance Act, 1924, repealed.—S. 7. Public Trustee and General Manager of State Fire Insurance Office liable for land tax: exemption from land tax of land used to provide access to railways, etc., specified in paragraph (f) of S. 69 (1), and of certain Crown Lands and endowment lands occupied for pastoral purposes: S. 69 amended accordingly and S. 9 (3) of Amendment Act of 1924, repealed.—Cl. 8. Where Public Trustee as mortgagee of lands in respect of which mortgagor has made default has before passing of Act become purchaser of such lands, he is to be assessed for land tax as if he were mortgagee in possession thereof.—Cl. 9. Time within which charges in respect of land tax may be registered extended in certain exceptional cases: S. 11 of Amendment Act of 1924 amended.—Cl. 10. By clause 11 the assessable income of any person is deemed to include: "(a) All profits or gains derived by any taxpayer from the use or occupation of lands used for agricultural or pastoral purposes if the unimproved value of all such lands owned by the taxpayer at any one time during the income-year was not less than fourteen thousand pounds: Provided that the income-tax payable in any year in respect of the income to which this paragraph relates shall not exceed the difference between the sum of fourteen thousand pounds and the total unimproved value of the lands from which such income was derived: (b) All profits or gains derived from the extraction, removal, or sale of minerals, timber, or flax, whether by the owner of the land or by any other person, reduced by an amount equal to the cost of the minerals, timber, or flax so extracted, removed, or sold by the taxpayer during the income year: (c) All profits or gains derived from the use or occupation of any Crown land or other land administered by a Land Board and held as a small grazing-run or for pastoral purposes, or derived from the use or occupation of any other lands reserved, set apart, or granted by the Crown as endowments and occupied for pastoral purposes: (d) All profits or gains derived from the business of dealing in live-stock, meat, butter, cheese, or wool, or in grain, fruit, or other crops, being the natural products of land carried on by any person other than the owner of that land: Provided that when the taxpayer is the owner of other land, which, being used for the purposes of the said business, is not in itself sufficient for the full sustenance of such live-stock or production of such other products the Commissioner shall (except in cases to which paragraph (a) of this subsection is applicable) assess for income-tax only the profits derived from dealing in so much of such live-stock or products as is in excess of the capacity of the said land fully to sustain or produce. Consequential repeal of paragraph (l) of S. 78, paragraphs (d) (dd) and (e) of S. 79 of principal Act, and subsections (1) and (2) of S. 9 of Amendment Act of 1924. Income tax payable in respect of income derived from use of land to be reduced by amount of land tax payable in respect of same land: S. 83 of principal Act modified.—Cl. 12. Special provisions as to computation of assessable income derived from business of dealing in live-stock.—Cl. 13. Provisions of principal Act relating to special exemptions in respect of children amended.—Cl. 14. Special exemption in respect of dependent children or grandchildren incapacitated by permanent mental or physical infirmity.—Cl. 15. S. 99 of principal Act amended.—Cl. 16.

Land and Income Tax (Annual). (Rt. Hon. Sir Joseph Ward). Specifying rates of ordinary land tax, special land tax, and income tax, for year commencing April 1st, 1929.

Unemployed Workers. (Mr. Fraser). Sundry definitions including "district" as meaning any one of the industrial districts constituted by Industrial Conciliation and Arbitration Act 1925; "employer" as meaning any person, firm, company or local authority employing labour of any kind for hire or reward and including any agent, representative or attorney of them respectively: "ruling rate of wages" as meaning wage fixed by an industrial agreement or by award of Court of Arbitration or, if no such agreement or award exists, ruling wages for similar work in district.—Cl. 2. Unemployment Board established.—Clauses 3-7. Unemployment Insurance Fund created partly from contributions from workers and employers at prescribed rates and partly from monies provided by Parliament.—Cl. 8. Enforcement of contributions.—Cl. 9. Special works to reduce unemployment.—Cl. 10 and 11. Railway passes to unemployed workers.—Cl. 12. Power to regulate methods and conditions by and under which employers may advertise for labour.—Cl. 13. Right to work.—Cl. 14. Technical training of unemployed workers.—Cl. 14. By clause 16 the Governor-General in Council is hereby empowered from time to time by Order-in-Council *to issue such orders and give such directions and prescribe such rules as will in his judgment be calculated to safeguard the requirements and well-being of the people or to give full effect to the provisions of this Act.*" Clauses 17 to 20 contain general provisions and further powers of regulation making.

Unemployed Workers (No. 2). (Mr. Fraser). Governor-General in Council to make such regulations as may be necessary for purpose of carrying out provisions of Act.—Cl. 3. Every unemployed worker entitled to be registered for employment at any Government Labour Bureau—Cl. 5—and to have right to work and receive minimum living wage for services.—Cl. 6. Immigrants induced or assisted by New Zealand Government to come to New Zealand to have similar rights.—Cl. 6.

Legislative Interference.

Proposing the toast of "The Company," at a recent dinner of the London Carpenters' Company, Mr. Justice Eve made some trenchant observations on the steadily growing evil of legislative interference with the private individual. One of the main objects, he said, which lead to the formation of that and similar institutions was the desire to secure the right to maintain and manage their own affairs without statutory restrictions. To those who were convinced that the best Government was that which governed least, it was alarming to contemplate the increasing scope of legislative interference in those matters which in the past had been considered the private affairs of the citizen. Legislative interference was sometimes supported by attractive pretexts preceded by certain harmless intrusions, and if they were tolerated and ignored the attack would become more aggressive, the advance more permanent and more rapid, and individual liberty and corporate activities would find themselves hampered by unnecessary restraint. The insatiable appetite to control other men's affairs was often evinced by those whose capacity to manage their own affairs was in inverse proportion to their desires.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"Crown proceedings are not at present entirely intelligible.

Mr. R. M. Welsford, President of the Law Society.

Vol. V. Tuesday, October 15, 1929 No. 17.

Discovery Against the Crown.

The decision of the Court of Appeal delivered at its present sitting in *Rayner v. The King* holding that discovery against the Crown is not a matter of right raises again the important question as to whether the time has not arrived for the passing of legislation to place the Crown in litigation in the same position as a private litigant. In coming to their decision the Court of Appeal found that our Crown Suits Act did not affect the Common Law prerogative of the Crown to resist discovery any more than the Common Law Procedure Act, 1854, affected the Crown's right in England. The Australian cases, holding that the subject had a right to insist on discovery from the Commonwealth and certain States were held not applicable to New Zealand as they were based upon legislation substantially different from the provisions of our Crown Suits Act.

In an article in the *Law Journal* of the 10th August last, it is stated: "There is no doubt in the minds of the legal profession and of the public that a change of procedure in order to place litigation with the Crown on a modern and businesslike footing, is long overdue." In claims for damages arising out of collision with a ship belonging to the Crown and a privately-owned vessel, the article referred to states that there has been for many years a practical procedure which might form a precedent for other actions and which comes into operation without the necessity of any legislation, but by the goodwill and the good sense of the Admiralty. This goodwill and good sense of the Admiralty seems to have followed upon certain remarks of Dr. Lushington, who after giving a decision observed: "Sitting here as a Judge in a Court of Justice, I am bound to express the opinion that I cannot apprehend the high personages who represent Her Majesty of Admiralty, will avoid doing justice. Whether they shall appear or not is not a matter for this Court to determine." Dr. Lushington's appeal was apparently not in vain. The Admiralty ordered an appearance, and from that time onwards a shipowner whose vessel had been damaged in collision with a ship of the Crown had no more trouble in securing justice than if the other vessel was in private ownership. Curiously enough the article in question doubts whether, if Dr. Lushington's appeal were made to-day, it would have been successful.

In *Rayner v. The King*, the Court of Appeal in the course of its judgment determining that the suppliant had no right of discovery against the Crown expressed the view that in the past the Crown had always been fair in the matter of discovery and had refrained from granting it only when State interests demanded a refusal; and the Court went on to express the hope that the practice would be continued in future. A Government Department's view of State interest does not always, however, coincide with the ordinary layman's view, and we doubt whether litigants will long continue to have to submit to the Crown being sole arbiter on this point when it is involved in litigation. In all correspondence and discussions that have taken place in regard to necessity for reform in this branch of procedure, the right of the private litigant to discovery has been regarded as one of the most important details.

Sir Henry Slesser when he introduced his recent Crown Proceedings Bill, said, in dealing with the objects of the Bill: "An anomaly was discovered. The right to obtain documents from Government Departments is, at present, a matter of right almost non-existent. This Bill gives the right of discovery but, at the same time, is carefully guarded against any improper use of discovery against the Crown in cases where the public interests demand that there should be no discovery." Letters that appeared in the Press from eminent English barristers expressed the opinion of the writers that the attitude of Government Departments in regard to discovery was by no means fair, and, on reflection, it does seem clear that it must be difficult on such a question for the Crown in litigation to exercise an impartial judgment.

The Court in refraining from expressing an opinion as to whether the time for legislative action, considering the present extensive activities of Crown Departments, had arrived or not, but expressing a hope that no departure would be made from the practice obtaining on the part of the Crown to give the other party inspection of all relative documents not withheld owing to circumstances of public policy has in effect left it to members of the Profession whether the present practice is to continue or whether legislation granting discovery against the Crown should be asked for. This question is bound to provoke a difference of opinion. The general impression, however, seems to prevail that there is no reason whatever for putting the Crown in a favoured position when it is engaged in litigation with a private individual.

It is probably seldom that in New Zealand the public interest can demand in litigation the suppression of the documents held by the Crown. The public interest is rightly construed as being the interests of the public, not merely the interests of the Government Department. Nevertheless discovery is not always willingly given by the Government Departments and the private litigant, since he is debarred from demanding an affidavit of discovery, is never aware of what documents are in the possession of the Department. If it is found that in a large number of cases, the private litigant is embarrassed by not having the right of discovery, the proper conclusion is that, since our Courts have no power to order it, the Legislature should step in to give them power.

Supreme Court

Myers, C.J. July 22; September 11, 1929. Wellington.

FLOOD v. LOWER HUTT BOROUGH.

Municipal Corporation—Street—Misfeasance—Hole at Side of Street—Dedication of Street Accepted by Corporation and Certificate of Compliance with Statutory Requirements Given Before Statutory Requirements Complied with—Transfers to Plaintiff and Others of Allotments Fronting on Street Registered—Semble Corporation Liable for Injuries to Plaintiff Sustained Through Falling Into Hole By Whomsoever Made if Hole Existed at Time of Dedication or Made Subsequently—Hole Made by Corporation and Extending Into Street Under Control of Corporation—Plaintiff Falling Into Hole While Walking in Latter Street—Hole Not Safeguarded or Lighted Where Plaintiff Fell In—Misfeasance—Corporation Liable.

Action for damages for personal injuries. On 11th September, 1928, the plaintiff was returning, after dark, after his day's work, to his home, which was situate on a section of what was known as the Kingston Park Estate. At the junction of a street on the estate, known as Stellin Street, with the Main Hutt Road, his cap blew off, and he dismounted from his bicycle for the purpose of recovering it. While endeavouring to recover his cap he fell into a hole which had been excavated at the junction of Stellin Street and the Hutt Road, and which was alleged to be not fenced, lighted, or otherwise safeguarded, and he sustained serious injuries, in respect of which he brought this action. The Kingston Park Estate was at one time the property of one Stellin, by whom it was sold to the Hutt Golf Course Estate Co. Ltd., of which company Stellin was the Chairman of Directors. The estate had an area of about forty acres, and was in course of being subdivided by the company for sale. On 15th March, 1927, an agreement was executed between the Borough, the company, and Stellin with regard to the formation and metalling of the streets and the construction of other works. On 11th October, 1927, a bond was executed whereby it was recited that the Council had agreed to approve the plan of subdivision and perform all acts necessary for the purpose of declaring the streets public streets, the company and Stellin binding themselves in the sum of £6,722 to complete the streets and the other works required to be done. On 19th December, 1927, the company by memorandum of transfer dedicated various strips of land (including Stellin Street) for the purposes of public roads or streets in pursuance of the provisions of Section 116 of the Public Works Act, 1908. The Corporation had previously, on 29th November, 1927, by memorandum under its seal endorsed on the transfer in accordance with a resolution of the Council, formally accepted the dedication; and by certificate under seal endorsed on the transfer and executed on 29th February, 1928, in accordance with a resolution of the Council the Corporation certified that the requirements of Section 116 of the Public Works Act, 1908, had been complied with so far as they affected the streets shown on the plan of the Hutt Golf Course Estate subdivision. When that acceptance of dedication and certificate were executed the conditions as to the streets and other works which the Council required to be constructed and done by the company had not been complied with. That erroneous certificate was accepted by the Registrar as satisfactory evidence of compliance with the requirements of Section 116 and he thereupon registered transfers to the plaintiff and another or others who had bought allotments of the estate, and titles were issued accordingly to them. Some kind of barrier in the shape of two more or less loose wires were hung across Stellin Street at its junction with the Hutt Road, and a gate was placed in the fence at its north end. The hole in Stellin Street which was about ten feet deep extended not only to the boundary of that street with the Hutt Road but also some distance into the Hutt Road itself, i.e., some distance outside the wire fence on the Hutt Road side, but there was a conflict of evidence as to whether the hole had been dug by the servants and officers of the Borough or by the contractor engaged by Stellin.

O'Regan for plaintiff.
Bunny for defendant.

MYERS, C.J., said that it was necessary for the plaintiff and other persons having sections on the estate and their tradesmen and other invitees to use the streets. That must have been known to the responsible officers of the Borough, and indeed the acceptance of the dedication by the Borough and the giving of the incorrect certificate as to compliance by the company with the statutory conditions must have been intended for the very purpose of enabling titles to the sections to be issued, and houses to be erected, with the consequent user of the streets by at least a number of people. Leaving out of consideration for the moment the extension (to which more particular reference would be made later) of the hole in Stellin Street into the Hutt Road, it was at least arguable that, on the facts so far stated, the Borough would be liable to the plaintiff in respect of injury suffered by him through falling into the hole (by whomsoever made) if the hole either existed at the time of the dedication or was made subsequently. His Honour distinguished **Coleshill v. Manchester Corporation,** (1928) 1 K.B. 776, on the grounds that in the present case the strips of land were no longer the property of the company but had been dedicated to the public as streets and the dedication had been accepted by the Council; houses on the estate had been actually occupied which involved the user of the streets; and the Council had actually certified by a document of a public nature that the requirements of Section 116 of the Public Works Act had been complied with and that the strips of land were dedicated to the public as public streets. The case bore some similarity to **McClelland v. Manchester Corporation,** (1912) 1 K.B. 118, where, at p. 129, Lush, J., said that if a road authority opened a road to the public as a made up street they must exercise due care and have due regard to the safety of those who used it. It seemed to His Honour that the Council was in the present case in very much the same position as a highway authority which made a new road. On that point Bailhache, J., in **Thompson v. Bradford Corporation,** (1915) 3 K.B. 13, 21, following **McClelland's case** (*cit. sup.*) which was also expressly approved in **Papworth v. Battersea Corporation (No. 2),** (1916) 1 K.B. 583, 590, said the duty of a highway authority which made a new road was to make it so that when the authority threw the road open to the public for public use the road should be reasonably safe for the purpose for which it was intended to be used. His Honour did not think it necessary to consider the effect of the erection of the wire fence and gate, even if they had been erected by the Borough and not by the company, because the Borough must at least be assumed, His Honour thought, to have thrown the road open to those persons (and their invitees) who had secured titles issued by the Registrar in reliance upon the Council's certificate and who were properly using the road, and who were entitled to assume at least that the streets had been properly formed. It was unnecessary, however, to express a definite opinion on that aspect of the case because there was a broad question of fact upon which His Honour preferred to base his decision.

It was suggested by Mr. Bush, the Borough Engineer, and Mr. Frethey, a cadet engineer employed by the Borough, that the hole had been dug by the company or its contractor and had been left open possibly at the request of Mr. Frethey for the convenience of the Borough in order that the sewer invert at the junction of Stellin Street and the Hutt Road might be connected by the Borough authorities with the manhole in the Hutt Road, so as to simplify the work that had to be done. It was, however, quite unnecessary to leave the manhole open for that purpose because the evidence of the engineers was that the connection could easily have been made at any time by driving a small tunnel for a very short distance, and that seemed to be the usual practice adopted in the like circumstances. Mr. O'Regan contended that if those facts were accepted and the hole was left open to suit the Council's convenience the Borough would still be liable to the plaintiff although it did not dig the hole itself. For that proposition he cited various authorities, including **Mayor and Corporation of Shoreditch v. Bull,** 90 L.T. 210. It occurred to His Honour also that the Corporation might be liable on the ground that the hole constituted a nuisance in a public street. But as His Honour had already said, he proposed to base his decision upon the broad facts of the case and, that being so, His Honour did not think it either necessary or desirable to express a definite opinion upon points which did not expressly arise for determination.

It was alleged by the plaintiff that the hole in Stellin Street which was about ten feet deep extended not only to the boundary of that street with the Hutt Road but some distance outside the wire fence on the Hutt Road side. When proceeding to recover his cap the plaintiff did not go through the fence into Stellin Street but walked by the fence on the Hutt Road, and in the darkness fell into the hole. There was no evidence that the extension of the hole into the Hutt Road was caused by erosion or other similar process, and it would appear that the

hole existed in its condition as on the night of 11th September from the time when it was last dug prior to that date. There was no footpath on the Stellin Street side of the Hutt Road and probably that side of the road was not used a great deal for pedestrian traffic. The plaintiff himself says that though he knew prior to the accident of the existence of the hole in Stellin Street he did not know that it extended into the Hutt Road as he had never been across to look at the hole. His Honour found as a fact that the hole did extend at least eight inches and probably more into the Hutt Road. The plaintiff himself said that he fell into the hole while walking on the Hutt Road side of the fence. The main question of fact in controversy between the parties was as to who made the hole. If it was made by the Borough so as to extend into the Hutt Road, then inasmuch as on the Hutt Road side the hole was not safeguarded or lighted, and the injury to the plaintiff was caused by his falling into the hole while walking along the Hutt Road, it was clear that the Borough would be liable on the ground of misfeasance. Upon a lengthy consideration of the evidence His Honour came to the conclusion that the excavation that caused the injury was made by officers or servants of the Borough. His Honour also found that the excavation so made extended into the Hutt Road and that the plaintiff fell into the hole from the Hutt Road side of the fence, and it followed, in His Honour's opinion, that there was misfeasance on the part of the Borough for which it was liable in damages. The defendant raised the defences of *volenti non fit injuria* and contributory negligence. The circumstances of the present case were much more favourable to the plaintiff on the question of contributory negligence than were those in the case cited during the argument of **Bond v. South Australian Railway Commissioners,** 33 C.L.R. 273, where it was held that the plaintiff's prior knowledge of the locality where the accident happened did not prevent him from recovering. His Honour could see no foundation for the defence of contributory negligence unless the plaintiff knew that the hole extended into the Hutt Road. His Honour was satisfied that he had no such knowledge, and that finding to His Honour's mind disposed of both defences.

Judgment for plaintiff.

Solicitors for plaintiff: **P. J. O'Regan,** Wellington.
Solicitor for defendant: **E. P. Bunny,** Wellington.

Herdman, J. September 4; 10, 1929. Auckland.

REYNOLDS v. STOKES AND JOHNSTON.

Motor Vehicles—Motor-omnibus Traffic—"Carrying on Motor-omnibus Service" Without License—Offence Committed if Service Carried On on Isolated Occasion—Not Necessary to Prove Regularity or Continuity—Motor-omnibus Traffic Act, 1926, Sections 2 and 5.

Appeal from decision of Mr. E. C. Cutten, S.M., on an information against the defendants alleging that they on 30th November, 1928, at Devonport, did within a Motor-omnibus District, viz., No. 2 Motor-omnibus District, carry on a motor-omnibus service by means of two described motor-omnibuses otherwise than pursuant to the authority and in conformity with the terms of a license granted by a licensing authority under the Motor-omnibus Traffic Act, 1926. The defendants pleaded "not guilty" and after evidence had been heard the charge was dismissed. It was proved or admitted upon the hearing:—(1) That the motor-omnibuses referred to in the information were motor-omnibuses within the meaning of the Motor-omnibus Traffic Act, 1926; (2) that the defendants had no license under the Act to carry on a motor-omnibus service in the district in question; (3) that the defendants never applied for such license nor were the motor-omnibuses or the drivers thereof licensed under the Act or the regulations made thereunder; (4) that the defendants plied for hire with and carried passengers in the motor-omnibuses on 30th November, 1928, at fares of 1/- each way on several occasions to and from the racecourse and the main wharf at Devonport within the district in question. The question for determination was whether acting as they did on 30th November, 1928, the defendants were carrying on "a motor-omnibus service."

Stanton and Watson for appellant.
Northcroft for respondents.

HERDMAN, J., after referring to Sections 2 and 5 of the Motor-omnibus Traffic Act, 1926, said that it seemed to him to be beyond doubt that the defendants were carrying on a motor-omnibus service. They used vehicles which were motor-omnibuses within the meaning of the statute and they carried passengers for hire at fares which did not exceed the sum of 2/-. They were doing precisely what a person licensed to use a motor-omnibus in a motor-omnibus service was entitled to do. The Magistrate seemed to be of opinion that to establish the offence of carrying on a motor-omnibus service it was necessary to prove something more than sporadic instances of the carrying of passengers by motor-omnibus. If that were the law then difficult questions would at once arise. The Magistrate had decided that an unlicensed motor-omnibus proprietor might lawfully ply for hire on one day or may be on three or four days during a year. If that were the correct legal position then every unlicensed proprietor of a motor-omnibus—and there were no doubt many of them in New Zealand—might avail himself of that right and carry passengers to race meetings, football matches and other public entertainments. What might happen was well exemplified by the present case. The defendants owned what was called a "sight-seeing bus." On the day named in the information that vehicle was diverted from its usual business and was employed taking the public to and from the races. If it were lawful to carry passengers on one day in the year, on how many other days in the year might the practice be indulged in without the law being broken? The learned Magistrate was of opinion that the act might be committed with impunity on three or four occasions during a year and that to establish an offence there must be some proof of "regularity and continuity." In other words, a man's culpability was to depend upon the degree to which he carried on the business of carrying passengers for hire at fares under 2/-. His Honour did not think that the words of the statute justified that interpretation. The plain language contained in the definition of "motor-omnibus service," in His Honour's opinion, evidenced an intention on the part of the Legislature to put a definite end to any carriage by unlicensed motor-omnibuses of passengers for hire at fares which did not exceed for each person the sum of 2/-. In addition to a fine of £100 a further penalty of £10 was provided for every day on which the offence was committed. That the Legislature intended to restrict arbitrarily the carriage by motor-omnibus of passengers for hire was to His Honour's mind quite plain. It determined to restrict that traffic with such rigour that if any unlicensed person on any one day or during part of a day committed the act of carrying persons for hire in a motor-omnibus at a fare less than 2/-, he offended against the law. That was the plain meaning to be given to Section 5 of the Act read in conjunction with the definition of motor-omnibus service in Section 2. In **Wheeler v. Smith,** (1927) N.Z.L.R. 69 at p. 77, Adams, J., discussed Section 5 of the statute and pointed out that the offence did not consist in carrying on a business but in carrying passengers for hire. With that interpretation of the Section His Honour agreed. Whether a man carried passengers on one day or on twenty days did not matter. If it were proved that he carried passengers on an unlicensed vehicle at a fare less than 2/- that was enough.

Appeal allowed.

Solicitors for appellant: **Brookfield, Prendergast and Schnauer,** Auckland.
Solicitors for respondents: **Earl, Kent, Massey and Northcroft,** Auckland.

Herdman, J. June 7, September 9; 12, 1929. Auckland.

SUBRITZSKY v. SILICH.

Contract—Construction—Agreement to Pay Royalty on Price Realised on All Sales of Kauri Gum Less Percentage of Freight and Commission—Royalty to be Paid Before Gum Consigned from Town where Land Situated—Provision that Licensee was to have Use of Drying Ground on Land and that all Gum to be Consigned be Weighed and Branded in Presence of Owner—Evidence that Gum Usually Sold in Nearest Market Cleaned—Licensee Paying First Royalties on Value of Cleaned Gum—Royalty Held Payable on Price Payable for Gum When Cleaned and Not When Uncleaned.

Action arising out of a contract dated 12th May, 1927, by which the plaintiff gave to defendants the right to dig for gum and to extricate and wash all gum on certain land belonging to him at Mangawai. The agreement contained the following provision for payment of a royalty to the plaintiff: "The Syndicate shall pay to Hayward Charles Subritzsky royalty at 25% on the price realised on all sale of Kauri Gum less 25% proportion of freight and commission and to produce account sales of all gum sold PROVIDED however that before any gum is consigned from Mangawai by the Syndicate the said Syndicate shall pay 25% royalty aforesaid to the said Hayward Charles Subritzsky or give satisfactory security or a bond to the value of 25% of the value of the gum in the proposed sale." The agreement further provided that "all gum to be consigned" shall be first weighed and branded in the presence of the plaintiff, and that the defendant was to have the right to use a drying ground and shed on the ground. The plaintiff contended *inter alia* that the amount of royalty was to be computed on the price of cleaned gum sold less 25% of the amount paid for freight and commission, while the defendant, on the other hand, submitted that under the terms of the contract he was free to sell his gum cleaned or uncleaned just as he pleased and that he was at liberty to sell where he pleased. The case is reported on this question only.

Hall Skelton for plaintiff.

Webb for defendants

HERDMAN, J., said that to determine the rights and liabilities of the parties the contract must be interpreted. The royalty was to be paid "on all sales of kauri gum" but it did not in express terms state whether the royalty was to be paid on the price which cleaned gum realised or on the price which uncleaned gum brought. As cleaned gum realised about £7 a ton more than the uncleaned article it was obvious that the question whether the plaintiff was entitled to royalty on cleaned or uncleaned gum was a matter of some moment to him. On its face the contract provided for the payment of royalty on all gum sold but it transpired during the hearing that gum might be sold in two different ways. In the present case there was a latent ambiguity. Whether royalty was to be paid on the proceeds of cleaned gum sold or upon the proceeds of uncleaned gum sold was not expressly stated. Keeping in mind the principles stated in **Norton on Deeds,** 2nd Edn. 121, His Honour looked at the document first and noted that in paragraph 4, "freight and commission" were spoken of and it was provided that royalty was to be paid before the gum was consigned from Mangawai. The parties therefore had it in mind that the gum was to be sold away from Mangawai, and Auckland appeared to be the recognised market to which gum was dispatched for sale. Although occasionally uncleaned gum might be sold in Auckland the weight of evidence given at the trial indicated that gum was generally cleaned before it was sold. In paragraph 6 it was provided that "all gum to be consigned" should be first weighed and branded in the presence of the plaintiff. Again there was a provision that the defendant was to have the right to use a drying ground and shed on the land. That drying ground, so it was stated at the hearing, would be used for cleaning gum. Then it was significant that when the defendant first commenced to extract gum from the land he cleaned it and paid royalty to plaintiff upon the proceeds of cleaned gum sold by him. His Honour inferred from those facts that, in the early stages of the work that he carried on under the contract, the defendant placed the same interpretation upon the document as did the plaintiff in the present action. A provision in the contract about freight and commission put it beyond doubt that the parties contemplated a sale away from Mangawai. To support the plaintiff's claim a number of witnesses in the gum business were called to prove that when gum was marketed the practice was to sell the cleaned article. From the fact that the necessary cleaning apparatus was on the property and that a drying shed was placed at the defendant's disposal, and recollecting that the defendant in the early stages of his digging operations paid royalty on the value of cleaned gum, His Honour thought that it was to be inferred that the price got for the cleaned article was to determine the quantum of royalty. His Honour, therefore, interpreted the deed as imposing an obligation on the defendant to pay the plaintiff a royalty computed upon the proceeds of the sale of cleaned gum.

Solicitors for plaintiff: **Hall Skelton and Skelton,** Auckland.

Solicitors for defendant: **Webb and Ross,** Dargaville.

Adams, J. September 6; 9, 1929. Christchurch.

BOOTH v. BOOTH AND WEIR.

Divorce—Adultery—Petition and Cross Petition—Both Parties Guilty of Adultery—Petitioner's Act of Adultery Committed After Filing of Petition Subsequent to Respondent's Adultery and After Respondent Had Left Matrimonial Home—Quaere as to Power of Court to Grant Two Decrees Nisi Between Same Parties—Two Decrees Unnecessary—Decree Granted to Petitioner and Refused to Respondent—Divorce and Matrimonial Causes Act, 1928, S. 26.

Petition by husband for divorce on ground of adultery. A cross-petition was filed by the wife on the same ground. His Honour found that the respondent committed adultery on 22nd April, 1929, and that the petitioner was guilty of adultery on 6th July, 1929. In these circumstances the respondent asked that if a decree were granted to the petitioner the Court should grant a decree to her also.

Hunter for petitioner.

Thomas for respondent.

ADAMS, J., said that counsel for the respondent relied on **Hall v. Hall,** 21 N.Z.L.R. 251. In that case Denniston, J., granted separate decrees but went on to say that if he was wrong in doing that he would grant the decree to the wife. The Court of Appeal reversed the finding of the learned Judge against the petitioner but said nothing as to the power of the Court to grant two decrees *nisi* in one case. His Honour did not find it necessary to express any opinion on that question. When **Hall v. Hall** (*cit. sup.*) was decided it was possible for the party in whose favour a decree *nisi* had been pronounced to delay application for the decree absolute, and so prevent the guilty party from securing a dissolution of the marriage, and that was not infrequently done with mischievous results. But the Legislature had provided a remedy for that mischief and a respondent could obtain a decree absolute on application to the Court under Section 26 of the Matrimonial Causes Act, 1928. If, therefore, the Court ever had power to grant two separate decrees *nisi* for dissolution of marriage between the same parties, it was no longer necessary to adopt that course, and His Honour thought that the maxim *cessante ratione cessat ipsa lex* should apply. The petitioner's matrimonial offence was committed after the filing of his petition and some time after the respondent left his home and committed the matrimonial offence proved against her. His Honour thought, therefore, that the decree should be pronounced in his favour.

Solicitors for petitioner: **Hunter and Ronaldson,** Christchurch.
Solicitor for respondent: **W. J. Stacey,** Christchurch.

Adams, J. April 23; September 9, 1929. Christchurch.

SECOND CHURCH OF CHRIST SCIENTIST, CHRISTCHURCH TRUST BOARD v. SYMES.

Trust—Religious Educational and Charitable Trusts—Powers of Trust Board—No Power to Mortgage Freehold Property—Power to "Sell" Not Including Power to Mortgage—Mortgage by Trust Board Sanctioned by Court Under Its General Jurisdiction—Religious Educational and Charitable Trusts Act, 1908, Sections 7, 9, 13.

Originating summons under the Declaratory Judgments Act, 1908, asking for a judgment declaring whether the plaintiff being a Trust Board incorporated under Part II of the Religious, Charitable, and Educational Trusts Act, 1908, had power under that Act to give a valid mortgage over its freehold property; and for such other order as in the circumstances might be just.

Saunders for plaintiff.

Sim for defendants.

ADAMS, J. said that the Second Church of Christ, Scientist, adopted a constitution and by-laws in 1925, and revised it in 1927. Article VIII, Section 1 of that constitution provided for a Board consisting of a President and six Directors. Sec-

tion 5 of the same Article provided that the Board as trustees of the Church should have the custody and control of all the property of the Church, and should hold the same in trust for its use and benefit, and have the general direction of the business affairs and religious interests of the Church. Section 7 provided that the exercise of all duties, authorities, and discretions of the Board should be subject to the control of any corporate meeting, general or special. Counsel for the plaintiff submitted that Section 7 of the Act conferred on the Board full power to "do and suffer all that corporate bodies may do and suffer" without regard to the trusts upon which its property might be held. That submission, however, was negatived by Section 9, and in any case was in His Honour's opinion untenable. All the powers vested in the Board under the Act were vested in it as trustees and were exercisable only in accordance with the nature and terms of the trusts upon which the property was held. It was true that Section 13 as amended provided that, notwithstanding any trusts that might affect its property, a Board might dedicate for any public purpose, or might sell or exchange, all or any part of its property upon such terms as it deemed expedient, but that must be read with Section 9. The dedication, sale, or exchange must be for the benefit of the trust. Section 13 was no doubt intended to give to any incorporated Board, without an order of the Court, such powers of dedication, sale, or exchange as, apart from the Act, would have been sanctioned by the Court under its general jurisdiction, including such cases as **In re Ashton's Charity,** 22 Beav. 288; **In re Mornington Baptist Church,** 10 G.L.R. 520; and **In re Wellington Diocesan School for Girls Trust Board,** (1925) N.Z.L.R. 582. His Honour could not agree with the contention of counsel that the word "sale" in Section 13 included "mortgage." The case in which the meaning of the word had been so extended were clearly distinguishable. The provisions of Part II of the Act did not, His Honour stated, confer on the Board power to give a valid mortgage of its property. There appeared, however, to be no reason why recourse should not be had to the general jurisdiction of the Court in proper cases. The decision of Stout, C.J., in **In re Wellington Trust Board** (*cit. sup.*) was a clear authority that an order might be made sanctioning a mortgage, and in the present case His Honour thought such an order should be made and His Honour made it accordingly, all such amendments—if any—as might be necessary being deemed to have been made.

Solicitors for plaintiff: **R. L. Saunders,** Christchurch.

Solicitors for defendant: **Duncan Cotterill and Co.,** Christchurch.

MacGregor, J. August 24; September 19, 1929. Napier.

IN RE HAWKE'S BAY ELECTRIC POWER BOARD AND NAPIER BOROUGH.

Arbitration — Arbitrator — Removal — Agreement by Borough Council to Take Electricity From Power Board and Not to Generate Electricity Except in Special Circumstances—Provision for Reference of Dispute to Arbitration—Power Board Appointing as Arbitrator Electrical Engineer Who Had Acted as Adviser to Board and Assisted in Preparation of Agreement—Engineer Not an "Indifferent Person" and Not Fit or Competent to Act as Arbitrator—Application by Summons for Removal of Arbitrator Not Irregular—Party Entitled to Apply for Removal Before Reference Entered Upon—Arbitration Act, 1908, Section 7.

Summons for removal of arbitrator appointed by one of the parties to a reference to arbitration, upon the ground that such arbitrator was not a proper person to act as an arbitrator on the questions in dispute between the parties, on account of his intimate relationship with the party appointing him. The reference had not been actually entered upon. The facts are set out in the report of the judgment.

Lusk for Napier Borough Council in support of summons.

Scannell for Hawke's Bay Electric Power Board to show cause.

MacGREGOR, J., said that the summons was opposed on three grounds: (1) That the Court had no power to remove the arbitrator in question at that early stage of the arbitration proceedings; (2) That the application should have being made by motion and not by summons; and (3) That on the merits no sufficient cause had been shown for removal. Before discussing in detail the several questions arising His Honour pointed out that those were in effect the very questions determined by Cooper, J., in **In re Coleman and Royal Insurance Co.,** 24 N.Z.L.R. 817. In that case the learned Judge ordered the removal of the arbitrator then objected to as not being an "indifferent person," and decided that the procedure by summons in such cases was not irregular, and that in an appropriate case an arbitrator might be removed by the Court (if not "indifferent") before the reference had actually been entered upon. Mr. Scannell contended that the judgment of Cooper, J., on the two points last-mentioned was wrong, and invited His Honour to dissent from the learned Judge's decision accordingly. He maintained that **Coleman's case** was "unique" in its result, and was not justified by the English authorities on the subject. **Coleman's case,** had, however, stood for nearly a quarter of a century in the reports and digests, and had not, so far as His Honour was aware, ever been questioned in New Zealand as an authority during that period, and in the circumstances His Honour thought he ought to follow it. If the decision in **Coleman's case** was wrong, it must, His Honour thought, be left to the Court of Appeal to say so. It seemed to His Honour that there was no valid reason why an application to remove an arbitrator should not be made by summons, as well as by motion. Further, His Honour respectfully agreed with what Cooper, J., said in deciding that a party to a reference was entitled to apply for the removal of an arbitrator before the reference was entered upon. Otherwise the injured paryy would have to go through the solemn and expensive farce of proceeding with the arbitration under protest and then applying to set the award aside. That would appear to His Honour to be a wholly unreasonable course. For those reasons the first and second objections to the summons could not, in His Honour's view, prevail.

The third ground of objection was that no sufficient cause had been shown on the facts for the removal of the arbitrator in question. That question involved a scrutiny of the circumstances relating to the appointment of the arbitrator objected to. The present summons was taken out by the Napier Borough Council against the Hawke's Bay Electric Power Board. On 15th March, 1927, an agreement was entered into between the Board and the Council under which the Board agreed to supply and the Council agreed to take a quantity of electrical energy upon the terms and conditions set out in the agreement. By Clause 20 of that agreement the Corporation undertook not to operate its generating units on supply at any time after the commencement of the agreement except under certain specified conditions. By clause 22 of the Agreement it was provided that if any dispute question or difference should arise between the parties with reference to the agreement or any clause thereof or any matters arising out of the agreement then, unless the parties concurred in the appointment of a single arbitrator, the dispute question or difference should be referred to two arbitrators, one to be appointed by each party to the difference, or to an umpire appointed by the arbitrators, in accordance with the provisions of the Arbitration Act, 1908. The Board claimed that the Council had committed breaches of clause 20 of the agreement which the Council denied, and in consequence of the difference that arose between the parties to the agreement it was agreed that the matters in dispute should be referred to arbitration in terms of clause 22 of the agreement. By letter dated 28th June, 1929, the Board notified the Council that it had appointed Mr. John Gill Lancaster of the firm of Vickerman and Lancaster, of Wellington, Electrical Engineers, to act as its arbitrator on the arbitration. On 3rd July, 1929, the Council wrote a letter to the Board objecting to the appointment of Mr. Lancaster as an arbitrator in the matters in dispute and requesting the Board to appoint another arbitrator in his place, upon the ground that Mr. Lancaster was acting as adviser to the Board in arranging the terms of the very agreement which was the subject-matter of the dispute between them. It was stated in the letter that this was evidenced, among other things, by the correspondence received by the Council from Mr. Lancaster as representing the Board from as early as March, 1925, and by the fact that Mr. Lancaster, as adviser to the Board, attended a conference between members of the Board and of the Council held on 11th August, 1926, to discuss the terms of the agreement to be entered into between the Board and the Council, and by a copy of a letter from Messrs. Vickerman and Lancaster to the Board dated 14th August, 1926, which copy was sent by the Secretary of the Board

to the Council. The Council accordingly asked that the Board nominate some person who had had no previous connection with the subject-matter of the dispute to take the place of Mr. Lancaster as arbitrator. This the Board refused to do. It was clear that up to the date of the final settlement of the terms of the agreement Mr. Lancaster had been employed as electrical engineer and expert adviser to the Board in all matters connected with the proposed supply and the terms and conditions to be inserted in the proposed agreement, and that acting on behalf of the Board he had on several occasions prior to the signing of the agreement communicated with the Council on matters connected with the proposed supply of electricity. The draft agreement was apparently prepared by him. Mr. Lancaster had sworn an affidavit in which he set out his qualifications, and stated broadly that there was nothing in his previous connection with the Board or otherwise which would in any way prevent him from carrying out his duties as arbitrator in a fair and impartial manner. There was no dispute that Mr. Lancaster was a highly qualified electrical engineer, and that in ordinary circumstances he would make an excellent arbitrator in a dispute such as the present.

The substantial question to be determined by the Court was, however, whether Mr. Lancaster, in all the circumstances of the case was really "indifferent" between the parties to the dispute. It was clear law that an arbitrator ought to be a person who stood "indifferent" between the parties. As pointed out by Cooper, J., in **Coleman's case** (*cit. sup.*) at p. 823, the term "indifferent" excluded not only persons who had an interest in the result of the arbitration, but also persons who might be reasonably presumed, owing to their prior relationship with one of the parties to the dispute in connection with the subject-matter of the dispute, to have a bias in favour of such party. It must be remembered that under clause 22 it would be the duty of Mr. Lancaster as arbitrator to construe the agreement which he himself prepared for the Board. Could he do so judicially, i.e., without some bias in favour of his own draftsmanship and skill and his employer's financial interests? It seemed to His Honour obvious that a certain portion of clause 20 on its face presented difficulties in interpretation that could best be solved by a fresh mind, not hampered or trammelled by any preconceived ideas on the subject derived from an *ex parte* source. The legal principles laid down by Jessel, M.R., in **Beddow v. Beddow,** 9 Ch. D. 89, at p. 93, that no Judge, arbitrator or other quasi-judicial person ought to be allowed to proceed in the hearing of a case which such judge or arbitrator was, for any special reason, unfit or incompetent to hear, applied in the present case. Was Mr. Lancaster then, for any special reason, "unfit or incompetent" to hear the present case? What was suggested against him acting as arbitrator was that, from his former intimate connection with the Board in the very matter, he must inevitably approach the case with a mind that was not free from the human weakness of a preconceived opinion in favour of his employers. Mr. Lancaster was not in the position of an arbitrator named in the agreement under which the arbitration had arisen. He was not in any sense an arbitrator chosen by the Council. On the contrary he had been selected and nominated by the other party to the reference, the Board itself. Could an arbitrator so selected be expected to have "the perfectly open judgment, the absence of all previously formed or pronounced views, which in an ordinary arbitrator are natural and to be looked for"? (See per Bowen, L.J., in **Jackson v. Barry Railway Coy.,** (1893) 1 Ch. 238, 247). His Honour was afraid not. It would be too much to expect of frail human nature, in such a case as the present. Mr. Lancaster was no doubt a professional man with undoubted qualifications, and actuated by a high standard of professional honour, but His Honour thought that in deciding the disputed questions arising under the arbitration he would be bound to approach their decision with a bias, more or less unconscious, in favour of his former employer—the Board. That being so, His Honour held that Mr. Lancaster was legally "unfit or incompetent" to act as an arbitrator in the case, and ordered his removal as arbitrator, and His Honour further ordered that the Board within seven clear days after the service of the order should appoint another person as arbitrator in his place, and that in the event of the Board failing to make such new appointment within the time limited the Council might proceed under paragraph (h) of Section 7 of the Arbitration Act 1908.

Solicitors for Napier Borough Council: **Kennedy, Lusk and Morling,** Napier.

Solicitors for Hawke's Bay Electric Power Board: **Carlile, MacLean, Scannell and Wood,** Hastings.

MacGregor, J. May 2; September 16, 1929. Wellington.

SMITH v. TILLER.

Landlord and Tenant—Land Transfer Act—Implied Covenant—Memorandum of Lease Containing Covenants by Lessee to Repair—Transfer of Lease—Existing Breach of Covenant to Repair at Time of Transfer—Transferee Claiming Damages for Breach of Covenant Implied under Section 58 of Property Law Act, 1908—Covenant Implied in Transfer of Lease Under Land Transfer Act—Liability of Transferor Not Affected by Act of Transferee's Carrying Out Repairs Without Notice to Transferor and Before Required by Lessor.

Action for damages for (*inter alia*) breach of implied covenant. By the terms of a memorandum of lease under the Land Transfer Act, 1915, the defendant covenanted to keep the exterior and interior of certain demised premises and all additions thereto and the boundary walls and the sanitary and water apparatus thereof in good and tenantable repair and to take due care of the fixtures and fittings and at the determination of the tenancy to deliver them up in good and clean condition. The defendant on 30th November, 1927, transferred the lease to the plaintiff. The plaintiff claimed that the covenants above referred to had been broken at the date of the transfer, and claimed damages for breach of the covenant implied by virtue of Section 58 of the Property Law Act, 1908.

W. Perry for plaintiffs.

Hay for defendants.

MacGREGOR, J., after referring to Section 58 of the Property Law Act, 1908, whereby in every conveyance of a term of years in land for valuable consideration there is implied a covenant by the conveying party his executors and administrators: "that the rent reserved by the lease under which the land is held, and the covenants and conditions expressed or implied in the lease and to be performed and observed by the lessee, have been respectively paid, performed, and observed up to the date of the conveyance," said that the "conveyance of a term of years in land" in the present case was a memorandum of lease executed under the Land Transfer Act, 1915. For the defendant it was contended or suggested that Section 58 of the Property Law Act, 1908, did not apply to instruments executed under the Land Transfer Act. Mr. Hay, for the defendant, however, frankly admitted that the only reported cases in New Zealand on the point were rather against than for this contention: see the remarks of Chapman, J., in **Daveney v. Carey,** 33 N.Z.L.R. 598, 600, 602. His Honour saw no reason to disagree with the reasoning of the learned Judge in that case and accordingly held that Section 58 applied to the transfer of lease executed by the defendant in the present case. In other words, it appeared to His Honour that the defendant remained bound by an implied covenant that the covenants in the lease had been performed and observed up to the date of the transfer of the lease executed by her. The covenants in question were those relating to the repair of the premises. His Honour was satisfied that these covenants had been broken by the defendant. The evidence taken as a whole showed that the demised premises were not on the 30th November, 1927, in good and tenantable repair and condition as provided by the lease. On that date the lease was transferred by the defendant to the plaintiffs, who were then entitled to assume that the defendant's covenant as to repair had been performed and observed by her. In those circumstances the plaintiffs had a right in law to recover damages from the defendant for the breach of her implied covenant, unless the performance of this covenant had in some way been excused or dispensed with. It was contended for the defendant that her breach of covenant should not be enforced against her at the suit of the plaintiffs, inasmuch as they (1) had negligently failed to ascertain for themselves the condition of the premises with full opportunity for inspection prior to completion; (2) had undertaken the repairs alleged to be necessary without giving the defendant notice; and (3) had voluntarily executed great part of the repairs claimed for before receiving any requisition from the landlord on the subject of lack of repair. Although the actions of the plaintiffs throughout the whole transaction were unbusinesslike and unfair to the defendant, His Honour was unable to see that their conduct had been such as to justify the defendant's prior breach of her covenant to repair. Once that had been established the only question left open appeared to be one of damages. The parties had agreed as to the amount

of the damages. Judgment was given for the plaintiffs accordingly in respect of the breach of covenant.

Solicitors for plaintiffs: **Perry and Perry,** Wellington.
Solicitors for defendant: **Mazengarb, Hay and Macalister,** Wellington.

Kennedy, J. September 10; 17, 1929. Christchurch.

SHEEHAN v. THE PUBLIC TRUSTEE.

Family Protection—Application by Widow for Further Provision Out of Estate—Application for Extension of Time—Application Not Made for Seven Years After Testator's Death—Residuary Beneficiary Not Aware That Her Interest Under Will Valueless Until Farm Sold Five Years After Testator's Death—Further Delay of Two Years Not Satisfactorily Accounted For—Extension of Time Not Granted Where Delay Long and Inexcusable Unless Refusal to Grant Extension Would Result in Manifest Injustice—Widow in Good Health and Able to Earn Living—No Manifest Injustice—Testator's Intention When Making Will Irrelevant—No Manifest Breach by Testator of Moral Obligation to Make Provision for Support of Wife—Extension of Time Refused—Family Protection Act, 1908, Section 33—Family Protection Amendment Act, 1921-22, Section 2.

Application by plaintiff for an order extending the time for making application for further provision under the Family Protection Act, 1908, and for an order that further provision be made under that Act. The facts appear in the report of the judgment.

Brown for plaintiff.
Cuthbert for executor and pecuniary legatees.
Burns for infant residuary legatees.
Wilding for Bank of Australasia.

KENNEDY, J., after referring to Section 33 of the Family Protection Act, 1908, as amended by Section 2 of the Family Protection Amendment Act, 1921-22, said that while each application should be considered on its merits—**Newman v. Newman,** (1927) N.Z.L.R. 418—it was nevertheless convenient to consider the cases in which an extension had been granted or refused, and to ascertain what principles had been applied in dealing with applications for extension. His Honour referred at length to the cases of **Hoffman v. Hoffman,** 29 N.Z.L.R. 425; **Milne v. Cunningham,** (1917) N.Z.L.R. 687; **In re Pulleng,** (1922) G.L.R. 339; **Corbey v. Boonstra,** (1923) G.L.R. 433; **Copeland v. Wakelin,** (1927) N.Z.L.R. 846; **Smith v. The Public Trustee,** (1929) N.Z.L.R. 342, and **Newman v. Newman** (*cit. sup.*). The facts of the present case were that the testator died on 24th September, 1921, and probate of his will was granted to the Public Trustee on 11th May, 1922. The present application was not filed until 22nd November, 1928, more than six years after the grant of probate and more than seven years after the death of the testator. The reason given for the delay until August, 1926, was that a farm property in which the applicant's husband held one moiety and upon which a partnership business was carried on by Davidson and P. M. and C. Sheehan had dropped in value, and that as the plaintiff was entitled to a share in the residue, she was unaware, until the sale in August, 1926, of what the provision in the testator's will would amount to. Her explanation of the delay in making application was that it was not until 1926 that the true position of the estate was known. The Public Trustee had, she said, held the farm unsold until August, 1926, on the chance of values rising and so providing sufficient to pay the legacies and produce the share of residue anticipated by her father. Further delay arose in consequence of the death of Mr. Rowe, who acted as her solicitor, who had the application in hand prior to his death. After his death it was some time before the papers could be found. Nowhere was it suggested that the plaintiff was ignorant of her rights under the Family Protection Act, 1908. She and her husband bought the estate's moiety in the farm property in August, 1926, and, although one might hesitate to believe that she was unaware in a general way prior thereto of the effect of what was called "the slump" on values and of its effect on her interest in the estate, yet it was no doubt true that a better sale was hoped for. But if it were accepted in fact that she believed she had an interest of some kind in the estate until August, 1926, and that she then for the first time became aware that the provision made for her by the will was valueless, that circumstance would justify the Court in granting the extension of time. The plaintiff should have applied with reasonable promptitude thereafter. Although in August, 1926, she was aware of the position of the estate and of that fact that she could expect nothing, and, although in that month her solicitor gave an intimation to the Public Trustee of her intention to apply immediately for an extension of time, no application for an extension of time was made until a further two years and three months had elapsed. If the normal time for applying for further provision for maintenance and support was twelve months, it might be said that where an applicant did not become aware of her right to apply for four years after the death, and then delayed application for an extension of time for more than two years, an extension should be granted only in exceptional circumstances. From the perusal of a file of correspondence between the applicant and her solicitor and between the solicitor and the Public Trustee it was apparent that the applicant was not unaware of her solicitor's delay. Although the death of her solicitor was said to be the cause of the delay, it was clear that a delay of eighteen months ensued between the date of the solicitor's notification of intention to apply and the death of the solicitor, for his death was stated at the Bar to have occurred in February, 1928. The further delay between February, 1928, and November, 1928, was accounted for on the ground that the papers could not be found, but that explanation was not satisfactory. There had, in His Honour's judgment, been long and inexcusable delay and the application for extension of time should, as in **Milne v. Cunningham** (*cit. sup.*) be refused unless it clearly appeared that to refuse it would, in the circumstances, result in a manifest injustice: see **Copeland v. Wakelin** (*cit. sup.*) and **Newman v. Newman** (*cit. sup.*).

One ground urged by counsel for an order for further provision was that the testator made his will under an erroneous assumption as to the value of his interest in the farm and that he had evinced an intention, evidenced both by the will and by conversations with an officer of the Public Trust Office who had received the instructions for the will, to give approximately one half of his estate to the applicant and her children. That submission would have been of importance if the Court were entrusted with the task of recasting the will and were permitted to proceed upon the further assumption that the testator intended to give the applicant and her children approximately one-half of his estate whatever it might be. The proper inquiry, when an application was made under the Family Protection Act, 1908, was not, however, what was it fair to do to remedy such a frustrated and unexpressed intention—assuming the intention to be properly proved and in the present case it was not—but whether the testator, having regard to his means, the means of the applicant and the relative urgency of the various moral claims upon him, had been guilty of a manifest breach of a moral obligation to make provision for the maintenance and support of the applicant. Little information was given as to the circumstances of the applicant at the date of the death of the testator and of the relative urgency then of the moral claims of the other beneficiaries upon the testator. There was no suggestion that the applicant or her husband or her children were not in good health and at the date of the application the applicant and her husband were able to make a living on the farm and were also able to save. Although the duty of a testator was not limited, where his estate permitted it, to the furnishing of a merely eleemosynary provision, it could not be said that the affidavits disclosed, when regard was had to the actual value of the testator's estate and to the other claims upon the testator, that he had been guilty of such a manifest breach of a moral obligation to make provision for the maintenance and support of the applicant, that to refuse the application would result in a manifest injustice. At the highest the plaintiff's affidavits left the moral duty, under the circumstances, in doubt. Application for extension of time refused.

Solicitors for plaintiff: **Raymond, Stringer, Hamilton and Donnelly,** Christchurch.

Solicitor for executor and pecuniary legatees: **The Solicitor,** Public Trust Office, Wellington.

Solicitors for Bank of Australasia: **Wilding and Acland,** Christchurch.

Kennedy, J. June 18, 19, 20; September 16, 1929. Auckland.

THAMES BOROUGH AND THAMES COUNTY v KAURI TIMBER CO. LTD.

Municipal Corporation—County—Bridge—Damage to Bridge—Action to Recover Cost of Repair and Reconstruction—Part of Bridge Within Borough and Remainder Within County—No Damage to Part of Bridge Within Borough—Part of Bridge Damaged Vested in Crown—County No Title to Sue—No Interference With Statutory Rights and Powers Conferred on County—Crown Proper Plaintiff—Municipal Corporations Act, 1920, S. 172—Public Works Act, 1928, S. 110, 111—Counties Act, 1920, S. 115.

Action by the plaintiffs to recover the sum of £2,767, as the cost of repair and reconstruction of a bridge alleged to have been damaged and partially destroyed as a result of the floating or driving operations of the defendant company in the Kaueranga river. The bridge spanned that river near the Borough of Thames. Its abutments on the east side of the river were within the Thames Borough, while the rest of the bridge was within the Thames County. The defendant company was, and had been for many years, the holder of a timber floating license, issued under the Timber Floating Act, 1908, permitting it to use the Kaueranga river for timber floating purposes and to construct booms therein. On 16th May, 1924, the defendant had such a boom on the river some ten or eleven miles further up the stream than the bridge, and drove to that boom, and there held floating in the river, logs which were recovered from the boom when convenient. On the same day a barge loaded with gravel was moored about 120 yards above the bridge. During the night of 16th May, 1924, a flood came down the river and next morning the barge released from its moorings passed down the river carrying away part of the bridge. The plaintiffs alleged that the barge was released by being struck by the defendant's logs which had escaped from the boom or which, having been carried below the boom in former operations of the defendant company, were caught by the flood waters and borne down stream. Evidence was led to show that the Thames Borough Council had contributed to the expenses of repair and maintenance of the bridge, and had done so voluntarily and not under compulsion.

Hogben for plaintiffs.

Johnstone and J. B. Johnston for defendant.

KENNEDY, J., said that the plaintiffs' right to sue was based on the fact that they were alleged to be responsible for the maintenance, upkeep and control of the bridge. All streets and the soil thereof and all material of which they were composed in boroughs vested in the corporation of the borough: S. 172 Municipal Corporations Act, 1920. Had the damage been done to that part of the bridge which was within the Borough of Thames the Borough might have sued as owner for the damage so done and recovered damages if it established its case. The Borough of Thames did join as plaintiff but the evidence before His Honour did not establish damage to any part of the bridge other than that part which was within the Thames County. The portion of the bridge which was damaged was within the County of Thames. The Attorney-General was not joined as a party to the action although the bridge which was carried away was vested, not in the County, but in the Crown. The Crown was the owner of the bridge; the County was the mere custodian. The Public Works Act, 1928, S. 111, repeating an identical provision in force when the bridge was damaged, enacted that roads and the soil thereof were vested in the Crown together with all materials and things of which such roads were composed or which were capable of being used for the purposes thereof or were placed or laid upon any such road. By Section 110 of the Public Works Act, 1928, a road was defined as meaning a highway and unless repugnant to the context included . . . all bridges, culverts, drains . . . upon the line and within the limits of the road. The County Council had, therefore, no proprietary rights in the bridge and neither it nor the Thames Borough acquired such rights by the spending of money upon the repair, upkeep or maintenance of the bridge. If the bridge was vested in the Crown, the expenditure of money by the Thames County or by the Thames Borough did not divest the Crown of its ownership and vest the bridge either in the Thames County or the Thames Borough. S. 115 of the Counties Act, 1920, enacted that the Council should have the care and management of all county roads within the meaning of the Public Works Act. 1908, and should subject to the provisions thereof have full power to form, construct, improve, repair, and maintain the same and all the bridges and ferries therein or thereon. The County had, accordingly, no proprietary rights in the bridge but merely the care and management thereof with power to form, construct, improve, repair and maintain. The defendant had not interfered with the County's care and management of the bridge. It did not, and had not, so far as the evidence showed, interfered with the exercise by the County of its powers of forming and constructing improving, repairing and maintaining the same. The real and substantial injury, and the injury for which damages were claimed in the present action, was to the Crown's property, for the bridge was carried away. There was no bridge of which the County could take care or which it might manage as the Crown's property had been destroyed. No power had been given to the County Council to maintain an action for damages for destruction not of its own property but of the Crown's property and such a right could not be regarded as incident to the County's rights of care and management. It followed, therefore, that the plaintiffs were not the proper parties to sue for the damage to the bridge. The rights of the County Council to sue in respect of injuries to Crown property, under its care and management, had been considered in a number of cases. His Honour referred at length to **North-East Valley Road Board v. Proudfoot**, 4 N.Z.J.R. N.S. 22; **Kaikoura County v. Snushall**, (1920) N.Z.L.R. 783, and (1923) A.C. 459, **Tuapeka County Council v. Johns**, 32 N.Z.L.R. 618, and **Hutt County v. Whiteman Brothers**, (1923) N.Z.L.R. 751, and said that what the plaintiffs complained of in the present action was not, as in **Kaikoura County v. Snushall** (*cit. sup.*), **Lee Conservancy Board v. Button**, 12 Ch. D. 383, and **London County Council v. South Metropolitan Gas Co.**, (1904) 1 Ch. 76, a wrongful interference with their statutory rights and powers conferred for the benefit of the public, but rather the destruction of Crown property. The Thames Borough was entrusted with no rights and duties in respect of the bridge and could not consequently complain of any interference. The action brought by the Thames County was not an action to prevent wrongful interference with its statutory rights and duties but was an action to recover damages for injury not to its property but to the property of another—the Crown. The Crown was entitled to the bridge and was the proper party to bring an action, if it were so advised, and what was recovered was its property and not the property of the Borough or of the County. The plaintiffs accordingly failed in their action.

Judgment for defendant.

Solicitors for plaintiffs: **Neumegen and Neumegen**, Auckland.

Solicitors for defendant: **Stewart, Johnston, Hough and Campbell**, Auckland.

Sir Nicholas Bacon.

Sir Nicholas Bacon, Lord Keeper, is the only holder of the Great Seal to whose vast proportions the attention of posterity has been emphatically called. He had much wisdom, according to Fuller, "*in corpore crasso*," and Conder refers to him as "*vir praepinguis ingenio accerimo.*" Queen Elizabeth herself observed that "his soul lodged well." Towards the close of his life it became the practice of the Bar to delay their opening observations until he had rapped three times on the floor after taking his seat on the Bench. The signal was an intimation that he had recovered his breath and was ready to begin.

For the year ending 31st March last there were 5,491 more dealings registered under the Land Transfer and Deeds Systems than during the previous year, though the registration fees amount to £1,372 less than for the previous year. This apparent anomaly is accounted for by the operation of the Land Transfer (Compulsory Registration of Titles) Act, 1924, and the fact that registration under the Land Transfer System is cheaper than under the Deeds Registration System.

Professional Discipline.

The Disciplinary Jurisdiction of the Supreme Court of New Zealand over the Legal Profession.

By H.F. von Haast, M.A., LL.B.

In New Zealand the whole disciplinary jurisdiction over the legal profession, which in England is divided between the Inns of Court and the Judges, is vested in the Supreme Court alone: *In re Lundon*, (1911) reported in note to *In re Baillie*, (1915) 34 N.Z.L.R. 705 at p. 709. The Court in England possesses apart from statute a disciplinary jurisdiction over solicitors as being its own officers: 26 *Halsbury's Laws of England*, 828. As regards barristers, they are not officers of the Court so that the Court has no control over them, though it has been said that the superior Courts have by virtue of their inherent jurisdiction power to suspend from practising before them barristers who have been guilty of such misconduct as renders them unfit to practise. But there is no instance in modern times of the exercise of this power which is probably now delegated to the Benches of the Inns of Court—2 *Halsbury's Laws of England*, 385—who can expel any member and can debar any barrister and disbench one of their own members: *Ibid* 361. But any doubt as to the power of the Court in New Zealand to deal with barristers is removed by Section 12 of the Law Practitioners Act, 1908, which provides: "Any barrister shall be removable by the Court from the roll for reasonable cause, whensoever and wheresoever the same arises in the manner hereinafter provided." Section 23 enables the Court to strike off the rolls or to suspend from practice any solicitor acting as agent for an unqualified person or employing without the leave of the Court a person suspended from practice and struck off the rolls.

The bounds of the Court's disciplinary jurisdiction remain undefined. *In In re Lundon* (*cit. sup.*) the Court of Appeal said: "It is of the highest importance that the exercise of that jurisdiction should not be fettered by any attempt to define its bounds. Nor can the fact that the bounds of that jurisdiction remain undefined injuriously affect the profession over which it extends. Every legal practitioner knows intuitively or ought to know intuitively, whether or not his acts can justly be regarded as constituting serious professional misconduct, and every member of the legal profession knows that he has protection in this: that charges of this nature are never brought before the Court otherwise than upon the initiative of those members of his profession who are annually selected as the Council of the District Law Society by the whole body of that profession in the district in which he practises or has practised. The consideration of such a charge when it has been so initiated must always be regarded by the Judges as a matter of grave importance. It is no light matter to take away from a professional man the status which enables him to earn his livelihood or even to suspend him from the right to exercise his profession which that status confers upon him. But, if it is clear that any member of the legal profession has been guilty of such conduct as to be inimical to the public welfare, and to bring disgrace upon the profession to which he belongs, then whether an offence against the law has been established or not, justice must take its course without regard to its effect upon the offender."

This extract from the judgment of the Court of Appeal is given at length because it illustrates the method of procedure prescribed by Sections 54, 55 and 56 of the Law Practitioners Act, 1908, viz., a motion by the Council of the District Law Society in the Supreme Court of the District where the practitioner is practising to the Supreme Court for a rule *nisi*, the granting of a rule and the reservation of the case for the consideration of the Court of Appeal, with or without suspension from practice of the practitioner pending the decision of the Court of Appeal, and finally the making absolute of the rule and the striking off the rolls of the practitioner and his suspension from practice or other punishment, or the discharge of the rule.

The term "punishment" has been used and the jurisdiction is occasionally described as "punitive," but this gives an erroneous impression of the attitude that the Court adopts in the exercise of its jurisdiction, whether in admitting, striking off, or re-admitting a practitioner. "Striking off the rolls," said Gordon, J., in *Ex parte Meagher*, (1919) N.S.W.S.R. 433 at pp. 442, 443, "is not strictly speaking a punishment although it entails consequences no doubt highly detrimental to the pecuniary interests of the solicitor thereby debarred from the practice of his profession. It is in effect a declaration by the Court that a person formerly shown to be "fit and proper" to practise as a solicitor is no longer "fit and proper" so to practise." That is the question in every case. Is the practitioner a fit and proper person, according to all recognised standards of right and wrong, to stand in the ranks of an honourable profession and discharge with honour and fidelity the important duties and grave responsibilities that belong to a solicitor, and in whom the public may repose unbounded confidence? The test is expressed in various ways. Sometimes more stress is laid on the question as to whether members of an honourable profession can fairly be asked to meet in business a man who has demeaned himself in such-and-such a way. Sometimes stress is laid on the fact that it is a matter affecting the public and that ignorant and unsuspecting people, easily influenced, have to resort to practitioners, and can the Court hold out such a person as worthy of their confidence? But in the long run we come back to the same question: "Is the practitioner a 'fit and proper' person to be on the roll?" In putting this question to itself the Court bears in mind the facts stated by Gordon, J., in *Ex parte Meagher* (*cit. sup.*) at p. 442: "The relations between a solicitor and his client are so intimate and so confidential, and so open to abuse that before any person can practise as a solicitor he must be authorised by the Court so to practise. In this respect a solicitor stands in a different position from a person desirous of earning his living in almost every other profession or walk of life . . . By the words 'fit and proper persons' is meant persons who have been proved to the satisfaction of the Court not only to be possessed of the requisite knowledge of law but above all to be possessed of a moral integrity and rectitude of character, so that they may safely be accredited by the Court to the public as fit, without further inquiry, to be entrusted by that public with their most intimate and confidential affairs without fear that that trust will be abused." The matter was put in another way by Williams, J., in *In re Garbett*, 18 C.B. 403, when he refers to "attorneys and officers of the Court who have *the sanction of the Court* for saying that *prima*

facie, at least, they are worthy to stand in the ranks of an honourable profession, to whose members ignorant people are frequently obliged to resort for assistance in the conduct and management of their affairs and in whom they are in the habit of reposing unbounded confidence ; in restoring this person to the roll we should be sanctioning the conclusion that he is in our judgment a fit and proper person to be trusted." The responsibility of the Court is as put by Isaacs, J., in *Incorporated Law Institute of N.S.W. v. Meagher*, 9 C.L.R. 655, at p. 681 : " There is a serious responsibility for the Court—a duty to itself, to the rest of the profession, to its suitors and to the whole of the community—to be careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his right to that credential." Hence it may be that owing to the practitioner's misfortune and not his fault the Court is obliged to prevent him from practising as a solicitor. That was the case in *In re A.*, (1923) N.Z.L.R. 207. A barrister and solicitor who had been a mental defective in a mental hospital was discharged " unrecovered." The Public Trustee, as it appeared from the notice of discharge that the practitioner was unable to manage his own affairs, continued to administer his estate and hence by Section 111 of the Mental Defectives Act, 1911, A. was disqualified, except by leave of the Court, from entering into any contract except for necessaries. A. had been practising as a barrister and solicitor for almost a year when an application by the Nelson Law Society to strike him off the rolls was heard by Hosking and Reed, JJ. The Court had no doubt that reasonable cause had been shown for restraining the practitioner from practice, while he was by law deemed incapable of managing his affairs, and, without the leave of the Court, of entering into any contract except for necessaries, but adjourned the proceedings for about three months to enable the practitioner to take such steps as might be necessary to get free from the operation of the Mental Defectives Act.

In view of its responsibility, the Court is concerned not only to purge the profession of those who are not fit and proper persons to remain on its rolls, but also to bar the door against those who are not worthy to enter it. Hence Section 6 of the Act directs the Court or a Judge to examine and inquire (*inter alia*) into the character of the candidate, and the Judges' rules provide for adequate notice by those intending to apply for admission, in order that the Council of the District Law Society may make enquiries and bring before the Court any grounds that it has for opposing such admission. The dicta already quoted show the necessity for vigilance on the part of the profession in connection with applications for admission, for it is upon the District Law Societies that the Judges must rely for enquiries and information about practitioners or prospective practitioners. Hence the expression of opinion of Skerrett, C.J., on an application for re-admission in *Re Lundon*, (1926) N.Z.L.R. 656 at p. 668 : " We are constrained to say that the Court has not received that assistance from the local society which it was entitled to expect. The Court usually attaches weight to representations by a law society relating to applications for admission. It would be a matter of regret if law societies should become indifferent to claims for admission where the character or fitness of the applicant is in question or to matters affecting the personnel of solicitors or their standard of conduct." The onus of proof that he is of good character and worthy to be admitted as a practitioner lies on the applicant : *In re Martilal Maganlal Doctor*, (1921) N.Z.L.R. 1059. In that case the applicant, an Indian, had all the qualifications necessary to entitle him to be admitted as a practitioner if the Court had been satisfied as to his character. The application was opposed by the Auckland District Law Society which filed affidavits from practitioners in Fiji and others stating that he was the prime mover in a strike by Indians accompanied by lawlessness and violence, that the Governor prohibited him from residing within certain districts of that colony and that his general reputation was such that he was unfit for admission in New Zealand. In reply the applicant filed affidavits that he was a person of good character, some of which expressed the opinion that he was not the cause of the strike. The Court of Appeal found that he had failed to discharge the onus of proving affirmatively that he was of good character and worthy of admission.

Although the bounds of the Court's jurisdiction remain undefined, the grounds upon which a practitioner may be struck off may be classified as follows :—

1. That he has been proved guilty of a criminal offence of such a grave character as to make it expedient for the protection of the public and the profession that he should be struck off. And even if he has been tried and convicted, and his conviction quashed on technical grounds, he may still be struck off if the Court is satisfied that he was guilty of the charges : *Re Garbett*, (1856) 18 C.B. 403, in which Williams, J., said at p. 414: " It is clear to my mind that Mr. Garbett was convicted of forgery upon evidence which ought not to have been received, and therefore, that that conviction was properly quashed. But it is equally clear that he was guilty of that crime."
2. That he has been guilty of professional misconduct.
3. That he has been guilty of conduct, connected or unconnected, with his profession, that proves his unfitness to be a practitioner.

As regards crimes the Court has no option but to strike off and cannot admit a practitioner or person convicted of felony or perjury or subornation of perjury, unless he has obtained a free pardon for his offence. Felony in New Zealand means any crime which would be a felony if division of crimes into felonies and misdemeanours still existed : Section 57 of the Act : *In re T*, (1926) N.Z.L.R. 418 (decided in 1922). In that case T., convicted in 1914 of theft of £77 14s. 1d., was struck off the rolls in 1915. In 1922 he applied for re-admission. The Court of Appeal held that although the offence of which T. was convicted was one of the various species of theft defined in the Crimes Act, 1908, the facts on which he was convicted would not have sustained a charge of felony under the Larceny Act, 1867, and that if the facts had been sufficient to bring the case within any of the group of sections dealing with frauds by trustees or agents then by the express terms of those Sections the offence would have been a misdemeanour only. It is high time this ridiculous distinction between ferony and misdemeanour was abolished. As the law stands, a practitioner who steals 5s. in a drunken bout must be struck off and is forever barred from re-admission, whereas if as an agent or a trustee he deliberately misappropriates thousands of pounds, there is no statutory bar

against his re-admission. It is, by the way, a singular thing in English law that embezzlement by a clerk or servant is made a felony punishable by penal servitude for fourteen years, while embezzlement by persons entrusted with property, by agents, by trustees, by directors, officers and members of public companies and corporate bodies are made misdemeanours and punishable by penal servitude for seven years only. Apparently the higher the position of trust abused the lesser the crime.

Professional misconduct may range from misappropriation of trust funds, at one end of the scale, to neglect and delay in the transaction of a client's business, at the other. In every case, the test already given is the same, and typical cases must illustrate the way in which the Courts apply the test and exercise their disciplinary jurisdiction.

What is not misconduct sufficient to authorise the Court to exercise its jurisdiction is laid down by Denman, J., in *In re Four Solicitors*, 7 T.L.R. 672, at p. 673: "In order to authorise the Court to exercise its punitive jurisdiction it is not, in my opinion, sufficient that the party charged has been guilty of grave errors of judgment, nor that he has accepted a position which a highly sensitive and scrupulous solicitor would not accept, nor that he has accepted an amount of remuneration enormously in excess of the professional services rendered, but that something has been established showing either that his conduct in the management of the professional business entrusted to him has been fraudulent, or that he has neglected some positive duty to his client or clients, or if the conduct complained of be something *dehors* his professional behaviour, that it be of such a character as that, if he had been guilty of it before applying to be admitted, it would be properly deemed sufficient to warrant the refusal to admit him."

(To be Continued).

Rules and Regulations.

Defence Act, 1909.—Samoa Military Police disbanded and Regulations relative thereto cancelled.—Gazette No. 63, 19th September, 1929.

Education Act, 1914.—Scheme of Control of Waimate High School; amended Schemes for the control of Gore and Hutt Valley High Schools.—Gazette No. 63, 19th September, 1929.

Finance Act, 1920.—Amended Regulations providing for transfer of Inscribed Stock from London to New Zealand Registers.—Gazette No. 63, 19th September, 1929.

Fisheries Act, 1908.—Amended Regulations for trout fishing in the Waimarino Acclimatisation District, and trout, perch, or tench fishing in the Waitaki Acclimatisation District.—Gazette No. 63, 19th September, 1929.

Customs Act, 1913.—Revocation of Order-in-Council of 21st March, 1921, prohibiting the exportation to China of arms, explosives, military stores, naval stores and munitions of war of every description.—Gazette No. 66, 3rd October, 1929.

Engineers' Registration Act, 1924.—Amendment of Examination Regulations.—Gazette No. 66, 3rd October, 1929.

Government Life Insurance Act, 1908.—Amended Rules and Regulations regarding issue of policies in lieu of Regulations made on 19th March, 1923.—Gazette No. 66, 3rd October, 1929.

Motor-omnibus Traffic Act, 1926.—Regulations relating to the design, construction and condition of motor-omnibuses.—Gazette No. 66, 3rd October, 1929.

Samoa Act, 1921.—Samoa Legislative Council (Elective Membership) Amendment Order, 1929.—Gazette No. 66, 3rd October, 1929.

Stock Act, 1908.—Regulations as to the registration of standard marks.—Gazette No. 66, 3rd October, 1929.

New Zealand Law Society.

Proceedings of the Council.

A meeting of the Council of the New Zealand Law Society was held in Wellington, on Friday, 4th October, 1929.

Mr. A. Gray, K.C., President of the Society, was in the chair.

The following gentlemen were in attendance, as the representatives of the District Law Societies, namely:—

Auckland	(represented by)		Mr. F. L. G. West
Canterbury	,,	,,	Mr. M. J. Gresson and Mr. H. F. O'Leary (Proxy)
Gisborne	,,	,,	Mr. C. A. L. Treadwell
Hamilton	,,	,,	Mr. F. A. Swarbrick
Hawke's Bay	,,	,,	Mr. E. F. Hadfield (Proxy)
Marlborough	,,	,,	Mr. H. F. Johnston
Otago	,,	,,	Mr. R. H. Webb
Southland	,,	,,	Mr. H. F. Johnston
Taranaki	,,	,,	Mr. G. M. Spence
Wanganui	,,	,,	Mr. W. A. Izard
Westland	,,	,,	Mr. A. M. Cousins
Wellington	,,	,,	Mr. A. Gray, K.C., Mr. C. H. Treadwell, and Mr. C. G. White.

Various matters of interest to the Profession were considered, some being of a more or less confidential nature. Among other subjects the following were dealt with:—

Reciprocal arrangements with Australian States as to admission of Solicitors.

The Council had under consideration the question of admission in New Zealand of Australian Barristers and Solicitors, particularly with regard to a recent communication from a New Zealand Solicitor who desired to be admitted in New South Wales.

A committee set up by the Council at a previous meeting to deal with the subject had furnished a report referring to the report of a former committee appointed several years ago and concurring in that former committee's conclusion that reciprocity was desirable.

It was pointed out that complete provision exists in "The Law Practitioners Act, 1908," Section 42, whereby an Order-in-Council can be made for the admission in New Zealand of practitioners qualified in any part of the British Dominions other than the United Kingdom, such Order-in-Council being subject to two prior requisites namely, due provision in the country referred to securing proper qualifications and competency of Barristers and Solicitors admitted there, and provision by the law of that country that Barristers and Solicitors of New Zealand are entitled to admission there on terms as favourable as those on which practitioners of that country will be entitled to be admitted in New Zealand.

The committee, in its report on the subject, also referred to the question of reciprocity with Queensland, which had been brought under the notice of the Council in a letter from the Attorney-General relating to an application from a New Zealand solicitor who desired to be admitted in Queensland and had asked that steps should be taken to establish reciprocity with that State by the issue of an Order-in-Council authorising the admission of Queensland Barristers and Solicitors in New Zealand without examination.

London Letter.

Temple, London,
1st August, 1929.

My dear N.Z.,

The "Vestris" enquiry, perhaps one of the most important legal events of this period in the life of those to whom these things matter, came to an end ultimately, and the judgment was read yesterday by the Wreck Commissioner, whom had assisted in his enquiry a Vice-Admiral, two Captains, an Engineer Lieutenant-Commander and a Major, presumably of Marines. It is now some seven or eight months since the "Vestris" disaster occurred; you may recall the anxieties and rumours to which it gave rise; and I, being at sea shortly afterwards and much the object of a knowing purser's knowingness, anticipated the most sinister revelations as a result of this same enquiry, the judgment in which now lies before me. I suppose there is much that is sinister in it. You will note the passage: "Speaking generally the evidence is unsatisfactory, contradictory, inconsistent and piecemeal. Much of it is unreliable; some of it is untruthful."

This smacks much of W. Butler Aspinall, K.C., that same Wreck Commissioner and as great a little man as ever was in this generation of the profession. Short, whitehaired, smiling, and as physically fit as mentally alert, there may be many men of the Bar better known but there are few more distinguished than he. Beneath his happiness of expression, facial and speaking, he has just that touch of bitterness, or, better, of asperity, which goes to make for the best judicial observations. Add this expert knowledge of shipping matters, his pre-eminent common sense, and his quick eye for points and principles, and you may well imagine how impressing his remark was at the conclusion of the evidence: "This is the sort of evidence with which, if you take bits of it and keep them apart, you can prove or disprove anything, construct or destroy any theory.',

I shall not attempt to construe the judgment for you; others, more knowledgeable in Admiralty matters, will do that for you, whether at your end or in the London papers to reach you at the same time as this. I confine myself to the general observation, that the judgment admirably justifies the reputation which Butler Aspinall enjoys; there is little distance he could not have gone, if he had liked to go, in the profession; and I hope I shall assist your final studies of this important matter (for surely the internationalising of our Merchant Shipping precautions, such as the Plimsol line rule, is a thing hardly to be surpassed in such importance), by informing you as to the manner of man our *doyen*, Butler Aspinall, is.

We have reached the end of the year, legally, without having read the great work of the Lord Chief Justice, so long promised to the public and threatened at the Departments. We are told that the change of government has had something to do with the delay in its appearance, the Lord Chief not deeming it proper, (if, as some question, it can be proper at any time) for him to make his attack at such a moment; but, with this and other explanations of our disappointment, we are positively assured that the *magnum opus* will be in our hands by the autumn. So be it: the work has been so much talked of, and the subject so much discussed in the interval, that I apprehend some anti-climax when it does at last appear, the Lord Chief, so far as I know, attaining in the written word none of the lustre of his spoken speeches, and the thrill of a controversial publication from the top of the Bench having spent its force before the publishing so long delayed.

Otherwise, there is not much to gossip of: Astbury, J. is known to be going, this time, and the old suspects again are suspected of a contemplated resignation: Horridge, Avory, Rowlatt, JJ. I fancy we shall see them all on their same old Bench next term; and goodness knows what will happen when they do all go, and new Judges need to be appointed, for I am told on all sides that when this occurs, our Geoffrey Lawrence, K.C., is bound to be one of the appointees, and then the whole of these Chambers, which run to some three flats and comprise a positive herd of us, will have to be dealt with, and presumably I, the senior of the junior herd and the first to establish the Chambers in 1912 with Lawrence, upon his leaving old Finlay's Chambers and setting up these of his own with me and a clerk, shall have to make the first move. However, that is all personal, not to say egotistical. I let it run on, to get over to you the sense of what a set of chambers is in the Temple, and how haphazard its origin, its processes of development and its destinies. Up till quite a short while ago, if you had called here to see me, your first threshold would have had painted over it the name of JOHN SANKEY, who is now Lord Chancellor and who once, as a practising silk, a young one too, if of great promise, held with Clive Lawrence one of our three flats. As Sankey went on to the Bench, so Clive Lawrence was left stranded; and he, being temporarily working for the Treasury, joined up the premises with his brother, Geoffrey, and, this done, became Treasury Solicitor, moved to St. James's and was no more heard of here. Thus our Chambers became two flats; and I, hearing of this ample supply of room, announced my intention of returning from the War upheaval, to occupy some of it. (Sankey's room, where I sat for a while on my return, figures large in the life of Charles Lamb; I have a sort of idea he was born there; but as to that, see Mackinnon, J.'s book). But by the time I got back, the space was congested, so we took a third flat and I moved into it . . . And thus "Chambers" come into existence; and if, as did not happen in our case, one of the founders goes into politics and becomes a Law Officer, or goes into society and becomes a star of magnitude in press comments, it is thus that a body of men, chosen purely by chance, go forward together in the light of the one man's greatness. It always seems to us to be very odd, unmethodical and happily careless!

The term wound up yesterday as is the habit of this term above all others, with a mass of interesting judgments. *In re The Home and Colonial Insurance Coy.*, was a singularly nasty business for the respondent to the misfeasance summons which it discussed; not that it made any reflection upon him, such as the term may imply and the process often comprises, but that the result of his accepting, as liquidator, an insufficient proof of a debt, lands him under the most formidable liability to make good in the liquidation, as it seems to me. The "misfeasance" consisted in adopting a practice, apparently quite usual in the business, of accepting the "slip" alone as evidence of a contract of re-insurance.

Horridge, J., pronounced his judgment in the *Hayley Morris case*, the case against the prison Governor, by

an interpretation of the rules made under our Prison Act, 1898, as to the "earning" of a remission of sentence by good conduct while undergoing a sentence. Morriss claimed that this remission was a matter of right, given the good conduct; the defence contended that it was a matter of grace. Much depended upon the word "earned" which appears in the Act itself; but Horridge, J., duly regarding that word, still found himself forced to the view that the remission was a matter of grace, only.

And lastly there is the judgment of the Lord Chief in the Diplomatic Privilege case: *Dickinson v. Del Solar* (*Mobile and General Insurance Co., Ltd., third parties*). The point certainly was an interesting one: if the assured is entitled to claim diplomatic privilege, so that the victim of this tort could not sue, and if the assured does not claim privilege so that the victim does sue and gets damages, what is the position of the assurance company called upon to pay those damages? In the circumstances, here, it was held that the assurance company must pay, the waiver of the privilege being no breach of the agreement between the assured and the assurer.

With that my news and term ends, and I go down to the country, till wanted, and then shall only stay in the Temple as long as wanted. But the country is now a disadvantageous place for barristers, everyone who meets them seeming concentrated upon one subject only—the Croydon Inquest and Mrs. Duff—and also seeming to think that a barrister has no other business but to follow these matters in the newspapers, the better to inform the lay public at dinner parties, tea parties, tennis parties and every other sort of party. As I do not know the first thing about the inquest, except what I have gathered from the questions put to me, my vacation is not likely to be a social success!

Yours ever,

INNER TEMPLAR.

Bench and Bar.

Messrs. M. H. Oram and G. I. McGregor, of Palmerston North, have dissolved partnership and are now both practising on their own account.

Mr. S. I. Goodall, of Auckland, has been joined in partnership by Mr. J. L. H. Kayes. The firm will practise under the style of Goodall and Kayes.

The Good Judge.

"Law is not an exact science, and judgment is more of an art. A good judge, like a good poet, is born—not made. Legal learning may adorn his native wit, it cannot take its place. We talk of poetic justice. We might equally talk of poetic judgments. Listening to the utterances of a good judge, one feels how aptly he is putting the case, how shrewdly he has calculated the probabilities, how instructively he has grasped the main issues and, without pretending to mathematical exactitude, how truly he has weighed parties and witnesses in the balance."—"Justice of the Peace and Local Government Review."

Law Reports.

Some Notes on the History of Law Reporting in England.

Although, as has sometimes been estimated, it is probably true to say that if it were possible to collate into a set of volumes only those reports with which the average practitioner is likely to be concerned in the course of a normal career, such a collection of leading cases need not exceed some two or three hundred volumes, yet, since such a collation is not practicable, it remains necessary for law libraries to keep upon their shelves thousands of volumes of law reports, any one of which may at any time be required for reference, although most of them necessarily contain a large number of obsolete cases.

It is impossible to estimate with any degree of accuracy the number of law reports in existence or in frequent use. Nor does it seem possible to prune the luxuriant growth, or indeed desirable to attempt to do so. The circumstances in which our law is made and grows render it highly desirable to encourage, in fact, the growth of reliable law reports, since they embody those judicial precedents the enunciation of which by the judges secures for English law that elasticity which is its greatest advantage over many other systems of law, both ancient and modern, which are to be found contained within the narrow compass of a code.

It is worth while to glance back at the history of the law reports, wherein is to be found the explanation of their growth and utility.

The origin of English law reporting is clearly traceable as far back as the beginning of the thirteenth century. The famous *Note Book* of Bracton contains reports of cases decided during the reign of Henry III, which that eminent jurist compiled from the year 1218 onwards, in preparation, it has been surmised, for his great treatise on the Laws of England.

In succession to Bracton there followed a continuous line of reporters, from the reign of Edward I to that of Henry VIII, whose labours resulted in the production of the Year Books. These Year Books seem to consist of notes of cases heard in the courts both at Westminster and on circuit which must have been taken down by lawyers sitting in the courts during the hearing. Who these lawyers were is not known; nor is it certain, even, whether their work partook at all of an official nature; nor do we know by whom they were appointed, and, if they were remunerated, on what basis. It has been suggested that they were official reporters, appointed and remunerated by the Crown, a theory which received the weighty support of Plowden, Coke and Bacon, in the sixteenth and seventeenth centuries.

In view of the desirability of the functioning of a body of official reporters which was felt for centuries amongst legal practitioners, resulting, as we shall see, in the nineteenth century in the establishment of a series of "authorised" reports of a *quasi*-official nature, it is worth noting that Bacon (1561-1626), who had always pressed for the establishment of such a body as being likely to foster more efficiently the growth of good and reliable law, did in fact for a short period succeed in attaining his ideal. From 1617 onwards, at any rate for a few decades, official reporters were appointed by

the Crown. Thus, on the title-page of "Hetley's Reports" we find: "Collected and Reported by that Eminent Lawyer, Sir Thomas Hetley, Knight, Serjeant-at-Law, appointed by the King and Judges for one of the Reporters of the Law. London, 1657."

From the days of Queen Elizabeth down to the middle of the reign of Queen Victoria there was no lack of lawyers who made it their regular business, quite apart from and regardless of any official recognition, to collect and publish law reports. Since they were self-appointed, these generations of reporters varied in respect to the quality of their work, some of whom attained but a poor standard and came to be looked upon by the Courts with considerable disfavour; quotation from them was discouraged by the judges. Having regard to the fact that down to 1865 (with the possible exceptions already referred to) the law reports in use did not profess to be other than the compilations of private enterprise, it becomes necessary for one who proposes to use an old report for citation purposes at the present time to ascertain first whether the particular report or reporter is regarded as reliable. Some reports are wholly useless, others have been discredited by some judges and upheld by others. The quality of the work of any given reporter, moreover, varies, as might be expected, from year to year, and even from volume to volume. Sometimes, indeed frequently, it happened that more than one lawyer was reporting in one and the same court at the same time. They did not attempt to compile anything approaching verbatim reports; consequently, the decision in any particular case has not seldom to be pieced together from more than one report.

Very many instances could be given of judicial utterance on the value of particular reporters and of certain volumes of a set of reports. For instance Lord Mansfield in *Olive v. Smith*, 5 Taunt. 56, observed during the course of the argument (p. 64): "Unfortunately Lord Hardwicke's judgments in general are known only by Mr. Atkyns' Reports, which are extremely inaccurate." Lord Mansfield was apparently an outspoken critic of reports for we find him in *Quantock v. England*, 5 Burr. 2628, at p. 2629, telling counsel that he should not have quoted from Moseley's Reports. But Lord Eldon twice at least took occasion to praise this reporter: *Mills v. Farmer*, 1 Mer. 55, at p. 92; *Parkhurst v. Lawter*, 2 Swan. 194, 195 (n). In *Woolston v. Woolston*, 2 Burr. 1136, at p. 1142, there appears a reference to Barnardiston's Reports, viz.: "Lord Mansfield absolutely forbid the citing that book; for it would be only misleading students to put them upon reading it. He said it was marvellous, however, to those who knew the serjeant and his manner of taking notes, that he should so often stumble upon what was right; but yet, there was not one case in his book which was so throughout." Among other reporters whose work has been the subject of unfavourable judicial comment are Carrington and Payne, Espinasse, Keble, Lewin, and Noy (though these reporters have been praised by some judges), while we find favourable observations on the reports of others—e.g., Dyer, Levinz, Owen, Peere Williams, Saunders, and Winch. Those who are interested further in such matters are referred to 30 English and Empire Digest, pp. 203 *et seq.*

(To be concluded)

"The smallest case that comes before a lawyer is worth his entire devotion."—Lord Atkin.

Correspondence.

The Editor,
"N.Z. Law Journal."

Sir,

Quashing of Special Orders.

In your issue of August 20th you allowed me space to draw attention to the undesirable nature of Clause 8 of the Wellington City Empowering and Amendment Bill now before Parliament. This provision as originally drawn amounted to an absolute prohibition of the taking of judicial proceedings to quash a special order passed by the Council for the purpose of raising loans. I need not now repeat what I said in my previous letter upon this point.

The Clause as now reported from the Local Bills Committee reads as follows: "No special order passed by the Council for the purpose of raising loans shall after the passing thereof be quashed by any proceedings in any Court or otherwise *unless such proceedings are commenced within three montths after the date of the passing of the first resolution made by the Council in respect of the special order.*" The words in italics have been added by the Committee.

Under Section 65 of the Municipal Corporations Act, 1920, proceedings to quash a special order may be brought at any time within six months from the making of the special order, and it is exceedingly difficult to see any reason why the law in this respect should not be uniform as regards all municipal corporations. If the measure is passed it will no doubt be the precursor of other legislation fixing other and different periods of time in the case of other individual municipal corporations. Further the period of three months fixed may be rendered largely illusory by a corporation, for it runs, not from the making of the order as under Section 65 of the Municipal Corporations Act, but from the date of the passing of the first resolution which may be two months before the passing of the confirming resolution.—Section 63 (b).

In the opinion of the writer it is time Parliament set some limit on special legislation of this nature; but our legislators can hardly be expected to see its undesirability while the Profession remains silent.

I am, etc.,

"Common Law."

Wellington.

Answers to Correspondents.

C.C.C. (Auckland). Your letter has been referred to the promoters of the measure for their consideraton.

"It is not altogether surprising to find a great lawyer, once in a way, mistaking the meaning of an uninstructed and perhaps inaccurate layman."

—Mr. Justice Maugham.

Bills Before Parliament.

Destitute Persons' Rest-Homes. (Rt. Hon. Sir Joseph Ward.) Act to be read together with and deemed part of Destitute Persons Act, 1910.—Cl. 1. Interpretation.—Cl. 2. Minister may establish rest-homes for purposes of Act.—Cl. 3. Governor-General may by proclamation set apart any area of available Crown land for purposes of any rest-home or Minister may acquire by way either of purchase or lease any private land for such purposes.—Cl. 4. Minister may close rest-home and may either discharge or arrange for transfer of inmates.—Cl. 5. Provision for appointment of Superintendent of rest-homes and other officers.—Cl. 6. Official visitors of rest-homes may be appointed: rights and duties of official visitors. Cl. 7. Keeping of, and making of entries in, visitation book.—Cl. 8. Institutions established by private organisations may, on application of persons or society that has established or may desire to establish institution, be declared by Minister to be rest-homes for purposes of Act.—Cl. 9. Charitable institutions under control of Hospital Boards may be declared rest-homes, if used or intended to be used for reception of aged and infirm destitute persons.—Cl. 10. Voluntary applications for reception for not less than twelve months into rest-homes may be made to Magistrate on ground that applicant a destitute person unable by reason of age and infirmity to take proper care of himself: applications to be heard and determined by Magistrate in private.—Cl. 11. Application may be made in first instance to Superintendent of rest-home who is to transmit application to Magistrate.—Cl. 12. On complaint on oath of reputable person Magistrate may make order for committal of destitute person to rest-home: provisions of Justices of the Peace Act, 1927, with respect to complaints and orders to apply, but no order for costs to be made against defendant: every complaint to be heard and determined in private.—Cl. 13. Destitute persons charged with offences involving vagrancy may be committed to rest-home and Court need not hear or determine the charge against defendant while he remains in rest-home in compliance with order: powers under this section to be exercised only by a Magistrate.—Cl. 14. Persons mentally infirm detained in mental hospital may be transferred to rest-home and re-transferred to mental hospital.—Cl. 15. Escaped inmate may be arrested without warrant and returned to rest-home.—Cl. 16. Minister may discharge any inmate and may transfer inmate to other rest-home, the consent in writing of a voluntary inmate being in the latter case necessary. Superintendent may discharge voluntary inmate at his request or at request of any person who undertakes in writing to exercise proper care and control of the inmate before expiry of period for which he was ordered to be detained.—Cl. 17. Offences in relation to inmates of rest-homes.—Cl. 18. No obligation apart from contract to receive person into private rest-home.—Cl. 19. Where any person agrees to contribute towards cost of maintenance of any person in any rest-home Minister may cause a certified copy of agreement to be registered in prescribed manner in Magistrates' Court and thereupon agreement shall be of same force and effect as if it were a maintenance order made by a Magistrate in accordance with principal Act. Magistrate making order for reception of any person into rest-home may make a maintenance order against any near relative of such person or may make an order against estate of person to whom order of reception relates.—Cl. 20. Act not to relieve Hospital Board from obligation to provide charitable institutions.—Cl. 21. Protection of persons for acts done in good faith and with reasonable care in pursuance or intended pursuance of Act, or of any warrant, order, or regulation made or issued, or purporting to be made or issued, under authority of Act.—Cl. 22. No Court fees to be payable in respect of any judicial proceedings under this Act.—Cl. 23. Wide powers of regulation making.—Cl. 24.

Land Laws Amendment. (Hon. Mr. Forbes.) Part I "Principal Act" means Land Act, 1924.—Cl. 2. Establishment of Lands Development Board for purpose of promoting the settlement of Crown Lands and of settlement lands and of protecting and furthering interests of Crown tenants in manner hereinafter provided.—Cl. 3. For purpose of advising and otherwise assisting the Development Board, Minister may from time to time appoint one or more advisory committees.—Cl. 4. Payment of allowances and expenses of unofficial members of advisory committees.—Cl. 5. Unoccupied Crown Lands may be developed before being offered for selection: in determining, for purposes of disposal under principal Act, capital value of any such lands Land Board shall take into consideration moneys expended in connection with works and value of works done, but without limiting discretion of Board to fix capital value of any such lands in same way as empowered to do under principal Act. Provisions of Ss. 136 to 141 of principal Act, relating to payment of "thirds" and "fourths" to local authorities for construction or maintenance of roads and bridges, and provisions of S. 357, relating to payment to local authorities of proportion of royalties received by Crown in respect of licenses to cut timber or flax, to have no application as regards lands in relation to which development works have been carried out under this Section.—Cl. 6. Development Board may make advances to tenants or licensees of undeveloped Crown lands for erection of buildings, clearing, draining, fencing, cultivation, grassing, or general improvement of lands including purchase of fencing-materials, grass-seed, lime, manure, implements or other things (not including live-stock) required for profitable occupation of the land; moneys advanced to be secured by way of mortgage over the land or applicant's interest therein; no advance to be made of an amount exceeding 90 per cent. of estimated value of completed improvements.—Cl. 7. General financial and machinery provisions.—Clauses 8, 9 and 10.

Part II. "Principal Act" means Land for Settlements Act, 1925.—Cl. 12. Unoccupied settlement lands may be developed before being offered for selection.—Cl. 13. Development Board may make advances to lessees or licensees of undeveloped settlement lands for erection of buildings, clearing, draining, fencing, cultivation, grassing or general improvement of lands, including purchase of fencing materials, grass-seed, lime, manure, implements, or other things (not including live-stock) required for profitable occupation of the land; moneys advanced to be secured by way of mortgage over the land or over applicant's interest therein; no advance to be made of an amount exceeding 90 per cent. of estimated value of completed improvements.—Cl. 14. General financial and machinery provisions.—Clauses 15, 16 and 17.

Part III. Miscellaneous amendments of Land Act, 1924. S. 12 extended so as to permit of disposal of lands comprised in roads or streets closed under any former Land Act.—Cl. 19. Lands comprised in closed roads abutting on rivers, etc., may be disposed of under S. 12.—Cl. 20. Provisions of S. 12 as to registration where lands comprised in closed roads included in leases of adjacent lands amended.—Cl. 21. S. 113 as to preference at ballots amended.—Cl. 22. Where selector surrenders allotment within thirty days of ballot, fresh ballot to be taken of unsuccessful applicants.—Cl. 23. On renewal of any lease or license to which S. 164 relates, or on issue of any new lease or license in respect of land comprised therein capital value to be ascertained without taking into account any moneys expended by Crown for purposes referred to; amount of such moneys to be added to capital value so ascertained and rent to be fixed by reference to total capital value.—Cl. 24. Rent payable under renewable leases of lands acquired out of Native Land Settlement Account to be 5 per cent. of capital value as determined by Board, but this not to apply to renewal of any renewable lease in existence at time of passing of Act.—Cl. 25. Provision for further revaluation of lands that have been revalued under Discharged Soldiers' Settlement Amendment Act, 1923.—Cl. 26. Limiting application of Part XIII of Act.—Cl. 27. For purposes of Part XIII of Act lands held by husband or wife to be taken into account.—Cl. 28. S. 381 of Act amended.—Cl. 29. Where land mortgaged under Act or Lands for Settlement Act, 1925, Commissioner may sign on behalf of Crown all instruments in relation thereto.—Cl. 30. Provisions of S. 4 of Land Laws Amendment Act, 1927, declared applicable to year ended 31st March, 1928, and declared applicable with respect to administration of Taranaki Scholarships Endowment as from 1st April, 1927.—Cl. 31. Occupiers of Crown lands under temporary licenses liable to pay rates.—Cl. 32.

Part IV. Miscellaneous amendments of Land for Settlements Act, 1925. Altering construction of Dominion Land Purchase Board.—Cl. 34. Providing for appointment of Local Land Purchase Board for North and South Islands respectively.—Cl. 37. Compensation for lands taken under Act to be assessed under Public Works Act.—Cl. 36. Miscellaneous financial and administrative provisions.—Clauses 37 and 38. S. 46 of Act repealed.—Cl. 39. Modifying provisions as to method of fixing price of settlement lands.—Cl. 40. Extending period for purchase of buildings on settlement lands.—Cl. 41. Provision for revaluation of buildings to which S. 61 applies.—Cl. 42. Provision as to rates on settlement lands held under temporary permits for grazing purposes.—Cl. 43. No land to be hereafter subject both to Part XIII of Land Act and to S. 85 of Land for Settlements Act, 1925.—Cl. 44. Certain charges on Otago University Endowment Lands in favour of Land for Settlements Account restored.—Cl. 45.

Legal Literature.

County Court Precedents of Claims.

(By His Honour Judge Robert McCleary). (pp. xl: 427: lvi: (Butterworth & Co. (Publishers) Ltd. and Shaw & Sons Ltd.)

The English County Court has jurisdiction in contract and tort up to £100, and by over a hundred statutes it has had conferred upon it special jurisdiction in a great variety of matters. The object of Judge McCleary's work is to provide within one cover an appropriate form for use in commencing any proceedings which is at all likely will require to be brought in a County Court. In our Magistrates' Court it is necessary to set out in the statement of claim particulars of the substance of the action sufficient to inform the Court and opposing party of the cause of action, and Rule 6 of the Magistrates' Court Rules provides that forms of statement of claim similar to those in Appendix B thereto may be used: the Appendix sets out a little more than fifty forms, but it is, of course, obvious that they cover only a very small portion of the field. As is only to be expected a number of the forms given in the book are entirely inapplicable to our Magistrates' Court owing to the difference between its jurisdiction and that of the English County Court, and again other forms will require some modification; but despite these disadvantages, which, after all, are always present in the case of English text-books in greater or less degree, the practitioner who is in search of a guide for an unusual statement of claim for the Magistrates' Court, particularly if his action is one arising out of contract or tort, can hardly fail, where the jurisdiction of the two Courts is similar, to derive some assistance from a perusal of this work.

New Books and Publications.

County Court Guide. Sixth Edition. By Charles Jones. (Revised by J. Prys Williams) (Effingham Wilson). Price 12/6.

Analysis of Snell's Equity. Fourteen Edition. By E. C. Blyth, B.A., LL.D. (Lond.). (Sweet & Maxwell). Price 12/6.

Maxwell's Interpretation of Statutes. Seventh Edition. By G. F. L. Bridgman. (Sweet & Maxwell). Price 37/-.

The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries. By C. R. Adair. (Longmans Green). Price 24/-.

A Handbook on Compulsory Acquisition of Land and Compensation. By R. A. Gordon, M.A., LL.M., K.C. (Stevens & Sons). Price 15/-.

Wilshire's Principles of Equity. Second Edition. By L. B. Tillard. (Sweet & Maxwell). Price 27/6.

The King's Republic. By H. J. Schlosberg. (Stevens & Sons Ltd.). Price 9s.

Annual Digest of Public International Law Cases, 1925-26. (Longmans Green). Price 40/-.

The Justinian Theories of Law and Sovereignty. By H. A. Eastwood and G. W. Keeton. (Methuen). Price 4/6.

Wellington Law Students' Society.

The following case was argued recently before His Honour the Chief Justice (Hon. M. Myers): "The editor of 'Little Bits' with the object of improving the circulation of his paper, invents and publishes a competition in which he invites his readers to guess the amount of damages (if any) in a Society scandal case, shortly to be tried in the Supreme Court. Competitors have to send a postal order for 6d. with each attempt, and the total money thus subscribed is to be paid in cash to the subscriber who sends in the correct answer. Subsequently, in consequence of a warning from the Commissioner of Police, the competition is abandoned, and a notice to that effect is inserted in the paper. Prior to the publication, however, B (amongst others) sends in an attempt in which he estimates the damages as ½d. which turns out to be correct. B sues the publishers for the prize money."

Christie for defendants. Transaction tained with illegality as (a) contempt of Court; (b) lottery. As to (a), *Oswald on Contempt of Court*, 92. As to (b) there is a wealth of authority: see especially *In re The Evening Star*, 3 N.Z.L.R. (S.C.) 8, and *Greenwood v. Leathershod Wheel Co. Ltd.*, (1898) 14 T.L.R. 241. Power to punish for contempt very wide, and exercisable as cases arise: *Miller v. Knox*, 4 Bing. (N.C.) 574, at p. 589. Main question always been whether an interference or tendency to interfere with or prejudice administration of justice: *Helmore v. Smith*, 56 L.T. 535, and *Oswald*, 93. Scheme being illegal, and unenforceable, a resulting trust in favour of competitors: *Godefroi on Trusts*, 5th Edn. 129.

Cahill in support. Scheme, if not on general ground of public policy, is illegal as a lottery: Gaming Act, 1908, Section 39. See *Grant v. Collinson and Cunningham*, (1922) N.Z.L.R. 998, 1002, and *Blyth v. Hulton and Co. Ltd.*, 24 T.L.R. 719. Success depended on mere chance; an undesirable element of caprice involved. Materials for a skilful judgment were not, and could not be, before the competitors. A mere guess based on current rumour would result. A similar case was *Smith's Advertising Agency v. Leeds Laboratory Co.*, 26 T.L.R. 335. Plaintiff cannot therefore recover: *Kearley v. Thomson*, (1890) 24 Q.B.D. 742; *Gorenstein v. Feldemann*, 27 T.L.R. 457; *Barclay v. Pearson*, (1893) 2 Ch. 154.

Rollings for plaintiff. Transaction not a lottery within the Gaming Act, 1908. That result of competition depends largely on chance not sufficient; must be shown dependent entirely on chance: *Wardell v. McGrath*, 19 N.Z.L.R. 114, per Edwards, J., following *Hall v. Cox*, (1899) 1 Q.B. 198. Submitted present scheme not dependent entirely on chance: *Carminada v. Hulton*, 60 L.J. (M.C.) 116, followed in *Stoddart and Others v. Sagar*, (1895) 2 Q.B. 474. In latter case Pollock, B., held selection of winners of horse race not necessarily by chance, and hence not a lottery. See also *Henderson v. Neill and Co. Ltd.*, 2 G.L.R. 189.

Childs in support. Submitted transaction not contrary to public policy. Contract was one between all the competitors. Publishers merely trustees. Law as to public policy should not be extended by Judges, but question for Legislature: *Mogul Steamship Co. v. McGregor, Gow and Co.*, (1892) A.C. 25, 45. No tendency to prejudice jurors or public; competition confined to remitting postal order and opinion. Court's jurisdiction for contempt exercised only when publication will substantially interfere with fair trial: *Re Finance Union*, 11 T.L.R. 167. Cases on newspaper comment on pending proceedings inapplicable. See *Ex parte The Standard*, cited in *R. v. Dolan*, (1907) 2 I.R. 260.

His Honour the Chief Justice, delivering "judgment," said that in his opinion, the answers would be purely guesswork; there was no element of skill whatever to be exercised. The transaction involved a distribution of money by a pure chance, and was, therefore, a lottery within the Gaming Act. The contract between competitor and editor being tainted with illegality, the Court could not lend its aid to the plaintiff to recover. On that point His Honour was prepared to determine the case; but he regretted that it was not necessary to determine the very interesting point of contempt raised by the defendants. However, sympathy would be refused in any Court to such a scheme. Beyond that, His Honour would not express any opinion not necessary for decision in the case. Judgment would, therefore, be for defendants.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"If the scales of justice hang anything like even, throw into them some grains of mercy."

—*Lord Kenyon.*

Vol. V. Tuesday, October 29, 1929 No. 18.

Right to Interview Witnesses.

Recent proceedings have given rise to the suggestion that the Crown in criminal cases claims a right in the nature of a preserve over witnesses which its officers have interviewed. It is difficult to see how such a claim can be sustained, and if there is any justification for it the limits of the right will need to be clearly defined. We understand that the New Zealand Law Society has set up a Committee to enquire into the position and the alleged claim by the Crown.

If a claim of this nature can be supported when it relates to witnesses in a criminal case, can such a claim be maintained in regard to witnesses in civil cases? When the question was as to whether the course of justice had been interfered with by keeping a witness out of Court, the distinction between such an offence in a civil and a criminal case was made by Williams, J., in *Schlesinger v. Flerscheim*, 2 Dow. & L. 737, and, if it were rightly made there, it seems it must be made in determining the limits, if any, placed upon parties or their solicitors, of opportunity to interview witnesses known to have been subpoenaed by the other side. We have not been able to find any authority for any proposition that in terms limits the right of a party or his solicitor to interview any person at all whom he considers may be able to give evidence on the facts involved in litigation in which the party is interested. Nor do we think it likely that authority for any such proposition can be found because such a principle would be rather subversive of justice than in furtherance of it.

Interviewing the other side's witness may be evidence of an attempt to interfere with the witness and so pervert the course of justice, and in consequence dangerous to the party proposing such interview. Professional etiquette may also place desirable limits on the right to interview witnesses who are, in fact, known as the other side's witnesses. The principle that a witness is not to be persuaded from giving evidence against a person is well established, the reason for the rule being that such a course, if permitted, would prevent the due execution of justice. It is laid down in *Hawkins' Pleas of the Crown* that: "All who endeavour to stifle the truth and prevent the due execution of justice are highly punishable and also all those who dissuade or but endeavour to dissuade a witness giving evidence against a person indicted." So in *Rex v. Lawley*, 2 Strange 904, the information was for attempting to persuade a witness not to appear and give evidence against one Japhet Crooke for forgery. Such an offence has, however, to be proved as strictly as any other offence. Interviewing the other side's witness would unquestionably, in the absence of writing establishing the offence, be evidence at any rate of opportunity to commit the offence. Because of the dangerous inferences that can be drawn, solicitors have always been chary of taking part in such interviews unless notice has been given to the other side. On the other hand, properly enough, the danger has not prevented solicitors from engaging in such interviews when it appears that the interests of their client demand them.

Professional etiquette, if it demands in most cases notice to the other side that one of his witnesses is going to be interviewed, has not always demanded a similar notice to the police when criminal proceedings are involved. There seems good reason for such distinction. The police in criminal cases and in semi-criminal cases search for evidence and take statements from all and sundry. Such persons do not, by reason of visits from the police, become Crown witnesses. A claim by the Crown that all persons interviewed by the police should be regarded as closed to interview by a party involved or his solicitors would be intolerable, nor does it seem reasonable that notice should be given to the police that interviews are being sought with such persons. Such a course could only lead to injustice. A great number of people so interviewed by the police may be able to give evidence of the utmost value to a person accused and the person accused should not be debarred from obtaining, if he can, such evidence. Highway collisions may lead to both criminal proceedings and civil proceedings. The possibility of criminal proceedings and the statutory necessity laid on the parties to give notice to the police when a collision occurs and injury to the person is occasioned, makes it obligatory on the police to interview and obtain statements from practically all those who witnessed the collision. A party to a collision who knows that civil proceedings are inevitable as a result of a collision, is under the same necessity to obtain all relevant evidence from witnesses of the accident, and it would be monstrous that such a party should find himself restrained from collecting evidence by reason of the fact that all available witnesses had been gathered in the police net or by the other party to the collision.

Evidence can be looked for without force or fraud being used, and witnesses can be seen without any attempt being made to induce them to give false evidence or to dissuade them from giving evidence at all. There is not the slightest reason to suppose that the Bench regards this important duty that constantly falls to the lot of a solicitor acting in litigation as being improperly discharged, and there seems no need to establish a wider proposition on this subject than the one that has been laid down for centuries. The necessary proposition is clearly set out in the extract from *Hawkins' Pleas of the Crown* set out in the beginning of this article. Nothing wider seems required. In *Clements v. Williams*, 2 Scott 814, Tindall, C.J., found that the defendant was fencing-off service of the process of the Court and keeping the witness out of the way. Such a course of conduct he described as an offence against justice and punishable by attachment, but in that case and in *Smith qui tam v. Bond*, 2 Dow. & L. 460, and in *Schlesinger v. Flerscheim* (*cit. sup.*) the learned Judge presiding seemed distinctly adverse to enlarging a just, necessary and serviceable principle beyond the limits clearly defined by the language in which it has been from time to time embodied.

Supreme Court

Blair, J. June 22; September 23, 1929.
Auckland.

IN RE ZWIES.

Probate and Administration—Executor—Costs—Executor Not Disclosing Existence of Codicil on Application for Probate of Will—Pecuniary Legatee Under Codicil Lodging Caveat—Executor Having Honest Doubts as to Validity of Codicil and Intentionally Omitting Reference to Codicil with View to Having Question of Its Validity Determined—Duty to Disclose All Testamentary Documents—No Misconduct in Circumstances—Caveator's Costs Ordered to be Paid Out of Estate—Order Making Executor Personally Liable for Caveator's Costs if Residue Insufficient Refused.

Motion for an order *nisi* for probate of a will, the motion being opposed by a caveator who claimed to be entitled to an interest in the estate under a codicil. The deceased made a will on 31st January, 1928, appointing R. K. Trimmer his executor and leaving his whole estate to one R. P. Boag a stranger in blood. On 21st January, 1929, deceased executed a codicil leaving £600 to his sister Lina Nortman, the codicil being witnessed by two reputable persons in Whangarei, one of whom was a medical practitioner. The deceased died on 23rd January, 1929. On 11th February, 1929, a caveat was filed on behalf of Mrs. Nortman. On 14th March the executor named in the will, who was a solicitor, filed a motion for probate of the original will, and in the executor's affidavit omitted all reference to the codicil. The affidavit of death prepared by the executor was by Dr. Ward, the medical practitioner who attested the codicil. The estate was sworn as under £800. On 8th May the executor filed a motion for an order *nisi* for probate of the will unless cause was shown by the caveator within 14 days of the service of the order. An order *nisi* was sealed on 10th May, cause to be shown within 30 days, but it did not name a time for showing cause. The caveator being embarrassed by this then moved to set the order aside or alternatively for a time to be fixed. Costs £2 2s. 0d. were allowed to the caveator and the hearing of the motion was adjourned, leaving parties to arrange for a date of hearing and bring the facts before the Court. Thereafter the caveator filed affidavits from the attesting witnesses to the codicil, exhibiting it, showing that he was in full possession of his mental faculties at the time of execution of the codicil, and proving due execution. On the date arranged for hearing the executor had not answered the affidavits nor offered any explanation why he had disregarded the codicil as a testamentary document. An adjournment was applied for on this account so as to enable him to file affidavits. On 11th June he filed an affidavit setting out his reasons for moving for probate of the will only. He was solicitor for the testator, and discussed his will with him shortly before his death and had never heard of the sister, and Boag, the beneficiary under the original will, was disputing the validity of the codicil. There being in Mr. Trimmer's mind some question as to the validity of the codicil, he adopted the course he had taken so as to enable the question of validity to be settled.

Turner for executor.
Kirker for caveator.

BLAIR, J., stated that he thought the proper course for an executor to take, when there was more than one testamentary document was to disclose all such documents on application for probate, even if the executor doubted the validity of some of them. But the executor in the present case took what he honestly believed to be the proper course, and he was aware of the codicil and knew that the interests of the caveator would be looked after. It was suggested that costs should be visited on him because he was aware of the codicil and could easily have verified the testamentary capacity and the due execution of the same. At the adjourned hearing counsel for the executor abandoned as far as the executor was concerned any suggestion of invalidity of the codicil, and had since filed an affidavit by the executor swearing faithfully to execute the will and codicil if probate was granted. The codicil as well as the will, had been duly proved valid, and probate of both was therefore granted. The estate was sworn at £800 and the specific legacy to Mrs. Nortman was £600. Counsel for the caveator asked for her solicitor and client costs as against the executor, and that the executor should be permitted to charge the caveator's costs and such of his own costs as were referable to the proceedings against the residue of the estate and not otherwise, so that no portion of the caveator's share would abate for costs. It was also asked that, if the residue was not sufficient for all those costs, the executor should personally pay the amount so as fully to indemnify the caveator's share of the estate from any costs referable to the present proceedings. The order asked, therefore, was for a personal order against the executor for the whole of the caveator's solicitor and client costs, with a right to him for reimbursement out of the residue only. **Wilkinson v. Corfield,** 6 P.D. 27, was relied upon as authority not only for the caveator's full costs, but also as authority for visiting costs on the executor personally. The principle enunciated by the President of the Court in that case was that a legatee having propounded a codicil made in her favour and having succeeded, was entitled to her whole costs, the ground being that the executor, if he had done so, would have been entitled to his costs, and she should be in like position. His Honour thought it proper to make an order for the caveator's costs as between solicitor and client to be taxed by the registrar and paid out of the estate. The effect of that order would be to make the residue primarily liable, but His Honour did not think that he should make an order which would have the effect of fully indemnifying Mrs. Nortman's share from all liability for costs should it eventuate that the residue of the estate was not sufficient to pay costs. His Honour proceeded to consider the claim that the executor should be personally charged with costs except so far as the residue was sufficient to reimburse him. The matter had to be approached from the point of view whether there was anything in the conduct of the executor which justified the punishing of the executor. He was not in any respect interested as a beneficiary under the will or codicil. He had some doubts, and His Honour believed perfectly honest doubts, as to the validity of the codicil, and he took what he believed to be the proper course to put those claiming under the codicil to proof of its validity. It was suggested that he could have made enquiries from the attesting witnesses, and it was highly probable that he did make such enquiry, because he interviewed the doctor who attested the codicil, for the purpose of obtaining his affidavit as to death. But the executor showed that there were certain circumstances which to his mind and with the peculiar knowledge which he, as the testator's solicitor, possessed, might have justified further enquiry upon the question of undue influence. His Honour thought it established that the executor had honest and reasonable doubts as to the validity of the codicil, and the course he took was not unreasonable. His Honour referred to **Williams on Executors,** 11th Edn., 1651. It was true that in **Wilkinson v. Corfield** (*cit. sup.*) the executor was condemned in costs, but the case was one where the executor had set up a false defence—a clear case of misconduct on his part. His Honour accordingly made an order that costs of both caveator and executor as taxed by the Registrar be paid out of the estate, the residue of the estate to be primarily liable for such costs.

Solicitors for executor: **A. K. Turner,** Auckland, agent for **Connell and Trimmer,** Whangarei.
Solicitors for caveator: **Peek, Kirker and Newcomb,** Auckland, agents for **Rishworth and Harrison,** Whangarei.

Smith, J. August 13, 30; September 28, 1929.
Wellington.

OFFICIAL ASSIGNEE v. FOOTE.

Bankruptcy—Voluntary Settlement—Property Purchased in Husband's Name—Deposit Paid Out of Monies Advanced by Wife's Mother—Balance Paid Chiefly Out of Husband's Earnings—Moneys Derived from Letting of Rooms Not Produce of Wife's Labour—Wife Disbursing Husband's Moneys as His Agent—Transfer of Property by Husband to Wife Before Tendering for Building Contracts on His Own Account—Husband Unable at Date of Transfer to Pay Debts without Recourse to Property Comprised in Transfer—Transfer Void as a Voluntary Settlement—Bankruptcy Act, 1908, S. 75.

Action by the Official Assignee of A. W. Foote (a bankrupt), to set aside a transfer of land from the bankrupt, a building contractor, to his wife, the defendant, Eva Maude Foote, upon the ground that the transfer was a voluntary transfer or settle-

ment, that at the time of the transfer the husband was unable to pay his debts without the aid of the property comprised in the transfer, and that the transfer was, therefore, void pursuant to either Section 75 of the Bankruptcy Act, 1908, or to the Statute of 13 Eliz. c. 5. The defendant and her husband who in March, 1921, were living at Karori with the defendant's father and mother, decided in that year to purchase a house at Petone. The house was purchased pursuant to an agreement for sale and purchase between the vendor and the defendant's husband as purchaser, the price being £520 payable as follows: (a) £50 by way of deposit; (b) a further sum of £170 by equal monthly instalments of £2 7s; (c) a balance of £300 payable with interest on 19th January, 1926. The reason given for placing the property in the name of the defendant's husband was that owing to the defendant having three young children it was inconvenient for her to attend at the offices of the solicitors; the defendant, however, had gone to Petone to select the property purchased. To effect the purchase the defendant arranged to get the deposit of £50 from her mother. It was part of this arrangement that her father and mother should live with the defendant and her husband at Petone on the terms that they should have two rooms at a rental of 10s. per week and that the £50 should be lived out. The defendant obtained the deposit from her mother and handed it to her husband who paid it over to the vendor's solicitors. The redemption of the £50 was recorded in a small notebook kept by the defendant and her mother, headed: "E. Foote with thanks 1921, £50 to pay back." The £50 was lived out at the rate of 10s. per week, and the payments under the agreement for sale and purchase were duly made to the vendor's solicitors, at the rate of £2 7s. per month. In addition, the sum of £4 10s. was payable every three months by way of interest on the balance of purchase money, namely, £300. Those payments were recorded in a book of account headed "Agreement for Sale and Purchase—A. W. Foote, Petone, with Mrs. M. C. Lidderdale. The evidence showed that the husband's earnings averaged £5 per week and that it was obvious at the time the agreement was made that the outgoings would have to be paid by him. The husband supplied the money to his wife who disbursed it, and the whole of the balance payable under the agreement, with the exceptions following, were paid in this way out of the husband's earnings. In 1922 the defendant's husband was out of work for some time and she then went to the soap works and worked there for three months to earn some money to pay instalments and interest due under the agreement for sale and purchase. In 1924, the husband was ill with pneumonic influenza for about 8 weeks, and was out of work, and his wife then raised some money on her life insurance policy for the purpose of keeping the home going. On the 1st October, 1925, the property was re-financed. A first mortgage of £450 was raised, and a transfer was taken in the name of the defendant's husband, pursuant to the agreement for sale and purchase. The husband stated that he understood that it would cost more then to get a transfer to the wife than it would later on. Between October, 1925, and June, 1927, the husband did small jobs in his spare time, although these jobs seemed to have increased progressively in value. The books of account showed a progressive tendency on the part of the defendant's husband, to take bigger risks. Finally, early in 1927, the defendant's husband proposed to start contracting on his own account. His wife's view was that if he was going to start contracting, she wanted the property in her name, or, as she also expressed it, before he started taking any risks, he should put the property in her name. The husband stated that his wife was always getting on to him to transfer the place back to her at once, and that before he went out on his own to work, she wanted the property back in her name. These discussions took place in May, 1927, and prior thereto. The property was transferred by way of gift on 27th May, 1927, the wife paying the gift duty. At that date it was proved that defendant's husband was clearly unable to pay all his debts without the aid of the house property.

Shorland for plaintiff.

C. A. L. Treadwell for defendant.

SMITH, J., said that the plaintiff alleged that the memorandum of transfer from the defendant's husband to her was a voluntary transfer or settlement, and that the husband was unable at the time he made the transfer, to pay his debts without the aid of the property comprised in the transfer. The plaintiff claimed that the transfer was void pursuant either to Section 75 of the Bankruptcy Act, 1908, or to the Statute of 13 Elizabeth c. 5. The defendant's answer was in substance that the property was purchased and paid for by her alone, and that her husband was registered as the proprietor only for the purposes of convenience. In His Honour's opinion, the defendant had failed to discharge the onus of proving that the property was bought with her money. His Honour was not satisfied that the £50 was lent only to the defendant by her mother. Although the note-book recording the "living out" payments was headed "E. Foote, with thanks, £50 to pay back," it was contemplated that the father and mother would live with the defendant and her husband, as they had all done at Karori, and the facts were that the husband paid over the deposit of £50 and executed the agreement for sale and purchase personally. If it had been a special consideration at the time that the property was to belong to the daughter, His Honour thought she would have found it possible to execute the agreement. The inconvenience of arranging to leave young children would not have prevented her from doing so any more than it prevented her from going with her husband to select the property itself at Petone. Moreover, while the £50 was being repaid, by being "lived out," it was the husband who provided the means of preserving the house, by providing the moneys for paying the instalments and interest on the property, with the exception of the occasion when he was out of work, and the other occasion when he was ill. The mere letting of rooms did not, in His Honour's opinion, of itself and apart from the ownership of the house, make the rent thereof the produce of the wife's own labour. It was in a different category altogether from profits derived from the keeping of boarders, which in **Official Assignee of McWilliam,** (1923) N.Z.L.R. 561, was held to constitute the produce of the wife's own labour, It seemed clear, that during the four years 1921-1925 the monthly instalments and the quarterly interest payments were paid directly out of the husband's earnings, and that they did not go through the wife's Post Office Savings Bank account. That view was confirmed by the husband's statement that only what was left after paying groceries, interest, etc., was paid into the wife's bank account. His Honour found, then, that the wife received the husband's wages, and disbursed them as his agent. He made no gift of each payment of wages to his wife so that it became her absolute property. A test might be made on the purely suppositious basis that if the husband had been the defendant in proceedings under the Destitute Persons Act for maintenance orders in favour of his wife and children, he would have been able to show that he had made payments for the maintenance not only of his wife, but also of his children. It followed that the present was not a case in which the moneys invested in the property were the property of the wife either because they were savings of hers, or because they were the produce of her own labour. The only exceptions were the moneys contributed by the wife out of what she earned while the husband was out of work, and out of what she raised on her life policy while the husband was ill. They were quite unsubstantial compared with the total amounts paid on the property. The conclusion to which His Honour came on the evidence was that the property was placed in the husband's name because it was regarded both by the husband and by the wife as his, and that he was paying for it, although the wife managed the disbursement of his wages, and herself contributed something when her husband was out of work or ill. That conclusion was reinforced by the following further considerations: (1) In October, 1925, title was taken in the husband's name. That was at the very time that the husband started to do small jobs in his spare time. Although the surplus, after payment of the groceries, interest, etc., went into the wife's Savings Bank account, the evidence of the husband appeared to show that the husband did not part with the property in the moneys paid into the wife's bank account. It displaced the presumption of the wife's ownership created by Section 11 of the Married Women's Property Act, 1908. The reasonable conclusion appeared to be that he was entitled both to the land and to the money, and that his wife was his manager. (2) The husband stated that his wife was always getting on to him to transfer the place back to her at once. If the present claim of the defendant and her husband represented the true position (namely, that the husband was always but a bare trustee for the wife), and if the wife requested the transfer before title was taken in October, 1925, as the husband definitely indicated, then the husband deliberately took title, not only in defiance of his wife's wishes, but contrary to his legal and moral duty. Having seen the parties, His Honour did not believe that he so defied his wife. If the wife did not request the transfer to her until after it had been transferred to her husband, then the reasonable conclusion was that she wanted it transferred to her to prevent it from being available to her husband's creditors should he fail in his ventures. The fact was that if the wife commenced to ask her husband to transfer the property to her after October, 1925, at which time he began his extra jobs, then the husband resisted the request, and did not execute the transfer until, (a) he was proceeding to take contracts double the size of any of those for which he had previously tendered, and (b) until he was unable to pay his debts independently of the property transferred. The conclusion to which His Honour came was

that both the husband and the wife really regarded the property as the husband's because he was paying for it, but that they thought it was a prudent thing to transfer it to the wife when her husband started to engage in the hazardous business of a building contractor on his own account. It was idle to say that the costs of transfer prevented transfer at an earlier date. (3) The actual transfer of 27th May, 1927, was by way of gift, and was liable to conveyance duty (Stamp Duties Act, 1923, S. 79) whereas if the property had been conveyed pursuant to the trust alleged, the document would have been exempt from conveyance duty: Section 81 (d). Weight must be given to that circumstance. The foregoing discussion of the facts showed that the present case was not within the line of authority exemplified by **Taylor v. Allen**, 19 N.Z.L.R. 85, and **Official Assignee of McWilliam v. McWilliam**, (1923) N.Z.L.R. 561. In the view which His Honour took the case was within the authority of **In re McGrath**, 17 N.Z.L.R. 646, though His Honour regarded it as clearer in the present than in that case that the moneys received by the wife from her husband were received by her as the agent of her husband. She returned them to him, or paid them herself on his behalf as required, to pay principal and interest moneys on a property in his name. It was clear that the transfer of the property from the husband to the wife on 27th May, 1927, was a settlement of property within the definition of "settlement" in the Bankruptcy Act, 1908, and that it was not made before and in consideration of marriage, or in favour of a purchaser or incumbrancer in good faith and for valuable consideration. Nor was it a settlement made on or for the wife or children of the settlor of property which accrued to the settlor after marriage in right of his wife. It was clear also that the settlor was at the time of the settlement unable to pay his debts without the aid of the property comprised in the settlement. He had become bankrupt within three years of the settlement. All the conditions of Section 75 (b) of the Bankruptcy Act, 1908, had, therefore, been fulfilled, and the settlement was void as against the Official Assignee.

It was not necessary to deal with the claim under the Statute of 13 Elizabeth c. 5. His Honour accordingly made an order declaring the transfer void as against the Official Assignee.

Solicitors for plaintiff: **Hogg and Stewart**, Wellington.
Solicitors for defendant: **Treadwell and Sons**, Wellington.

Smith, J. August 2; September 13, 1929. Palmerston North.

BLACK v. MacFARLANE.

Negligence—Motor-vehicle—Collision Between Two Motor Cars—Street Intersection—"Off Side" Rule—"Off Side" Rule Applying to Intersections in Country Roads—Breach of Rule Conferring No Civil Right of Action on Party Aggrieved—Breach of Rule Evidence of Negligence if Wilful or Negligent, and Contributing to Accident and Accident One Which Regulation Designed to Prevent—Duties of Drivers of Vehicles Approaching Intersection—Main Road Driver Travelling at Excessive Speed and Failing to Observe Off-side Rule—Driver on Side Road Failing to Slow up Sufficiently When Approaching Intersection—Accident Due to Negligence of Both Drivers—Son Entitled to Recover Notwithstanding Negligent Driving of Father—Son Not Identified with Father's Negligence—Quaere as to Case of Child of Tender Years—Claim Against Wife and Husband—Wife Owner of Motor-car—Husband and Wife Not Sued Jointly—Judgment Against Separate Estate of Wife—Quaere Whether Plaintiff Entitled to Judgment Against Husband Separately.

Action by plaintiff, aged 18 years, by his father as guardian *ad litem*, claiming damages for injury caused to his eye as the result of a collision between a motor car in which the plaintiff was riding and a motor car in which the defendants were riding. It was alleged that the collision was caused by the negligence of the defendants' driver. The defendant, Elizabeth MacFarlane, was sued as the owner of the car, and the defendant, John MacFarlane, as her husband. The facts were that on 1st April, 1929, the plaintiff was a passenger in a motor car driven by his father along a side road leading from Rongotea to the sea. This road crossed the main road from Foxton to Sanson. The surface of the road at the intersection was of loose gravel and metal. The plaintiff's car approached the intersection about a quarter past noon. Until within 75 yards of the intersection, the car was travelling at about 30 miles per hour, but the plaintiff's driver gradually applied the brakes, and at the time he emerged on to the intersection he was travelling at about 20 miles per hour. When plaintiff's driver was 30 yards from the intersection, he saw no car on the Main Road. At a point 30 yards from the intersection a driver coming from Rongotea had a view of the main road to his left for a distance of about 30 yards from the intersection, but his view of the main road to the right was obscured by a sand cutting and trees until he was clear of the intersection. The main road driver had at a point 30 yards back from the intersection, towards Foxton, a view of the Rongotea road to the right for about 30 yards from the intersection. When the plaintiff's driver was almost on the intersection he saw the defendant's car about 30 yards away coming along the main road from Foxton. It was at this point the driver of the defendants' car, defendants' son, first saw plaintiff's car, the reason for his not seeing the plaintiff's car earlier being that he could not see through the trees. The defendants' car was travelling at this stage at a speed of more than 40 miles per hour. The plaintiff's driver, realising that he could not stop, released his brakes and allowed his car to travel forward across the road in the hope of clearing the defendants' car. He travelled about 27 feet before he was struck by the other car. The driver of the defendants' car applied his brakes, and steered out to his right, in the hope of passing behind the other car. His speed was, however, too great. About 4 or 5 yards before the impact, the defendants' car skidded on the loose metal. It then struck the defendants' car almost at right angles, and carried it sideways for some 49 feet.

F. H. Cooke for plaintiff.

Johnston for defendants.

SMITH, J., said that the plaintiff contended that the collision was caused by the negligence of the defendants' driver in—(1) not keeping a proper look-out; (2) driving at an excessive speed, and (3) failing to observe the "off-side rule," i.e., to give way to traffic approaching from the right. The defendants denied the allegation of negligence and contended that the collision was due:—(1) to the excessive speed of the car in which the plaintiff was riding, and (2) to the failure of the driver of the plaintiff's car to keep a proper look-out, to give warning of his approach, and to observe the rules of the road. The defendants further contended that, if they were guilty of negligence, then the negligence of the driver of the car in which the plaintiff was travelling amounted to contributory negligence for which the plaintiff was responsible. His Honour found that no warning was given by either driver. As to keeping a proper look-out, the plaintiff's driver said he looked both to the left and the right, but that he knew of the "right-hand" or "off-side" rule of the road, and that also as the right-hand side of the intersection was the harder (in that there was a less field of vision on that side), the right-hand side was the one on which his attention was the more fixed. In His Honour's opinion, neither driver saw the other as soon as he might have done.

The plaintiff's driver justified his concentration of view to the right, and such speed as he was driving at, on entering the intersection, by reference to the off-side rule. Plaintiff's counsel also contended that defendants' driver, although on a main road, was guilty of a breach of the off-side rule, and, as such, clearly negligent. The rule in question was No. 13 of Regulation 11 made under the Motor-vehicles Act, 1924, which provided as follows: "Every driver of a motor-vehicle when approaching any intersection the traffic at which is not for the time being controlled by a police officer or traffic inspector, and to which any other vehicle (inclusive of trams) is approaching, so that if both continued on their course there would be a possibility of collision, shall, if such vehicles (being other than a tram) is approaching from his right, or if such vehicle (being a tram) is approaching from any direction, give way to such other vehicle, and allow the same to pass before him, and, if necessary for that purpose, stop his vehicle, and no driver of a motor-vehicle shall increase the speed of his vehicle when approaching any intersection under the circumstances set out in this clause." The regulations, of which this was one, were made by Order-in-Council under statutory authority to make regulations regulating motor traffic on roads and streets and public places. They appeared to apply to the whole of New Zealand, and regulations made by any local authority relating to motor-vehicles and motor-vehicular traffic were subject to the regulations made under the Act. It was clear then, that the regulation in question applied to all roads and streets, whether main or side, and whether in city, town, or country. It was a statutory traffic regulation. It was clear, His Honour

thought, that a breach of it could give no right of action to the person aggrieved, by virtue merely of the breach. The effect of the regulation depended upon the intention of the Statute: **Phillips v. Britannia Hygienic Laundry Co.**, (1923) 1 K.B. 539, (1923) 2 K.B. 832. In the present case, there was only one penalty provided for numerous acts of differing weight and importance, namely a penalty not exceeding £50. The duty which was imposed was, His Honour thought, a public duty only. The regulation conferred no rights on a special class of the public. It was made in the interests of motorists and pedestrians alike; Furthermore, it was clear that in civil actions based on negligence, the failure to observe the rule of the road might be justified by circumstances, although no such exemption was provided by the terms of the regulation itself. His Honour thought, then, that the regulation did not confer upon a party aggrieved a civil right of action by virtue merely of a breach thereof. The remedy for the breach was a police remedy, viz., the penalty provided by the regulations. It did not follow, however, that the breach of a traffic regulation might not be used as evidence of negligence in a civil action. The conditions upon which such a breach was evidence of contributory negligence were explained by Salmond, J., in **Canning v. The King**, (1923) G.L.R. 595. They were: (1) The breach must be a wilful or negligent breach, and not the outcome of inevitable mistake, accident, necessity or other justifying circumstances; (2) The breach must have been the cause or contributory to the cause of the accident; (3) The purpose of the statute must have been to prevent the kind of accident which actually happened. His Honour respectfully relied upon that view, and added that if those were the conditions of the use of a breach of a traffic regulation as evidence of contributory negligence, they were also the conditions of the use of such a breach as evidence of negligence. The plaintiff took the onus of proving the regulation, and of the fulfilment of the condition, and when he had done that he had established a *prima facie* case of negligence. In that sense individual rights and remedies were affected by the statutory regulation. But notwithstanding the establishment of a *prima* facie case of negligence in such a way, it was still open to the defendant to show any circumstances justifying a disregard of the regulation—**Phillips v. Britannia Hygienic Laundry Co.** (*cit. sup.*)—or that the breach of the regulation did not in fact cause the collision. The defendant might also rely on any other defence open to him in an action for negligence, such as contributory negligence or *volenti non fit injuria*.

It was necessary to consider the legal incidence of the "off-side" rule, in certain respects. An "intersection" was defined in the regulations as meaning "the crossing of a road by any other road or by any railway or tramway, at a level crossing; and included the "meeting of a road with any other road." The rule applied, then, both to intersecting roads and to roads which merely met. Prior to the making of the regulation, the law was plain that a driver emerging from a side road to join the main road traffic must either stop or proceed slowly so as to turn into the main road on his correct side, and keep a sharp look-out so as to be ready to stop or to turn to the right or to the left in time to avoid a collision: **Wiri Kingi v. Guy**, (1921) N.Z.L.R. 331; **Boon v. Love**, (1926) G.L.R. 38. Similarly, it was clear that before the making of the regulation, a driver crossing a main road from a side road must have been prepared to stop before crossing so that an uninterrupted right of passage might be left for any traffic on the main highway with which the side road driver was likely to come into collision. That did not relieve the main road driver from the duty to take care and to observe his points of danger: **Simpson v. Watson**, (1928) G.L.R. 501. The law of New Zealand might indeed be stated, His Honour thought, as it was stated by the Court of Session in **Hutchison v. Leslie**, (1927) S.C. 95. It was to be observed, however, that the distinction between a "main road" and a "side road" was by no means one of automatic clarity. In **M'Nair v. Glasgow Corporation**, (1923) S.C. 397, 404, Lord President Clyde pointed out that "the distinction between a 'main road' and a 'side road' is itself a question of circumstances so variable and uncertain in character as to be unreliable and impracticable in a vast number of instances." But where the distinction existed, then, if the off-side rule was applied, it was clear that main road traffic must give way to side road traffic approaching from the right and with which there was a possibility of collision; and, if necessary for that purpose, must stop. His Honour saw no escape from that construction. It appeared to be clearly intended to lay down a definite rule. But difficulty arose in its application. Main road traffic was entitled to proceed at a good speed. Bitumen and concrete highways were intended to carry fast-moving traffic. Yet, where the intersection was reasonably visible to a driver on a main road or where he should reasonably know of its existence, it was, His Honour thought, his duty to take steps to observe the rule, should a possibility of collision arise. That might mean a reduction in speed and a sounding of the horn. Where the intersection was not so visible, or where the driver was reasonably unaware of its existence, he was not reasonably in a position to take steps to observe the rule. Then, whatever might be the driver's position in a Police Court, he had not committed a wilful or negligent breach of the rule, and a breach of it could not be used as *prima facie* evidence of negligence against him: **Canning v. The King** (*cit. sup.*). The test of wilful or negligent breach of the rule must depend then on the circumstances of each case. Where the view of an intersection was clear, and drivers knew there was or was likely to be traffic, the driver approaching from a side road on the right of a driver on the main road might be entitled to assume that the main road driver would give way. In that sense, the words of Lord Atkinson in **Toronto Railway Company v. King**, (1908) A.C. 260, 269, which His Honour quoted and which applied to city streets, might be applicable in varying degree to less populous thoroughfares. But below the circumstances of clear visibility and knowledge of traffic, there were circumstances of infinite variety. It must, therefore, be determined on the circumstances of each case whether the defendant was guilty of a wilful or negligent breach of the off-side rule. If he was not so guilty, then a breach of that rule, if it did occur, could not be relied upon as *prima facie* evidence of negligence; and the rights of the parties must be determined solely upon the ordinary principles of liability for negligence.

The defendants' driver knew that he was approaching an intersection. He knew that the surface was of loose gravel and metal. He knew of the off-side rule. He said himself that it was his duty to slow down to 15 miles per hour and to give way to any other car coming out from the intersecting road. His excuse was that he did not see the other car in time. In His Honour's opinion, that was an insufficient excuse. His knowledge of the intersection and its nature was such as to make it incumbent on him to have slowed up to enable him to apply the rule, should occasion arise. He clearly failed to slow up sufficiently. He was, in His Honour's view, guilty of a negligent breach of the off-side rule. The second condition upon which a breach of the off-side rule as *prima facie* evidence of negligence depended was whether the breach was the cause or a contributing cause of the collision. There was no doubt that it was so in the present case. The third condition upon which a breach of the off-side rule as *prima facie* evidence of negligence depended was whether the purpose of the statutory rule was to prevent the occurrence of the kind of collision that actually occurred. In His Honour's opinion, there could be no doubt that that was its very purpose. It purported to vary the obligations imposed upon main road and side road drivers as established by **Wiri Kingi v. Guy** (*cit. sup.*) and **Boon v. Love** (*cit. sup.*). It operated when there was a possibility of collision. It seemed to His Honour that the prevention of collision by the adoption of a uniform traffic rule was the whole object of the regulation. The plaintiff, then, had proved the traffic regulation, and the fulfilment of the aforesaid conditions. It followed that the breach of the regulation by the main road driver (defendants' driver) was *prima facie* evidence of negligence on his part. In addition to that *prima facie* evidence, and apart from the regulation, His Honour thought it clear that if the driver of a motor-car, notwithstanding that he was on a main road, proceeded to pass a true intersection, the surface of which was comprised of loose gravel and metal, and the view of which was obscured to one side, at a speed of some 42 miles per hour, he was guilty of negligent driving at Common Law.

It was necessary now to consider the position of the plaintiff's driver. In His Honour's opinion, the plaintiff's driver had failed to "slow up" sufficiently. He was the side road driver. If a car had been coming down the main road on his right, on which side his field of vision was less than on his left, he could not possibly have stopped to allow the car on his right to pass before him. It was true that that occasion did not arise. The actual danger came from the left. But if the plaintiff's driver had slowed up sufficiently to allow traffic from his more dangerous right to pass him, he could also, and more easily, have avoided traffic from his less dangerous left. His Honour did not think that the effect of compliance with his duty to his right (which would have resulted in this case in his ability to stop almost dead) could be properly separated from his duty to act reasonably when danger appeared to his left. His failure in that respect appeared to His Honour to constitute negligence contributing to the cause of the collision. Apart, however, from that failure of plaintiff's driver, His Honour did not think that as a side road driver he had any right to assume that the off-side rule would necessarily be observed by a main road driver passing along that particular main highway through the country. That was not, it appeared to His Honour, a reasonable assump-

tion to make. Until the off-side rule was more emphatically established by custom and usage on country roads, His Honour did not think that the same assumption could be made as a driver on a city street might make. A side road driver on a country road must act reasonably, and from the point of view of his civil liability, "slow up" so as to be able to avoid traffic to his right or to his left. He had the advantage, however, that if a collision occurred, notwithstanding his care, a main road driver approaching from the side road driver's left would be guilty, *prima facie*, of negligence, if he had wilfully or negligently failed to observe the off-side rule, and such failure had been the cause or a contributing case of the collision. In His Honour's opinion, plaintiff's driver was guilty of negligence in failing to slow up sufficiently to avoid danger either to his right or to his left when debouching on to the dangerous intersection.

His Honour found then, that both drivers were guilty of negligence contributing to the collision. The collision must have occurred in less than two seconds after the cars sighted each other. Upon a careful consideration of the evidence, His Honour was unable to say that there was a sufficient separation of time place or circumstance between the negligent management of the defendants' car and that of the plaintiff to make it right to treat the negligence of either as the sole cause of the collision: **The Volute**, (1922) 1 A.C. 144; **O'Callaghan v. Hawke**, (1926) G.L.R. 478. The collision was due to the negligence of each driver, mainly in driving on to the intersection at an excessive speed, and to some extent in failing, at the intersection, to sound the horn, and to keep a proper look-out; and neither driver (nor any owner responsible for the driver) could recover from the other.

The next question was the right of the plaintiff to recover from the defendants. The plaintiff was not the driver of the car in which he was, nor the owner of it. He was a passenger, but not for hire. He was of a family party proceeding to the seaside. The question was whether plaintiff was responsible for the negligence of his father who was his driver. It was clear that if he were a passenger for hire, he would not be debarred from recovering against the defendants by the contributory negligence of his father, apart of course, from any power of control otherwise arising: **The Bernina**, 13 A.C. 1, overruling **Thorogood v. Bryan**, 8 C.B. 115. In such a case, it was now clear that a plaintiff by selecting his particular conveyance did not so far identify himself with the defendant and his servants, that if any injury resulted from their negligence, the plaintiff must be considered a party to it. Did a different rule apply where there is a family relationship? His Honour did not think so, except possibly in the case of a child of tender years who was in the care of an elder guardian: **Waite v. North Eastern Railway Co.**, E.B. & E. 728. His Honour referred to the comment on this case in **Salmond on Torts**, 7th Edn., 54, and **Beven on Negligence**, 4th Edn., 226, and said that whatever was the true explanation of **Waite's case**, His Honour was of opinion that it had no application to the facts of the present case. The child there was five years old, and was described by Cockburn, C.J., as a child of "tender and imbecile age" and "wholly unable to take care of itself"; and as having "no natural capacity to judge of the surrounding circumstances." That could not be said of a young man of 18, for whose maintenance his father was no longer responsible, and who was earning his own living. Mere family relationship as such did not identify any member of the family with the negligence of any other member of it. Where a collision was caused by the negligence of two drivers the wife of driver A was not so identified with A as to be precluded from recovering damages from driver B: **Bruce v. Murray**, (1926) Sc. L.T. 236, cited in **Roberts and Gibb on Collisions on Land**, 2nd Edn., 25. Nor, in similar circumstances, was a mother identified with the negligence of her son: **Terry v. Gould**, 69 Sol. J. 212. If, however, the wife or mother were the owner of the car so driven by her husband or son, she would be responsible on the grounds of agency and control: see **Roberts and Gibb on Collisions on Land**, 2nd Edn., 24. If a wife, though a passenger, were not identified with her husband, when she neither owned nor controlled the car which he was driving, then neither was an able-bodied son, similarly a passenger, identified with the negligence of his father when the son neither owned nor controlled the car which the father was driving. In the present case, the car was the father's, and His Honour found on the facts that the son neither owned it nor controlled it on the occasion in question.

The defendants' driver and plaintiff's driver were not joint wrong-doers. They were each independently negligent: **Thompson v. London County Council**, (1899) 1 Q.B. 840. The defendant, Elizabeth MacFarlane, being responsible for her son's negligence, was liable for the damage done to persons not identified with her son's negligence, and not debarred by contributory negligence from claiming against her. The same principle of liability applied, of course, to the plaintiff's father as a negligent owner and driver. The plaintiff was one of those who were not debarred from claiming against the defendant Elizabeth MacFarlane. His Honour awarded the plaintiff £71 5s. 6d. special damages and £400 general damages, and judgment was given for the plaintiff accordingly. The plaintiff could not, His Honour thought, have judgment against the husband separately, and he had not sued husband and wife jointly at Common Law, adding a claim under the Married Women's Property Act. Judgment might be entered against the separate estate of the defendant Elizabeth MacFarlane, but liberty was reserved to counsel for the plaintiff to show cause why judgment should be entered against the husband as well as the wife. The final judgment might be settled in Chambers, if necessary.

Solicitor for plaintiff: **F. H. Cooke**, Palmerston North.
Solicitors for defendants: **Park and Adams**, Levin.

Kennedy, J. August 21; September 16, 1929. Invercargill.

EDGINTON AND BERNSTONE v. WAIHOPAI RIVER BOARD AND SOUTHLAND COUNTY.

Rating—River Board—Injunction—Laches—Invalid Rate—Injunction to Restrain Rating Authorities From Proceeding with Summonses Issued to Recover Rates—Right to Injunction Notwithstanding Statutory Provision That Invalidity of Rate Not to Prevent Recovery Thereof—Failure to Take Proceedings for Three Months After Knowledge of Invalidity of Rate Not Constituting Acquiescence—No Laches—Rating Authorities Not Induced to Alter Position by Conduct of Plaintiffs—Fact that Large Proportion of Rates Collected No Ground for Refusal of Injunction—Rating Act, 1925, Sections 4, 66—River Boards Act, 1908, Sections 87, 101.

Claim by plaintiffs for a declaration that certain rates made and levied by the defendants on land in the Waihopai River District were invalid and for an injunction to restrain the defendants from proceeding with summonses issued to recover such rates. The Waihopai River Board was a river board duly constituted under the River Boards Act, 1908, and the whole of the land in the river district of such Board was situated in the Southland County and the Borough of Invercargill. The system of rating on the unimproved value was in force in both the Southland County and the Borough of Invercargill and accordingly the rates made and levied in the Waihopai River District were by Section 4 (3) of the Rating Act, 1925, to be made and levied according to that system. The Waihopai River Board by special order dated 14th December, 1927, directed that a general rate be made and levied within the whole district of the Board by the Southland County Council and caused a copy of such special order to be forwarded to the Southland County Council, and not to the Invercargill Borough Council. On 13th January, 1928, the Southland County Council, by the direction of the Waihopai River Board, made and levied general River Board rates, not on the system of rating on the unimproved value, but on the system of rating on the capital value of land, and made and levied such rates not only upon land situated within the Southland County but also upon land situated within the Borough of Invercargill. The total amount of the Waihopai River Board rates for the year 1927-28 was £582 8s. 10d., and of that amount the sum of £437 13s. 7d. had been received from the Southland County Council. Of 287 ratepayers, 213 had paid the rates demanded from them, while £135 0s. 4d. was outstanding. The demands for the rates were sent out in March, 1928, and proceedings to recover the rates were taken in May, 1929. No proceedings had been taken in respect of the rates for the year 1928-29. The rates for that year amounted to £582 10s. 7d., of which £322 8s. 7d. had been collected. Of 291 ratepayers 163 had paid, leaving £206 10s. 7d. unpaid by 128 ratepayers. When the defendants issued summonses for the recovery of the rates in May, 1929, it was arranged that the summonses should be adjourned until after these present proceedings had been brought and determined.

W. A. Stout and **Hall-Jones** for plaintiffs.
S. M. Macalister and **Gilfedder** for defendants.

KENNEDY, J., after referring to Sections 87 and 101 of the River Boards Act, 1908, said that it was clear that the rates

made and levied were invalidly made because they were made and levied on the system of rating on the capital value when, according to law, they should have been made and levied on the system of rating on the unimproved value. It was equally clear that the Southland County Council had no statutory authority to make and levy rates upon land not situated within the Southland County, but situated within the Borough of Invercargill. It followed then that the general river board rates for the year 1927-28, which the Southland County Council purported to make, levy and collect were not according to law and were invalid. His Honour referred to Section 66 of the Rating Act, 1925, and said that notwithstanding the terms of that section it had been held that a ratepayer had still a right to apply to the Court to restrain a local body from collecting an invalid rate. His Honour referred to **Hendry v. Hutt County Council,** 3 N.Z.L.R., C.A. 254, which was recently followed in **Broad v. County of Tauranga,** (1928) N.Z.L.R. 702. His Honour saw no reason in principle why a defendant which had issued a summons and taken certain steps towards the collection of an invalid rate, should not likewise be restrained although it had proceeded further in its endeavour to enforce payment of its invalid rate than had the Tauranga County Council in the latter case. The defendants then must be restrained from further proceeding to collect the invalid rate unless, as contended on behalf of the defendants, the plaintiffs' conduct had disentitled them to this remedy.

The defendants contended that the plaintiffs had been guilty of laches and that an injunction should, for that reason, be refused, that the ratepayers had the most ample notice by advertisement of the rate and that the plaintiffs should have applied promptly, after such notification was given, to the Court to restrain the defendants from making, levying and collecting the rate. In the meantime, it was said, other ratepayers had paid and it would be a hardship upon them and upon the defendants, if the defendants were not allowed to proceed to collect from the plaintiffs and others who had not yet paid. It was urged that to grant the injunction would result in the Board having to collect in four years, if the Board were restrained, an amount which it could collect in two years if it were permitted to proceed with the summonses against defaulting ratepayers. This was urged as an element which the Court should take into consideration in granting or refusing an injunction. A plaintiff seeking equity was bound to prosecute his claim without delay, for a Court of equity refused its aid to a stale demand where a party had slept upon his rights and acquiesced for a great length of time. The plaintiffs' claim was then said to be barred by his laches. Delay in itself might be so great as to constitute laches and render the complaint stale so that a court of equity would not enforce it. In the absence of special circumstances a delay of over twenty years was the period which in practice might be taken as barring a claim; but delay for any shorter period might, having regard to such circumstances as were properly to be considered by a court of equity, bar the claim. In determining whether there had been such delay as to amount to laches the Court would consider any acquiescence on the plaintiff's part and any change of position which had taken place on the defendant's part. Acquiescence meant assent after the plaintiff had become aware of the violation of his rights. A person could not be said to have acquiesced in the claim of others unless he was fully cognisant of his right to dispute them: **Marker v. Marker,** 9 Hare 1, 16. The party acquiescing must be aware not only of the facts upon which his claim to relief was based, but his right to redress in respect to them. His Honour referred to **Randall v. Errington,** 10 Ves. 423, per Grant, M.R., at p. 426. The onus of proving acquiescence lay upon the defendants who asserted it. There was no evidence that the plaintiffs, any more than the defendants and other ratepayers, were, notwithstanding the publicity given to the making of the rate, aware prior to February, 1929, that the rate was invalid. His Honour did not think that acquiescence in an invalid rate was to be inferred against ratepayers who declined to pay that rate, merely because they did not, after declining to pay, follow that up by proceedings to have the rate declared invalid in the interval between February, 1929, and May, 1929, or even until they were sued for the rates by the defendants. What concerned ratepayers was not so much the declaration of a rate as its attempted enforcement through the Courts. His Honour did not consider the delay so great, in the circumstances obtaining, that the plaintiffs should be denied their remedy. The plaintiffs had no other remedy readily available than the remedy which they sought, and if an injunction were refused the result would be that the defendant Board might proceed to collect an invalid rate, collecting from certain ratepayers a larger sum than would be payable if a proper system were adopted and collecting a larger amount in one year than could properly be collected if the law were followed. To refuse a remedy to ratepayers, who claimed that the rate was invalid, was in effect to legalise what was illegal and to confer in substance upon the defendants powers in addition to and different from those conferred by statute. The plaintiffs were applying neither for an interlocutory nor a mandatory injunction. The injunction asked for was merely to restrain the defendant from proceeding further to collect a rate they should never have made and levied. No question of the loss or destruction of evidence arose nor could it be suggested that the plaintiffs had abandoned or released their right to object. It could not properly be contended that the plaintiffs had so acted as to induce the defendants to alter their position in the reasonable belief that the plaintiffs had released or abandoned their right to object. The defendants made and levied and proceeded to collect the rate of their own motion and not in reliance upon, or by reason of, anything which the plaintiffs did. Moreover the defendants could not successfully plead that it would be a hardship for the defendant River Board to have to wait a further two years, as it would have to do if restrained from proceeding to collect the invalid rate, to raise sufficient money to pay existing obligations and thereafter to become dissolved. If, following the law, it could only have raised sufficient money in the longer period, it could not be heard to say that it would be a hardship to have to wait a further two years if it was not allowed to pursue a course which was not authorised by the statute. The defendants could not successfully urge that it would be a hardship upon ratepayers who had already paid. It was true that what they had paid might not be recoverable: see **Julian v. Mayor, etc., of Auckland,** (1927) N.Z.L.R. 453, and **Slater v. Mayor of Burnley,** 59 L.T. 636. The payment of rates by the ratepayers who had paid was a voluntary payment and it was none the less a voluntary payment in the eyes of the law because it was made upon a demand by the Southland County Council and possibly under a threat that if payment was not made legal proceedings would be issued. Ratepayers made that payment presumably because of the demand from the Southland County Council and not because they relied or were entitled to rely upon the mere passivity of the plaintiffs. Furthermore there was no evidence that the sums received from the ratepayers who had paid, were received after the date when the plaintiffs first became aware of the invalidity of the rate and that could not be assumed. The defendant Board could not urge that its position, as distinct from the ratepayers who paid it, had become prejudiced through the inactivity of the plaintiffs, when the only result had been that they had received moneys which could not legally be demanded. There was nothing in the conduct of the plaintiffs which would result in the defendants being placed in a position in which it would not be reasonable for the plaintiffs to assert their rights to resist the invalid rate. The Court, if the element of hardship was to be regarded, could not disregard the fact that there was a considerable body of ratepayers besides the plaintiffs who had not paid and who would likewise suffer hardship if an injunction were refused. The incidence of the rates was different if the rates were levied upon the system of rating upon the capital value. In the result, therefore, His Honour held that the defendants had failed to prove laches and that an injunction should issue restraining the defendants from proceeding to collect the invalid rate and in particular from issuing and proceeding with summonses therefor.

Solicitors for plaintiffs: **Rattray and Hall-Jones,** Invercargill.
Solicitors for defendants: **Macalister Bros.,** Invercargill.

Rules and Regulations.

Fisheries Act, 1908: Native Land Amendment and Native Claims Adjustment Act, 1926: Taupo Trout-fishing Regulations, 1929. Rotorua Trout-fishing Regulations, 1929.—Gazette No. 68, 15th October, 1929: Amended regulations for trout, perch and tench fishing in Waitaki Acclimitization District.—Gazette No. 69, 17th October, 1929.

Honey Export Control Act, 1924. New Zealand Honey Control Board Election Regulations, 1925. Amendment No. 1.—Gazette No. 69, 17th October, 1929.

Seeds Importation Act, 1927. Seeds Importation Regulations, 1929, revoking regulations of 28th April, 1928.—Gazette, No. 69, 17th October, 1929.

Professional Discipline.

The Disciplinary Jurisdiction of the Supreme Court of New Zealand over the Legal Profession.

By H.F. von Haast, M.A., LL.B.

(*Continued from p. 299*)

What is professional misconduct? It is not necessary that it should be established that the practitioner has been guilty of any breach of the law, criminal or civil. Such conduct must be something more than a gross breach of professional etiquette, that would be reprobated by the reputable members of the profession. The Court of Appeal has held that it is impossible to define—and it would be extremely unwise to attempt to define—what conduct comes within the meaning of serious professional misconduct: *Re Lundon*, 28th October, 1911, reported in note to *In re Baillie*, 34 N.Z.L.R. 705, at pp. 708 and 709.

Two cases decided in 1917 illustrate how incumbent it is upon a solicitor jealously to protect the interests of his clients: *In re Beard*, (1918) N.Z.L.R. 202, and *In re Lundon*, (1918) N.Z.L.R. 193. In the former case it was laid down (p. 211) that where a solicitor's personal interests come into conflict with the duty of protecting the client, and he sacrifices his duty to his personal interests, he is guilty of professional misconduct. That was a case of an old and experienced solicitor buying land from "an easy-going, pliant and complaisant subject" without placing himself at arm's length with his client. Although the client was passed on to another solicitor to advise whether the documents drawn to carry out the bargain—an unconscionable one—were in due form for that purpose and to ascertain whether the client was willing to carry it out, the advising solicitor was not placed by the purchasing solicitor in possession of all the facts so as to be able to advise on the propriety of the bargain itself. Hence then solicitors must realise that the rules devised by the equitable doctrines of the Courts for the protection of clients from solicitors who purchase their property form a standard of honourable conduct on the part of the profession, and that where a solicitor by consciously departing from that standard has profited at the expense of his client, a case for the exercise of the Court's disciplinary powers is made out. In that case suspension for three years was ordered by the Court. In *In re Lundon*, (1918) N.Z.L.R. 193, the solicitor took advantage of a weak and intemperate man to make an unconscionable bargain with him for uplifting moneys on deposit, to get from the client a document alleging that a sum on deposit was a personal loan, as a device to defeat its being available in law for an expected claim against the client, later claiming that it was a loan and refusing to account. In this case, in view of a previous suspension, the practitioner was struck off the rolls.

Another case illustrating the necessity of a solicitor putting his client at arm's length with him, if he is to benefit pecuniarily from the relations between them, is *In re a Solicitor*, (1894) 1 Q.B. 254, in which the solicitor was a man of ripe age and his client a young man of extravagant habits and a good deal under the influence of his professional adviser and from whom he had received an advance during his minority. Shortly after the coming of age of the client the solicitor received from him sums amounting to £69,500 as a loan at 5 per cent. p.a., and eventually was unable to repay considerable portions of the money lent. For thus combining the two inconsistent characters of a borrower gaining a personal advantage from the use of these large sums and that of professional adviser to the young man, the solicitor was suspended for two years.

Considering the test and the view taken in New Zealand and the consequences that must follow if a solicitor places personal advantage before duty, the decision of the Supreme Court of Tasmania in *Southern Law Society v. Westbrook*, 10 C.L.R. 609, was surprising. In that case a solicitor who was entitled to certain benefits under the terms of a will which had been prepared by himself, and the validity of which was impeached, concealed from his clients, who were also interested under the will, the fact that he took any benefit under the will, and the concealment of that and other material facts induced those clients to employ him as their solicitor, to become parties to a probate action to support the will, and to agree to a compromise by which an investigation of the facts upon which the solicitor's right depended was prevented. The Supreme Court of Tasmania merely reprimanded the solicitor and refused to order him even to pay the costs of the application. On appeal the High Court of Australia took an entirely different view. Higgins, J., at p. 627 said: "It is as if a wolf in sheep's clothing persuaded a lamb to put itself under his protection against a wolf whom he pretends to be near. So great is the power which a solicitor has, in affairs of moneys, with his clients that the Courts insist on the utmost good faith on his part towards them and do not tolerate deceit practised by him with a view to his private interest." Isaacs, J., declared: "The discipline extended by the Court looks entirely to the future. How will the administration of justice be affected? How can this practitioner be trusted to make wills for confiding clients often in extremity of body and spirit, and afterwards, when the client is forever silent, assist the Court in determining whether they should be accepted as the true expression of the testator's own mind, or the unfair product of the will of the solicitor and his managing clerk?" The High Court, therefore, allowed the appeal and struck the solicitor off the roll. *Re a Practitioner*, (1918) South Aus. L.R. 160, had some features resembling those of *In re Lundon*. The client, a steward on a steamship, paid his solicitor several sums of money for the purpose of investment; the solicitor, knowing that the client had paid it under that belief, nevertheless received it intending to use it for his own purposes, and did not undeceive the client or explain to him what the solicitor had in his mind. The practitioner claimed that the payments were loans to him. The Supreme Court of South Australia struck the solicitor off the roll, holding that a practitioner may be found guilty of unprofessional conduct on evidence which would neither be sufficient to support a criminal conviction nor to give the injured party a remedy by any action. But apparently this decision was based on the Law Society Act, 1915, in which the proceedings of the Statutory Committee and its enquiry into charges of professional misconduct are "carefully placed upon a footing sharply distinguished from the criminal plane." In *In re Pullen*, 30 N.Z.L.R., 517, a soncitor on behalf of a client wrote a letter to another solicitor making a claim for a large sum of money, a claim which he knew, or ought to have known, had no foundation in fact,

and intimating that in default of a settlement his client would take criminal proceedings. When his conduct in writing the letter was challenged, his explanation was unsatisfactory. He was suspended for twelve months.

There is no case recorded in our reports where a solicitor has been struck off the rolls simply for failure to keep a separate trust account and to pay all trust moneys into it, and retain them there until paid to his clients, as directed by Section 47 of the Law Practitioners Act, 1908, although this failure has been an ingredient in several of the cases brought before the Court in which there has generally been a grosser offence committed by the solicitor. In *In re Bruges*, 26 N.Z.L.R. 541, Denniston, J., said at p. 544: "I am not prepared to say that the deliberate and long-continued breach of a statutory duty imposed upon solicitors with the express purpose of making it impossible with reasonable care for them to lose their clients' moneys, and by which breach their money has been lost, would not in itself be sufficient to make it a duty of the Court to declare that the solicitor so acting was unfit to practise his profession." But the facts in that case went far beyond that and the solicitor was struck off.

In *Purser's case*, decided in 1929, but unreported, the allegations on which he was struck off (by consent) were his failure to pay into a trust account and to retain there until payment out to his clients certain trust moneys, and his giving cheques on his trust account well knowing that there were not funds in such account to meet such cheques.

The Court takes a serious view of any attempt by a solicitor to evade payment of stamp duty. Thus in *Re Iles*, (1922) 66 Sol. J. 297, a solicitor in Trinidad was struck off the rolls by the Supreme Court of that Colony for altering, fifteen years previously, the date of a deed after its execution with the alleged intention of evading the payment of fifteen shillings penalty for stamping the deed out of time. His appeal to the Judicial Committee of the Privy Council was dismissed, the Court reflecting that the fact had become known in spite of the appellant, in circumstances of some notoriety in which any leniency might have grave consequences, and in spite of an ingenious but somewhat audacious attempt to conceal it by discreditable denials. "The appellant might have," said Lord Sumner, "pleaded that he had long forgotten the circumstances, that he had never recalled the act without regret, and that he had atoned for a single fault by years of unblemished professional conduct. Had he done so, no doubt a different complexion would have been put upon the matter; but he staked all on his affidavit and his affidavit was not accepted."

Book-making, in spite of "Sir Edward's" testimonials to the integrity and sportsmanship of "Duggie" on the back of the *Tatler*, is incompatible with continuance on the rolls as a solicitor: *In the matter of a Solicitor*, (1905) 22 T.L.R. 127. There a solicitor who had ceased to practise since 1898 and had not since taken out his certificate was carrying on the business of a bookmaker. The Court held that it was in the highest degree improper for a solicitor on the rolls to carry on this business and struck him off.

The question of the association of a solicitor with a debt-collecting agency has twice recently come before the Court. The Court did not express any opinion as to how far a solicitor may or may not legitimately associate himself with a genuine debt-collecting society and in *In re A Solicitor*, (1912) 1 K.B. 302, at p. 314, Hamilton, J., said: "It is neither necessary nor desirable to define what connection a solicitor may legitimately have with debt-collecting societies, or societies for the mutual protection of their members." In that case and also in *In re a Solicitor*, (1913) 29 T.L.R. 354, a solicitor was party to the formation of a debt-collecting company or association, financed it, and controlled its affairs with a view to its employment by him as an adjunct to his business as a solicitor; by the agency of the company he systematically solicited debt-collecting business without disclosing his connection with the company and with a view to procuring for himself the business of recovering the debts. The terms on which the solicitor conducted proceedings, viz., a commission by way of percentage on the amount recovered only, was champertous. In the former case the solicitor also included on each indorsement on the writ of summons a claim for his costs, although by the terms upon which he conducted the proceedings the plaintiffs were not to pay him any professional charges. In each case it was held that the solicitor had been guilty of professional misconduct. In the former case he swore a false affidavit and was suspended for twelve months and ordered to pay costs. In the latter, the solicitor having as soon as the former case was decided at once severed his connection with the association, he was ordered to pay the costs of the proceedings. In the former case Darling, J., applied to solicitors the definition given in *Allison v. General Council of Medical Education and Registration*, (1894) 1 Q.B. 750, with regard to medical men: "If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of 'infamous conduct in a professional respect,'"—a rather unfortunate analogy, perhaps, seeing that medical men have been excluded from practice for doing what their professional brethren regarded as unprofessional, but what was really in the interests of suffering humanity.

On the border line between professional misconduct and dishonourable conduct *dehors* the profession was the conduct of a solicitor in *In re a Solicitor*, (1911) 27 T.L.R. 535, in which the headnote reads: "The Court has power to punish a solicitor if he has been guilty of dishonourable conduct which makes him unfit to be a member of an honourable profession and an officer of the Court, or which would be sufficient to prevent his admission as a solicitor." There a solicitor in the capacity of legal adviser to a convict, the notorious murderer Crippen, under sentence of death, was permitted to visit the convict in prison. In abuse of the privilege thus extended to him he aided and abetted Horatio Bottomley, the editor of the newspaper *John Bull*, to disseminate in his journal false information in the form of a letter purporting to be written by the convict, although, as the solicitor knew, no such letter in fact existed, and he further published or permitted to be published other false statements relating to the same matter knowing them to be false. He was held to have been guilty of professional misconduct and was suspended for twelve months and ordered to pay costs.

(To be concluded)

London Letter.

Temple, London,
14th August, 1929.

My dear N.Z.,

We have been on the loose now for fifteen days, though as yet the General Public does not realise that we barristers are, as is our custom at this time of the year, stealing a march on them in the matter of holidays. The August Bank Holiday arrived rather late in the month, this year, and in all years it has now become somewhat extended; not much work was being done anywhere up till the day before yesterday, a Monday; and it was not possible to distinguish us from the ordinary run of vacators or to see any expressions or marks upon our faces intimating that we were committed to something like ten weeks of vacation. But I dare say that the best two, of the whole ten, weeks have now gone; the solicitors, bless them all, will soon be getting back to work themselves and disturbing us in our retreats; and I dare say that on the whole they fare better with their set four weeks, as often as not taken in this month of school holidays, than we do with our more prolonged but also more precarious period. Our professional clients tend to divide themselves, somewhat inconsiderately, into two categories: August holiday-makers, who want to finish off their work, with our urgency-will-oblige assistance, before they go, and September holiday-makers, who return full of vitality and an immediate desire to confer or draft.

Some placid degrees of controversy is being caused by the appointment, if it has taken place or is seriously contemplated, of Sir Cecil Hurst, Legal Adviser to the Foreign Office, to fill the vacancy in the World Court, at the Hague, caused by the death of Lord Finlay. Legal Advisers to the various Departments are all men of, necessarily, some academic ability; otherwise they could not aspire to write the minutes and draft the legal documents for which their several Departments call. The Foreign Office, during the time of Sir Cecil, has been particularly exacting, of course, in its demands upon its legal expert and draftsman, and Sir Cecil has not failed to rise to the occasion. But that he should be appointed to this so very eminent Judgeship would, indeed, be somewhat anomalous; members of the Bar apply for and accept these legal adviserships for a main reason, among others, that they do not see signs, possibly even hopes, of success elsewhere in their chosen profession; the younger men, who, to the number of two, in our day have left practice and possibilities of judicial promotion to go into Sir Cecil's Office, must certainly have been animated by such a modesty. Surely then the protest of the profession, voiced by its more persistent communicators to the London "Times" against the elevation of a Foreign Office Legal Adviser to such a Judgeship, must be held to be well warranted on principle. It is remarked by a well-known authority on these matters, always notably impartial and disinterested in his expressed opinions on professional matters, that "we are not concerned with Sir Cecil Hurst's abilities or his past work; it is enough that his position in the Foreign Office forbids his appointment as a Judge of this Court . . . . The Assembly or the Council," of the League of Nations, "ought, in obedience to their own principles, to reject the nomination," if the British Government persists in making it. The further criticism is made that, if the statements in the House of Commons are to be accepted as exact, the nomination comes not from any Lord Chancellor but from the late Government's Secretary of State for Foreign Affairs.

The American Lawyers, who, from the Mid-West States, now pay their visit of inspection and enquiry to England, have been fully informed, by distinguished lecturers, of the respective functions of a King's Counsel, a Junior Counsel and a Solicitor under our system; the "best bit" of any lecture being, to my mind, the quotation, in Sir Roger Gregory's address upon the work of the Solicitor, of the cynic's comment on the invidious position of the unpaid trustee with us: "I cannot imagine how anyone should ever accept the post of trustee, unless he intends to misappropriate the trust funds!" What we should all enjoy, and I have no doubt you would like to read, would be similarly detailed lectures upon the various functions of the various lawyers in the United States. We all have, for example, the vaguest and the most tantalising idea of what is indicated, especially in remuneration, by the position, unique to the United States of America so far as I know, of the permanent legal officers of the Big Corporations . . . .

Other matters which occupy, or have recently occupied, professional attention have been the conclusion of the Croydon Inquests and the quasi-controversy between the Coroner and his jury at the end of the last one; and the re-opening of the agitation, by Lord Justice Scrutton, against the "preposterous" expense of litigation these modern days. This is a subject upon which I have frequently observed in these letters; and well I may, for the fact of it tends to endanger our whole future, and the wholly illogical system of remuneration, to which Junior Counsel at any rate have to submit, results in this, as matters stand, that we work incessantly upon the preliminaries of actions which are never fought and of which the remunerative function never falls to be discharged. With very few exceptions, for example, it may be taken that the drafting and settling of the Pleading in any action entitles the workman to a fee of two guineas only, however vast the material to be worked upon and to be reduced to the compass of the Statement of Claim or Defence; and even the Advice on Evidence is, traditionally, rewarded with the same meagre fee, the rate of remuneration in both instances having become established upon the principle, once no doubt sound, that the Junior who had these tasks to perform would, at a later stage and for no very arduous work then required, receive the fee more commensurate with the work involved. It is felt that Scrutton, L.J., has somewhat spoilt the effect of his observations, by an easily recognisable understatement of the amount of leaders' fees formerly usual, the understatement being rather by implication than by expression perhaps, but certainly giving the impression that, if His Lordship spoke accurately, no leader ever received more than ten and two upon a brief, unless he was a "Star."

Of the last decision of the year, that of the most general interest is possibly of His Same Lordship's Court of Appeal, in the libel case: *Watt v. Longsdon*. The question came to the Court on appeal from Horridge, J., sitting with a Special Jury. Whether a friend or acquaintance is under any such moral duty in the social exigencies of the day, to communicate to a

spouse information received as to the conduct of the other party to the marriage, as produces, in the absence of malice, the protective privilege of occasion, is, the Court of Appeal held, a matter dependent upon the circumstances of each case, the relation of the communicator with the person to whom the communication is made and the nature of the information communicated. Horridge, J., had tended to exaggerate the general, universal nature of a privileged occasion in such a context; a new trial was ordered. If I have not said it before, I may say now with some emphasis, that we have had, at least in my day, few more able and satisfactory *Nisi Prius* Judges for this class of case, than Mr. Justice Horridge, a fact about him which neither his Court manner would lead the lay spectator to suppose nor his career at the Bar had promised.

I have no other matter to call to your attention, save the publication of the annual pamphlets of the Borstal Association and the Central Association for the Aid of Discharged Prisoners, both compiled in a spirit of modesty and in a vein of careful assessment, very refreshing and encouraging in these days of advertisement and boast. Both pamphlets give rise to one thought only of a critical nature: is not this work for the criminal individuals of the more sorely pressed classes done with a generosity and a tolerance which is almost unfair to the majority of those same classes who, notwithstanding the rigours of their life and the force of the temptations to which their weaker brethren have succumbed, keep, to their infinite credit, straight? Whenever it falls to my lot to sentence a young criminal, and to sentence him in such a manner that I know I am destining him to the most useful and possibly the most happy years of his life, I always feel this qualifying doubt; and now, seeing the pictures of life in a Borstal Institution, I feel that if I had to cope with the home and the surroundings and the circumstances which are theirs, I should unhesitatingly commit the crime that would secure me the healthy and invaluable schooling of a three years' term in a Borstal Institution. I warmly recommend the reading of both pamphlets to you; they give you cause to rejoice that you live in an enlightened age and that the development of the system of administration of justice, of which you are an agent, has led to something more than the conserving of wealth or means in the hands of those lucky enough to become possessed in the first place; it has achieved, already in a very large measure, a regeneration. The Law's excursions among criminals certainly lead to nothing but good; and the profession may take this small share of the credit of the good work, which these pamphlets almost unintentionally evidence, that it has almost entirely subordinated any discretion, which it has in the matter of sentencing, to the advice tendered to it, in general and in the particular case, by the administrative body dealing with the criminal after conviction. Both pamphlets insist upon the number of respective failures, with a view to analysing their several causes and profiting by the experience of a mistake, may be; but no one can possibly be discouraged by the fact, avowed, that there are sometimes failures on the part of Associations who are limited, for their material to work upon, to the worst available!

I recollect, at my closing hour, that there were three further matters I had noted, before the end of the term, to mention to you: recalling the Police Scandal round and about the individuality of Sergeant Goddard of Scotland Yard, you will like to know (if you have not heard upon your own account) that Rowlatt, J., overruled the demurrer pleaded by the said Sergeant and protesting that an Information was not the appropriate procedure by the Crown, whereby it might recover £12,471 in notes, accepted by the Sergeant as bribes. Eve, J., in a City company dinner identified himself as upon the side of those who resist the growing interference of the bureaucrats with the liberty of the subject, which interference was, according to him, "sometimes supported by attractive pretexts and preceded by certain harmless intrusions," and Mr. Justice Horridge, ill repaying the kind things we, of counsel, say about him and notwithstanding his harsh treatment of us, has said that if the country roads were widened, "counsel will not continue to live so adequately out of motor cases as they do now." Horridge, J., showed his sillier side, in making this utterance: only a very small proportion of running-down cases are now fought out and survive the knock-for-knock agreements of the Insurance Companies; and the life of the practitioner, who made even a half of his income out of them, could not in the wildest flight of fancy be described as "adequate."

Yours ever,
INNER TEMPLAR.

Correspondence.

The Editor,
"N.Z. Law Journal."
Sir,

Crown Witnesses.

Anent Mr. Leicester's article on "Tampering with Witnesses" appearing in your number of October 1st, I remember the late Mr. Justice Edwards with some solemnity announcing that witnesses for the prosecution in a criminal case were neither witnesses for the Crown nor for the accused but were witnesses "of God." His Honour's remark and his manner of delivering it have recurred to me many times since and I have often wondered quite what he meant. I know he wished it to be understood that Counsel for the accused was to be considered entitled to interview Crown witnesses because that was the point giving rise to His Honour's remark; but whether he considered the Almighty should be regarded as a party in Crown cases and that His Majesty The King or the Jury, being the "Country," do not sufficiently emphasise the impartiality required in such matters it is hard to say. I doubt whether, with his experience, he intended to suggest that witnesses in Court proceedings have a sanctity generally associated with the Deity. Perhaps it expressed a pious hope of the millenium.

I am, etc.,
"JUNIOR."
New Plymouth,
10th October, 1929.

"We have said again and again, and we now repeat, that in sentencing a prisoner regard must be had to the intrinsic nature of the offence. It is all wrong to send a man to a long term of penal servitude because at some other time, for some other offence, he has received heavy punishment."

—LORD HEWART.

Australian Notes.

(By Wilfred Blacket, K.C.)

Acting Chief Justice Ferguson was moved to the verge of wrath in the recent libel case, *Dr. Thompson v. Truth and Sportsman Ltd.* The doctor had had certain accounts outstanding and he employed an agent to collect these, giving him certain information as to the patients' ailments. Later he sued the agent for moneys collected but not paid over. There was no ground of defence to the claim but the doctor was cross-examined furiously for five hours on the information he had given to the agent, and it was on account of the report in the defendants' paper of these proceedings that the libel action was brought. In athletic words His Honour denounced such cruel and futile tactics ; but his remarks were *obiter*—His Honour in legal phrase was merely " talking to the Court clock " —and he could suggest no way of preventing such attacks upon a plaintiff suing in a just cause, nor can I, but I think that someone ought to.

The following is an advertisement which appeared in the Sydney " Morning Herald." :—

> Money on Fixed Deposit accepted by established firm solicitors. Sums from £50 to £500. Good Interest. No.—— Herald.

Two or three advertisements of this kind have recently appeared and no doubt some persons, being females, will be tempted by the " good interest." Query, would money so deposited be money " entrusted to (a solicitor) in the course of his practice as a solicitor " within clause 15 (1) of your Solicitors' Fidelity Bill ? I should think not ; money " lent " would seem not to be money " entrusted " within the meaning of that clause.

Judge White sitting in Quarter Sessions at Wollongong recently created an interesting precedent. A prisoner upon trial in a simple case of false pretences defended himself at such length that the case lasted for three and a half days, and he had addressed the jury for seven and a half hours when the Judge interposed and said that he would have to stop in ten minutes, and enforced that order. The point will probably come before the Criminal Appeal Court. It reminds me that in a Sydney Jury Court years ago a juror in his crude way endeavoured to stop an oration by Colonna Close. He rose when Colonna had been emptying the dictionary over the jury for two hours and asked : " Your Honour, are we obliged to listen to all this rot ? " And His Honour said wearily : " Yes gentlemen you are—and so am I." Then he covered his face with his hands and none could see whether he slept, or wept, or just silently endured the rest of the oration.

The General Election here has produced some new kinds of electioneering—I carefully avoid the word " propaganda," which, thank Heaven, will be heard no more till next Election—and promises to raise some new questions of law. The 35 to 34 vote against the Government which led to the dissolution was brought about by the action of five of its supporters who crossed the floor to vote with the Opposition on a fool-motion for a referendum on a question that was incapable of being made the subject of such a vote. One of the members who crossed the floor was Mr. Marks, a wealthy man, who represented a Sydney constituency. He had recently visited Hollywood and was well acquainted with some leading film-producers. A few days before the vote was taken the Federal Treasurer, Dr. Earle Page, had introduced his Budget imposing heavy taxation upon film owners and proprietors of picture shows. While the electioneering was proceeding the Sydney " Morning Herald," which strongly supported the Government, printed statements and reproduced a receipt showing that Union Theatres Ltd., a company which owns many films and picture shows, had paid for some electric signs supplied to Mr. Marks' Committee, and in the same column printed Mr. Marks' explanation of the transaction. There were also some other comments by the Herald that I, for obvious reasons, do not quote. Union Theatres Ltd. issued a writ for £10,000 against the " Herald," and it has been stated on its behalf that the statement imputed corruption on its part. Apparently the question arises whether a person who assists one political party, in order that taxation imposed by the other party may be avoided, is doing an act that subjects him to hatred and/or contempt. Avoiding the expression of any opinion on the point, I am still able to suggest that an answer in the affirmative would tend to diminish donations to party funds, so that the decision in the case should be of more than local interest. In Sydney the writ under the Common Law Procedure Act simply stated that the coveted £10,000 was for " damages," but the same plaintiff suing the " Argus," in Melbourne under the Judicature system in its statement of claim set out the words relating to payment by Union Theatres for signs for Mr. Marks and the published comment by the " Argus " : " It is obvious from this what an enormous part these interests are playing in the Election in their endeavour to bend the Commonwealth Parliament and the public men of Australia to their will. Surely the electors are not going to stand for such methods " ; and the statement of claim went on to charge that the publication imputed corruption. An application to strike out the claim as vexatious and frivolous was made to Cussen, J., whose reserved decision has not yet been delivered.

Mr. Justice Sly who died on the 12th October was for twelve years a Justice of the Supreme Court of New South Wales ; he retired in 1920 having reached the age of seventy years. He was a very careful and painstaking Judge, and an able lawyer. On one occasion however a spoonerism made a slight inaccuracy in his charge to the jury. It was a case wherein a doctor was sued for negligence. His Honour said : " Now gentlemen you have been quite properly told that you must not expect an ordinary medical man to have the high ability of a McCormick "—our most renowned surgeon—" all that he undertakes to do is to treat his patients with a reasonable degree of kill and scare. You understand that, don't you—he must exercise a reasonable degree of scare and kill." There was an appeal to the High Court and on the printed notes the words appeared just as I have written them, but the appeal never came to a hearing. And of spoonerisms, I remember another by Sir George Innes. He got his tongue caught in the phrase : " jot or tittle " and stated it in various erroneous ways. Until hearing him I did not think it possible that the phrase was capable of being stated in so many wrong ways ; but of course it must always be remembered that Sir George Innes was an exceptionally able man.

In your number of May 14th (*ante* p. 127) I mentioned the decision of Long Innes, J., to the effect that Mr.

E. R. Abigail, solicitor, who had lent his own moneys to the extent of £89,000 in seventy-one transactions during three years, was not a "money lender" within the meaning of the Act. This decision, you may be interested to learn, has been affirmed by the Full Court, in a decision that will be reported in the N.S.W. Law Reports.

The Privy Council.

New Zealand Appeals.

When the question of the abolition of the right of appeal to the Judicial Committee of the Privy Council was recently mooted, New Zealand was not slow to indicate its desire for the retention of that right. Of considerable interest is the following editorial comment of our English contemporary, the "*Law Journal*," in its number of 14th September last :—

"The Prime Minister of New Zealand has officially announced that this Dominion has no intention of altering the present position maintaining the right of appeal to the Judicial Committee of the Privy Council. The news is good hearing, for, if the appeals from New Zealand have during the past few years been infrequent and rare, a somewhat difficult situation of the longer past (the blame for which was, in the main, at the home end) was very happily cleared up during the course of a series of appeals heard three or four years ago, and a very happy relationship was then established between the far removed jurisdictions. The present Chief Justice, Mr. M. Myers, K.C., as he formerly was, came over to argue in all five appeals ; and, save for a small loss in that in which he appeared for the respondent, and in which he for the most part held the judgment, he succeeded in them all ! Another member of the New Zealand Bar, Mr. M. Gresson, also came to this country (no mean journey !) as well to make our acquaintance as to argue in the appeals. Both received an enviable ovation at their Lordships' Bar and among the profession ; and in both cases, the impression which they took away, though said by them to be of the happiest, could be no happier than the impression they left behind. From an Imperial point of view, generally, and for us particularly, it is a very fortunate thing that between us and almost our most distant outpost a regard as strong and as affectionate should prevail as exists anywhere in the length and breadth of the whole English-speaking areas of the world."

A Short Form.

The Solicitors' Journal gives the following as the will of Frederick E. Castles, Insurance Broker, New York :—

"All my earthly goods I have in store
To my dear wife I leave for evermore.
I freely give—no limit do I fix
This is my will and she the executrix."

Law Reports.

Some Notes on the History of Law Reporting in England.

(*Concluded from p. 302*)

The law reports, though regularly compiled for some three centuries following upon the discontinuance of the Year Books, were not compiled upon any systematic or harmonious plan. Not only was the compilation of this invaluable source of law an haphazard undertaking, but its preservation and publication was in most instances due entirely to chance. The compilations as and when made were not, in the vast majority of cases, intended to be more than rough notes for the compiler's own use. A lawyer, specialising perhaps in a particular branch of the law, would form the habit of attending a particular court, even when not professionally engaged therein, for the purpose of making notes for future reference. Colleagues, hearing of the existence of these notes, would borrow them from time to time. From these rough notes, the labour of one industrious student of the law, borrowed by several, developed, in process of time, printed publications sold for the private profit of the compiler.

The eminent reporter Burrow, who specialised on cases decided in the King's Bench Division between the years 1756 and 1772, takes us behind the scenes in his Preface dated 1765 : "It may naturally be asked 'Why I publish at all ?' . . . I found myself reduced to the necessity of either destroying or publishing these papers, which were originally intended for my own private use and not for public inspection. For as it was become generally known that I had taken some account (good or bad) of all the cases which had occurred in the court of King's Bench for upwards of forty-five years, I was subjected to continual interruption and even persecution by incessant applications for searches into my notes. . . . This inconvenience grew from bad to worse, till it became insupportable ; and from thence arises the present publication."

It was long obvious that such a chaotic means of procuring quotable sources of the common law should be ended, but it was not until 1865 that the system now in vogue was at last put into operation. In that year, the "Incorporated Council of Law Reporting for England and Wales" began to issue its series of monthly law reports, which are quotable, without question, in any court of law. The Law Reports are not in the real sense of the term "official" ; they are compiled and published by a co-operative, self-supporting, commercially-managed body, which, however, is controlled by a joint committee, on which representatives of official legal organisations sit. The Attorney-General, the Solicitor-General and the President of the Law Society are, indeed, *ex-officio* members. Twelve other members are elected by the Inns of Court, the General Council of the Bar, and the Law Society.

The Council zealously preserves its independence of the Courts, appointing its reporters (some two dozen or more members of the Bar, each assigned to a particular court or class of case) without reference to the Courts—with one exception ; the House of Lords makes its own appointment, though even there the Court, as a rule, invites the Council to make the nomination. The

Council enjoys, however, the co-operation of the Courts; the Judges of the Chancery Division always receive and generally revise the proofs of their judgments, a practice which obtains, also, with most of the Judges of the other Divisions.

Besides the Law Reports issued by the Council of Law Reporting, other series have acquired the status of "authorised" reports, conferred upon them by custom and the effect of judicial decisions. The closest rival, perhaps, to the Law Reports is the monthly series of *Law Journal Reports*, which has been published continuously since 1822; the Judges revise their judgments for this series also. Other notable series are those issued by *The Times*, *The Law Times* and *The Justice of the Peace*.

The "authorised" reports and many of the "unauthorised" (a distinction which is not always, or officially, clearly marked) are concerned exclusively with the reports of cases of definite legal importance—in other words, leading cases. Very many journals, however, which have a special, or professional, or technical appeal to limited sections of the community only are at pains to include in their reports of law cases as many cases as possible which have relation to their particular interests, whether or not they have also a legal interest. Such reports are often invaluable, as containing expositions of professional or trade customs, even to the lawyer; they have in any event news value of interest to their particular readers. Innumerable examples of such series are to be met with in the worlds of commerce and industry, most trade papers making a regular feature of law reports; or, again, in the journals which circulate amongst accountants, engineers, doctors and the like.

Pending the publication in the Law Reports of a leading case, the *Weekly Notes* and the Notes of Cases in the legal journals provide a useful means of learning of recent decisions; these reports, however, are not quotable, at any rate in the Court of Appeal: *R. v. Loveridge*, (1902) 2 Ch. 859.

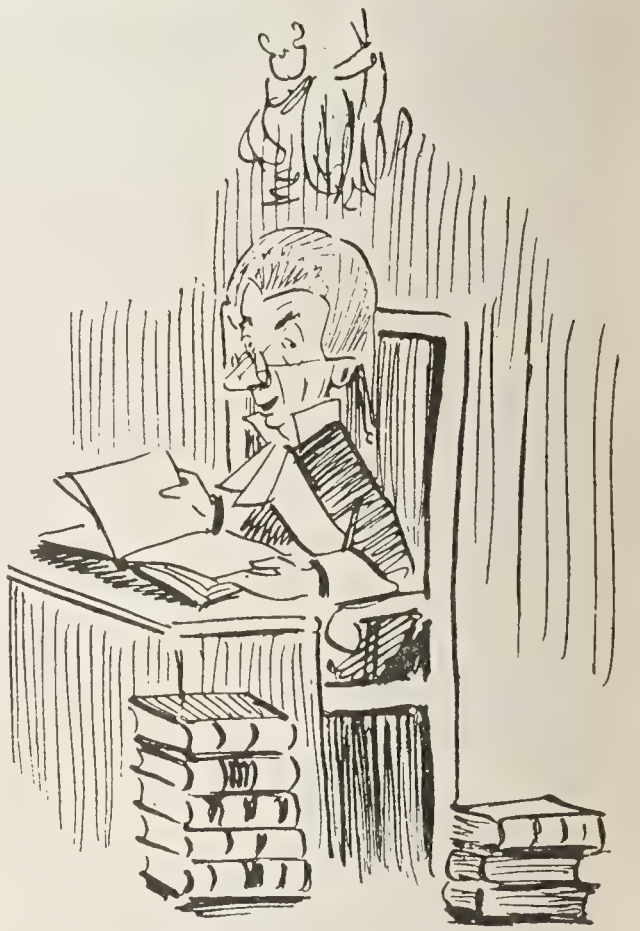
Ridley, J's. Lapse.

Ridley, J., was presiding over the Shrewsbury Summer Assizes, and an hot summer Assize at that. The prisoner, who was defending himself from the dock, clearly fancied himself as an eloquent speaker, and he gave an inordinately lengthy display of his gifts. The learned Judge, having asked him if he wished to give evidence or to call witnesses, and having been assured that the accused merely wished to speak from the dock, allowed his attention to wander a little. It was even observed that his eyes were shut. The accused in the dock at length wound up an impassioned, if interminable, appeal to the jury in these words: "I have only one witness to my innocence, gentlemen of the jury, and that is the Almighty." There was a dead silence in the Court where the Judge's was not the only attention that was wandering. Meanwhile the silence was enough to recall the judicial attention, and His Lordship immediately addressed himself to the concluding sentence. "Look here," he said to the accused, "if you have a witness to call, as I understand you to say that you have, he must be called, and must go into the box and be sworn in the ordinary way." The learned Judge, unconscious of any obstacle in the way of carrying out his suggestion, and indeed impatient at the delay, sat waiting for the witness to appear.

Forensic Fables.

THE EXPERIENCED JUDGE, WHO EXPLAINED TO THE JURY THE LAW RELATING TO CONTRIBUTORY NEGLIGENCE.

There was Once an Experienced Judge who Tried a Running-Down Case. The Defendant Pleaded that the Said Accident was Due to the Negligence or Alternatively the Contributory Negligence of the Plaintiff. The Experienced Judge (who was a Person of Robust Intellect) Requested the Jury to Say whether the Disaster in Question was Caused by the Negligence



of the Plaintiff or by that of the Defendant. As the Result of an Application for a New Trial the Experienced Judge Gathered that he had Failed to Explain Sufficiently to the Jury the Law Relating to Contributory Negligence. Shortly Afterwards the Experienced Judge had Another Running-Down Case to Try. This Time he Determined there should be no Mistake about the Law. So he Told the Retired Draper, the Lady in Glasses, the Dejected Publican, and the Nine Others who Composed the Jury All About It. They were, he said, to Consider whether (if they Thought that the Motor had in fact been Guilty of Contributory Negligence) the Taxi-Cab could by the Exercise of Reasonable Care have Avoided the Consequences of Such Contributory Negligence. Further, they Must Ask themselves whether it was the Motor or the Taxi-Cab which had the Last Opportunity of Avoiding

the Negligence of the Other. Thirdly, they must Enquire whether the Negligence of the Motor, or that of the Taxi-Cab, could be Deemed to be the Proximate, as Distinguished from the Remote, Cause of the Plaintiff's Injuries. Fourthly, they must Tell him whether they Regarded the Negligence of Either as the Efficient or Decisive Cause of The Accident. Lastly, they Must Bear in Mind that if the Confusion of the Driver of the Motor was Induced by the Want of Skill and Caution of the Taxi-Cab they should Give Due Weight to that Fact in Forming an Opinion as to the Degree of Responsibility which must be Attributed to the Former. The Experienced Judge then Read to the Jury at Length the Various Relevant Judgments Contained in the Law Reports. He Finished Up with the Speeches of Their Lordships in *The Volute*, (1922) 1 A.C. 129, Adding, however, the Warning that the Jury might Disregard the Provisions of the Maritime Conventions Act, 1911. After an Absence of Four Hours the Jury Announced that there was no Hope of their Agreement. As the Plaintiff's Financial Resources were Now Exhausted the Case gave no Further Trouble.

MORAL: *Explain the Law to the Jury.*

Solicitors' Fidelity Fund.

Amendments to Bill Made by Statutes Revision Committee

Several amendments as regards minor matters appear in the Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Bill as reported from the Statutes Revision Committee. A verbal alteration of no apparent consequence is made in Clause 3 dealing with the application of the Act. From Clause 14 the words empowering the Council to invest the fund otherwise than in trustee securities are struck out, and so is Subclause (2) authorising the payment of the income derived from the investment of the fund while the fund amounts to or exceeds £100,000 to the general account of the New Zealand Law Society. The proviso to Clause 18 the effect of which was to debar any solicitor to whom the Bill applies or any person practising as a barrister from claiming against the fund is also struck out.

Promotion to Law Lordship.

The promotion of a Judge of first instance to the House of Lords, without taking the Court of Appeal on his way, is unusual, though not unprecedented. It happened half a century ago in the case of Lord Blackburn, and a more recent instance is that of Lord Parker, who went from the Chancery Division to the House of Lords in 1913, and who did distinguished judicial work there and in the Privy Council during the war. The latest example is the appointment to the House of Lords, in February last, of Tomlin, J., of the Chancery Division. A more signal instance of promotion was that of Lord Macnaghten, who went straight from the Bar to the House of Lords.

Bills Before Parliament.

Arms Amendment. (HON. MR. WILFORD). Firearms or ammunition brought to New Zealand without permit may be seized and detained by any officer of Police or Customs: subsection added to S. 6 of principal Act accordingly.—Cl. 2. S. 7 of principal Act amended by omitting from subsections (1) and (2) words "firearm, ammunition, or explosive," and substituting word "pistol"; subsection (3) repealed; nothing in Section to apply to importation of pistols into New Zealand by a licensed dealer; S. 3 (2) of Act of 1921-22 repealed.—Cl. 3. Word "pistol" substituted for "firearm" in S. 9 of principal Act.—Cl. 4. S. 11 (4) repealed.—Cl. 5. S. 12 (1) amended by omitting words "for the purchase of which a permit is required by this Act."—Cl. 6. Police officer having reasonable grounds to suspect that any person has in his possession or control any firearm, ammunition, or explosive, and that such person is of unsound mind, or in state of intoxication, or has attempted to threatened to kill or do serious injury to himself or other person, may without warrant search person or place, detain such person for purposes of search, and seize and detain any such firearm, ammunition, or explosive. S. 15 amended by adding subsection accordingly.—Cl. 7. Subject to order of Magistrate under S. 19, firearms, ammunition, or explosives detained for not less than six months may be disposed of as Commissioner of Police may direct.—Cl. 8. Ss. 6, 7, and 8 of Amendment Act of 1921-22 repealed.—Cl. 9. S. 12 of Amendment Act, 1921-22 amended by omitting word "firearms" where first occurs and substituting word "pistols," and by omitting words "guns or."

Coroners Amendment. (MR. MACMILLAN). Supreme Court, upon application by Attorney-General, if satisfied (a) that a coroner refuses or neglects to hold an inquest which ought to be held or (b) by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, discovery of new facts, fresh evidence or otherwise it is necessary or desirable in the interests of justice that another inquest should be held, may order an inquest to be held and quash inquisition of inquest previously held. Court may order inquest to be held either by same or other coroner. Act to apply to inquests held after 1st January, 1928. Nothing in Act to prejudice or restrict any power or authority now vested in Supreme Court with reference to coroner's inquests.

Imprest Supply (No. 4). (RT. HON. SIR JOSEPH WARD.) Authorising imprest grant of £2,006,000 out of funds and accounts in First Schedule and imprest grant of £339,000 out of accounts in Second Schedule.

Imprisonment for Debt Limitation Amendment. (MR. MASON.) Paragraph (e) of S. 7 of principal Act, empowering Court to make an order on judgment summons where debtor has sufficient means and ability to pay the debt, or where he is about to leave New Zealand without paying the debt or to depart elsewhere within New Zealand with intent to evade payment, repealed.—Cl. 2. Proviso to S. 8 of principal Act, preventing making of order of committal where judgment creditor a debt-collector, repealed.—Cl. 3.

Licensing Amendment. (MR. MASON.) Subsection (8) and (15) of S. 11 Amendment of Licensing Act, 1914, amended so as to extend powers conferred by wine-maker's license.

Native Trustee Amendment. (HON. SIR APIRANA NGATA). Prescribing additional classes of security for investment of moneys in Native Trustee's account.—Cl. 2. Alienations of property to Native Trustee pursuant to S. 24 of principal Act not to require confirmation under Native Land Act, 1909.—Cl. 3. S. 11 of Amendment Act, 1921-22, as to application of profits of Native Trust Office amended.—Cl. 4. Extension of provisions as to advances from Native Trustee's account in respect of administration of estates or reserves.—Cl. 5. Authorising Native Trustee to lease Native reserves for periods not exceeding twenty-one years.—Cl. 6. Powers of leasing Poukawa Native Reserve.—Cl. 7. Authorising Native Trustee to grant to any local authority easements in respect of drainage or sewerage operations.—Cl. 8.

Transport Law Amendment Bill. (HON. MR. VEITCH). The provisions of this Bill of some sixty clauses are too lengthy to permit of detailed summary in this column. The following is a summary of the explanatory memorandum annexed to the Bill.

Part I.—Transport Department. Provides statutory recognition of the recently constituted Transport Department and

defines its functions. The Department is charged by the Act with the administration of the enactments mentioned in the Schedule, all of which have reference to transport matters, and more particularly to motor transport. Part II.—Motor-vehicles Amendment. The important amendments proposed in this Part are—(1) All exemptions from the payment of annual license fees are abolished. (2) Provision is made for altering the system of licensing motor-drivers; in future such licenses will be issued by the Registrar of motor-vehicles, or by a Deputy Registrar, instead of by local authorities, thus simplifying the procedure as to their annual renewal. The license fees will, however, continue to be paid to local authorities. (3) Provision is made for the compilation by the Justice Department, for the use of the Transport Department, of monthly lists of persons whose drivers' licenses have been endorsed or suspended by any Court. Part III.—Motor-omnibus Traffic. 1. It is proposed in this Part to make motor-omnibus districts coterminous with highway districts under the Main Highways Act. This change will bring within the scope of the Act those motor-omnibuses that are now carrying on business outside any motor-omnibus district. 2. Under the present law, licenses to carry on motor-omnibus services are granted by local authorities which, in most cases, are themselves enaged in carrying on the same class of service. It is proposed by the Bill to substitute a specially constituted licensing authority for each district, consisting of officials and of representatives of the interests affected. 3. A central licensing authority is constituted to deal with applications for motor-omnibus services to be carried on in two or more motor-omnibus districts. 4. A Dominion Transport Appeal Board is constituted to hear appeals from the decisions of licensing authorities. 5. Where applications for licenses in respect of motor-omnibus services are made by any local authority or by the Minister of Railways, and also by a private person, in respect of the same routes, the licensing authority is, in the circumstances defined in clause 38, required to give preference to the local authority or Minister over other applicants. Where the renewal of the license of a private person is refused on the ground that the service would be in competition with the service of a local authority or the said Minister, the licensee is entitled to require the local authority or Minister, as the case may be, to take over his undertaking, at a price to be agreed on, or to be determined by a Compensation Court. 6. The method of fixing the price to be paid for any such undertaking is substantially the same as is already prescribed by section 15 of the Motor-omnibus Traffic Act, 1926, except that a licensee is expressly declared to be entitled to receive compensation for the loss of his license in addition to the value of the property taken over from him. 7. Special provision is made for the issue of permits for the use of licensed motor-omnibuses on special occasions (for example, race days and holidays). 8. Additional provisions are made with respect to accidents occurring in connection with motor-omnibus services, to permit of the holding of formal investigations into the causes and results thereof. Part IV.—Motor-vehicles other than motor-omnibuses carrying on Transport Services on Definite Routes, according to a Time-table. It is intended to apply, with the necessary adaptations, the provisions of the Motor-omnibus Traffic Act to other motor-vehicles carrying on transport services of passengers or goods on definite routes and in accordance with a time-table. Part IV enables this to be done when the Department is ready to undertake the work of licensing, inspection, &c. Part V.—Modification of certain Local Acts. The sole purpose of this Part is to restore the jurisdiction of licensing authorities under the Motor-omnibus Traffic Act within the areas of the Auckland Transport Board and the Christchurch Tramway Board. Part VI.—Main Highways. The principal amendments of the law proposed to be made in this Part are—(1) The North Island and the South Island are to be separately represented on the Board. In matters affecting the North Island, South Island representatives are not entitled to vote; and, similarly, North Island representatives cannot vote on South Island proposals. (2) Provision is made for the allocation between the North Island and the South Island of the moneys available in any year for the maintenance of main highways. (3) A limited authority is conferred on the Board to assist local authorities in the maintenance of roads and streets that are not main highways. The amount to be expended for this purpose is limited in any year to £150,000. Part VII.—Motor-spirits Taxation. Provision is made by this Part for the imposition of an excise duty on motor-spirits produced in New Zealand. Provisions are also made with respect to refunds of duty on motor-spirits that are destroyed or are used otherwise than in motor-vehicles. Part VIII.—Amendment of Public Works Act. It is proposed in Part VIII to repeal the present express prohibition of the use of certain specified classes of motor-lorries contained in section 164 of the Public Works Act, 1928, and the limitations as to the use of six-wheeled motor-lorries contained in section 165. The use of these vehicles can be effectively dealt with under section 166 of that Act, which provides both for the classification of motor-vehicles and for the classification of roads and streets. Part IX.—Tramways Amendment. The only matter dealt with in this Part has reference to what are known as "one-man trams," in which there is no conductor as distinguished from the driver. Part X.—General. Drivers' licenses and licenses in respect of heavy motor traffic to be issued by the Post Office: fees will be collected by the Post Office, and will then be allocated to the local authorities entitled to receive the same. Clause 61 prohibits the practice that has been adopted by certain local authorities of fixing the remuneration of their Traffic Inspectors by reference to the amount of the fines recovered in respect of offences.

New Books and Publications.

The Companies Act, 1929. By Sophian. (Sweet & Maxwell Ltd.). Price 15/-.

Everyman's Own Lawyer. Fifty-ninth Edn. 1929. By a Barrister. (Crosby Lockwood). Price 18/-.

Local Government Act, 1929. By R. A. Glen. (Eyre & Spottiswoode). Price 24/-.

Recent Changes in Company Law and Accounts. By W. Barrie Abbott, B.L., C.A. (J. Blackwood & Son). Price 6/-.

Trial of Jean Pierre Vaquier. (Notable British Trials). Edited by H. H. Blundell and R. E. Seaton. (Butterworth & Co. (Aus.) Ltd.). Price 9/-.

Practical Guide to the Duties and Liabilities of Trustees in Bankruptcy and Trustees under Deeds of Arrangement. By Alma Roper. (Sweet & Maxwell Ltd.) Price 47/-.

Final Forensic Fables. By "O." (Butterworth & Co. (Pub.) Ltd.) Price 4/6.

Topham's Company Law. Seventh Edition. By A. F. Topham, LL.M., K.C. (Butterworth & Co. (Pub.) Ltd.) Price 9/-.

Personal Actions at Common Law. By R. Sutton, M.A. (with a Foreword by Lord Atkin of Aberdovey). (Butterworth & Co. (Aus.) Ltd.). Price 15/-.

Willis' Workmen's Compensation Acts (with Notes, Rules, Orders and Regulations). Twenty-sixth Edition. By W. Addington Willis, C.B.E., LL.B. (Butterworth & Co. (Pub.) Ltd.). Price 18/-.

Changes in Company Law, 1929. By P. J. Sykes. (Butterworth & Co. (Pub.) Ltd.) Price 7/-.

Butterworth's Workmen's Compensation Cases, 1928. Volume 21. Edited by His Honour Judge Ruegg, K.C., and Edgar Dale. (Butterworth & Co. (Pub.) Ltd.) Price 26/-.

The Life of Sir Edward Marshall Hall. By Edward Marjoribanks, M.P. (Gollancz). Price £1 9s.

The Law of Income Tax. Fourth Edition. By E. M. Konstam, K.C. (Stevens & Sons Ltd.). Price £2 7s.

Tudor on Charities. Fifth Edition. By H. G. Carter and F. M. Crawshaw, B.A., LL.B. (Sweet & Maxwell Ltd.). Price £3 10s.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"It would be strange if we had escaped from the frying-pan of the prerogative to fall into the fire of a Minister's regulations." *Lord Sankey.*

Vol. V. Tuesday, November 12, 1929 No. 19.

"The New Despotism."

It is reported that the Lord Chancellor has appointed an All-Party Committee of Parliamentary lawyers to consider the powers exercised by Ministers and the Crown by delegated legislation and judicial and quasi-judicial decisions. It is said that the Committee will report as to what safeguards are necessary to secure Parliamentary sovereignty and the supremacy of the law. The extent to which Parliament should delegate legislative action is a practical question of expediency but, as Parliament can always revoke any powers given, its sovereignty does not seem to be attacked. Nor, again, can it be said that the supremacy of the law is in question, though there can be no doubt that the supremacy of the Law Courts is, and the point seems to be whether a change of constitutional procedure which entrusts the interpretation as well as the administration of statutory rights and liabilities to officials of a Government Department is in the public interest.

The criticism of bureaucracy by the Lord Chief Justice, particularly in his book "*The New Despotism*," has directed public attention to the results of legislation which throws into the hands of the officials what has hitherto been regarded as work within the sphere of our judicial system. Lord Hewart's book has not yet reached New Zealand, but one of his strongest protests is said to be directed against the insertion in Acts of Parliament of a clause giving Departments power to interpret provisions. It is obvious that a Department which has to administer an Act of Parliament is not the best tribunal to interpret its provisions; but, although that criticism will be generally agreed to it does not follow that there will be the same general agreement that existing judicial machinery is able to cope with the growing bulk of work of a judicial nature created by the Legislature.

The *Daily Telegraph* is reported as saying: "It is unusual for the Lord Chief Justice to write a book which is so much more than a criticism as to be the most damning and crushing indictment of a well-defined feature of the existing system of Government. Indeed, it is so unusual that the motive must not only be strong but overpowering. His cause is nothing less than the liberty of the subject and his challenge must be answered without delay." In New Zealand, as elsewhere, there has been for some time a strong body of criticism directed against legislation by order-in-council and regulation, and in all such criticism the citadel which is said to be attacked is the liberty of the subject. The liberty of the subject is too often an excuse to avoid the real issue, which is practical. Parliament itself has never liked delegating to subordinate bodies too much legislative authority, even though such authority is subordinate, but modern conditions have forced Parliament to call upon subordinate authorities to exercise increased powers in cases which can only be conveniently formulated in regulations. That such delegation happens to be more now than in the past to Government authorities is due to Parliament's own action in enlarging the sphere of Government enterprise. The inevitable result is that, if in addition to the power to make regulations the authority concerned is given discretion in its administration of those regulations and the right to interpret them, a weapon is placed in its hands by which injustice can be inflicted; the very appearance of justice is swept aside, as the laws are not trained for the weapon. To make a subordinate administrator arbiter when a difference arises between his view of his Department's rights and the ordinary citizen's view of them, is entirely subversive of English procedure. In such circumstances the right of the citizen to invoke the decision of ordinary Courts of Justice is fundamental to English ideas, and modern legislation which expels the Court and leaves the administrator judge in his own cause is repugnant to them.

But if the real purpose of the legislation is to displace in a certain sphere the ordinary Court of Law in favour of some other impartial body the question is of an entirely different character. The elimination of the Court of Law as arbiter in these matters has taken place, to a great extent, because of a feeling that its methods of procedure were ill adapted for the ready decisions required, and a pessimistic view that the task of overhauling judicial machinery so that it may function with speed and efficiency will not be undertaken in reasonable time.

Professor de Montmorency has pointed out that the transference of judicial power to the Executive from the Judiciary marks a phase not previously unknown in history. In Rome the administrative system undermined the law; but modern legislation, according to Professor de Montmorency, sweeps it aside. It is of the utmost importance that criticism of modern legislative tendencies should recognise the difficult and complicated problems that legislation has to meet and that Parliament has found it impossible to cover in statutes the innumerable detailed circumstances which will have to be provided for by the administrators. The appalling length of many of our statutes is an example of this. Professor de Montmorency does not advocate that the review of administrative action should be withheld from the purview of the ordinary Law Courts on the ground that the administrators are the best judges of their own action and procedure, but because he has come to the conclusion that the "slow judicial method cannot be preserved in its entirety." According to him the French system of administering law, while excellent in France, is not in accordance with British lines of juridical thought—hence his recommendation of the creation of separate Courts to review administrative action.

To lawyers Lord Hewart's views, as set out in "*The New Despotism*," will prove of absorbing interest, and the finding of the Parliamentary Committee is bound to have far-reaching results. British lines of juridical thought have, generally speaking, moulded British legislation, but at the same time those lines are distinctly conservative and in no sphere more so than in that of judicial procedure. Unless those concerned in the regulation of judicial procedure realise that the machinery of Justice must be adapted to a constantly progressive task, the sphere of the ordinary Courts of Law is more likely to be restricted than extended.

Court of Appeal.

Herdman, J.
Adams, J.
Ostler, J.

September 27; October 10, 1929.
Wellington.

C. DICKINSON & CO. LTD. v. HERDMAN.

Practice—Order—Appeal from Magistrates' Court to Supreme Court—Application for Leave to Appeal to Court of Appeal—Leave Refused in Chambers—Order Refusing Leave Not Sealed—Motion for Review—Court Order and Not a Judge's Order—Order Final Though Not Sealed—No Necessity for Formal Order or For Sealing—Judicature Act, 1908, Section 67—Code of Civil Procedure, Rules 416 and 417.

Appeal from a decision of Myers, C.J., and MacGregor, J., reported 5 N.Z.L.J. 258. The facts of the case were as follows: On 8th May, 1929, MacGregor, J., gave judgment upon an appeal from a decision of a Magistrate. The Magistrate had given judgment for the appellant on a claim for commission on the sale of land. The learned Judge reversed that decision and ordered that the case should be remitted to the Magistrates' Court so that judgment could there be entered for respondent. When the judgment was delivered counsel for appellant moved orally in open Court for leave to appeal to the Court of Appeal, The motion was adjourned, and was eventually heard on 14th May, before His Honour in Chambers, when he refused the necessary leave. On 18th May the Registrar forwarded to the Magistrates' Court a memorandum of the decision of the Supreme Court as required by Section 169 of the Magistrates' Court Act, 1928. The memorandum did not state that leave to appeal to the Court of Appeal had been refused. It was entered as a judgment of the Magistrates' Court on 20th May, and the respondent acted upon it. On 29th May the appellant filed a motion in the Supreme Court for review and rescission of the order made by MacGregor, J., and in the alternative for an order granting leave to appeal to the Court of Appeal. Two affidavits were filed in support of the motion, the only ground stated in them being that the question involved in the appeal was one of great general interest. Myers, C. J., and MacGregor, J., dismissed the motion and from that order the appellant appealed.

Cornish and James for appellant.
O'Leary for respondent.

OSTLER, J., delivering the judgment of the Court, said that on the hearing of the motion in the Supreme Court the main argument adduced was that the refusal of leave to appeal was a Judge's order, and that it could be reviewed and rescinded under the provisions of Rule 421. That argument was rejected by their Honours in the Court below, and the Court of Appeal agreed with the judgment of the Court delivered by the learned Chief Justice on that point and with the reasons given for that judgment. The Court found it unnecessary to add anything to the reasons given in the Court below, because counsel for the appellant had admitted that upon that point the judgment was right.

Counsel for the appellant, however, relied upon another point which was raised in the Court below, but which was only slightly referred to in the judgment. They contended that the decision of the Court refusing leave to appeal was an order; that being an order it was sealable; that no order was taken out by respondent; that a Court always had power until its orders were sealed to review, alter, and even to rescind them, and, therefore, that the appellant Company had the right at any reasonable time before the order was completed, to move the Court to review its own order. They contended that the second part of the motion quoted was an application to the Court to review its own order, made within a reasonable time and before the order had been completed. They claimed that the judgment of the Court below decided that the Court had no power to review and rescind its own orders before such orders were drawn up and completed, and that they had an appeal on that ground. It was admitted that the only result of such an appeal being successful would be a reference back to the Court to ascertain whether it would rescind its own decision. In a sense the refusal of leave to appeal by the Court was an order, but it was not an ordinary kind of order. It was, as was held by the House of Lords in **Lane v. Esdaile**, (1891) A.C. 210, a decision in the exercise of a discretion, which was entrusted to the Supreme Court in order to bring about a finality to litigation which was considered to be in the public interest. A perusal of the judgments of the learned Law Lords in that case would show that they found great difficulty even in deciding that such a decision was an order at all. In their Honours' opinion it was somewhat misleading to call the decision of the Supreme Court refusing leave to appeal further "an order." It was wholly unnecessary to embody such a refusal in a formal order to make it *res judicata* between the parties. The decision was final and not subject to review or appeal. There were a number of instances in which it was unnecessary to embody the decision of the Court in a formal order. In England there was a special rule dealing with the matter: see Order 52 Rule 14, the Annual Practice (1929) p. 941. There was no corresponding rule in our Code, but Rule 19 of our Court of Appeal Rules recognised that, in general, the refusal of an application need not be embodied in a formal order. If it was unnecessary to embody the decision in the present case in a formal order, then, as the decision was a final order, it followed that as soon as that final decision was pronounced the matter became *res judicata* between the parties. Having finally decided the matter between them the Court had no power to reverse its own decision. In their Honours' opinion the fallacy in the argument of counsel for the appellant was in assuming that the refusal of the Court to allow an appeal was not absolutely binding upon both parties as *res judicata* until it had been embodied in a formal order. That fallacy vitiated the argument. It was only to such a decision of the Court as required a formal order to make it *res judicata* between the parties that the principle applied (illustrated by **In re Suffield,** 24 Q.B.D. 693, and many other cases) that a Court had power to review its own order before it had been drawn up and completed. In the case of **Lazarus v. Morrison,** 8 G.L.R. 719, it was true that a second application was made to the Supreme Court for leave to appeal from its decision on an appeal from a Magistrate. The Court in that case did not decide the matter on the ground that the refusal once given the Court had no power to alter its decision. In that case the Court entertained the application a second time and again refused it. But had leave been given on the second application after it had been refused the second determination, in their Honours' opinion, would have been invalid for want of jurisdiction. That case could not be construed into an authority for the proposition that the Supreme Court, having refused leave to appeal in such a case, had power to hear a second application for leave from the disappointed party. If the Court had such power then it would necessarily have the power to hear a third and fourth application, so long as the order had not been taken out. Their Honours held that when the Court had, after hearing the parties, either given leave or refused leave under Section 67 of the Judicature Act, 1908, to appeal to the Court of Appeal, that decision was final, and could not be reviewed by the Court.

Appeal dismissed.

Solicitors for appellant: **Webb, Richmond, Cornish and Swan,** Wellington.
Solicitors for defendant: **Bell, Gully, Mackenzie and O'Leary,** Wellington.

Full Court.

Myers, C.J.
Herdman, J.
Adams, J.
MacGregor, J.
Ostler, J.

October 4; 10, 1929.
Wellington.

GOVERNMENT LIFE INSURANCE COMMISSIONER v. ATTORNEY-GENERAL.

Revenue—Income Tax—Refund—Life Insurance Company—Debenture Tax—Provision for Refund to Holder of Local or Public Authority Debentures Where Tax Payable Exceeds Tax Payable if Interest from Debentures "Had Formed Part of His Taxable Income"—"Taxable Income" Meaning Ordinary Taxable Income—Life Insurance Company Entitled to Benefits of Provision Notwithstanding Partial Exemption of Such Companies from Tax Expressly Excluding Tax Payable in Respect of Income Derived from Debentures—Land and Income Tax Act, 1923, Sections 96, 99 (2), 118, 119.

Originating summons to determine whether the Government Life Insurance Commissioner was entitled to a refund or rebate

in respect of the income tax paid by it for the years ending 31st December, 1925, 1926, and 1927. The facts upon which the Government Life Insurance Commissioner claimed to be entitled to the refund are sufficiently stated in the report of the judgment.

C. A. L. Treadwell and James for plaintiff.

Solicitor-General (Fair, K.C.) for defendant.

MYERS, C.J., delivering the judgment of the Court, referred to Sections 96, 99 (2), 118 (3), and 119 of the Land and Income Tax Assessment Act, 1923, and said that rates prescribed by the annual taxing Act (passed pursuant to Section 73 of the Act of 1923) had been (a) in respect of all income derived from debentures issued by local and public authorities before 28th August, 1923, 2/6d. for every £1; (b) in respect of income derived from debentures issued by such authorities on or after the 28th August, 1923, 4/6d. for every £1; and (c) on ordinary income a graduated rate, with a maximum of 4/6d. in the £. In each and every year the income of the Government Life Insurance Department exclusive of income from debentures had been such an amount as to bring the Department into the scale on which the maximum amount of income tax was payable, and inasmuch as the appropriate rate under the annual taxing Act would be 4/6d. in the £, the rate payable by the Department under Section 96 of the principal Act was 2/3d. in the £. So far the parties were on common ground. But the Commissioner of Taxes had required the Department to pay the full rates of 2/6d. and 4/6d. in the £ respectively upon income derived from debentures according to whether such debentures were issued before the 28th August, 1923, or on or after that date. The Department claimed that by reason of the provisions of Section 99 (2) it was entitled to a refund or rebate, in respect of the income from debentures, of the difference between 2/3d. in the £ and the rate of 2/6d. or 4/6d., as the case might be, that the Commissioner of Taxes had charged and the Department had paid. The Commissioner of Taxes had refused to make any refund or rebate. The Solicitor-General's argument seemed to be that for the purpose of construing Section 99 (2), it was necessary to look at Section 96 for the definition of the Department's "taxable income," and he contended that that Section defined the Department's "taxable income" as including income from debentures and also income from all other sources and then proceeded to prescribe the income tax payable by the Department, such income tax being: (a) in respect of income derived from debentures, such tax as was prescribed by the annual taxing Act, and (b) in respect of all other income, one-half the amount that would be payable by the Department but for the provisions of Section 96. In other words he contended that the notional payment contemplated by the second portion of Subsection (2) of Section 99 was in the circumstances of the case the same in amount as the actual payment made under Section 96, and consequently, he said there was no refund to be made under Section 99 (2). Their Honours were unable to spell out that meaning from Sections 96 and 99 (2) of the Act. So far as Section 96 was concerned, all it did in their Honours' opinion was to provide that in respect of income from sources other than debentures the Department should pay only one-half the rate of tax prescribed by the annual taxing Act, and that, so far as income from debentures was concerned, it should pay tax at the same primary rate as any other taxpayer who derived income from debentures. Such last-mentioned rate was, of course, fixed by the annual taxing Act, but that Act was subject to Section 99 (2), which applied to every holder of debentures and provided for a refund, where the taxpayer was a debenture-holder, of the difference between the amount of tax that would have been payable by him if the interest received by him on the debentures had formed part of his taxable income and the actual aggregate amount of income tax paid or payable by him including the tax paid in respect of interest on debentures. The words "taxable income" in Section 99 (2), having regard to the context and to the purpose of the subsection, must, in their Honours' opinion, mean ordinary taxable income, or taxable income other than income from debentures. That harmonised with the provisions of Sections 118 and 119, because the income derived by holders of debentures was assessible and chargeable with income tax separately from income derived by the debenture-holders from other sources. The amount actually paid by the Department was 2/6d. or 4/6d. in the £, as the case might be, on debentures according to their date of issue, and 2/3d. in the £ in respect of income from other sources. If the income derived from debentures had formed part of the ordinary taxable income of the Department that was to say income from sources other than debentures, the rate payable by the Department would have been 2/3d. on the whole of its income. It followed that the view taken by the Government Life Insurance Department was, in their Honours' opinion, right and that the Department was entitled under Section 99 (2) to a refund or rebate equal to the difference between 2/3d. in the £ and the amount actually paid.

Solicitors for plaintiff: **Treadwell and Sons**, Wellington.
Solicitor for defendant: **Crown Law Office**, Wellington.

Myers, C.J.
Herdman, J.
Adams, J.
Smith, J.

July 9; October 10, 1929.
Wellington.

PETERSEN v. PAAPE.

Licensing—Publican's License—Sales Off Premises—Order Taken by Agent of Licensee at Timaru and Forwarded to Licensee at Dunedin and Accepted There—Liquor of Description Ordered Selected Packed and Marked on Licensed Premises—Delivery by Carrier to Purchaser in Timaru—Finding of Magistrate That Order Accepted on Licensed Premises—Facts on Which Finding Based Not Before Appellate Court—Quaere Whether Contract Made on Premises if Acceptance Posted—Appeal on Point of Law Only—Appellate Court Bound by Finding of Magistrate and Complete Executory Contract Therefore Made on Licensed Premises—Sale Lawful—Licensing Act, 1908, Section 195.

Appeal in point of law from the decision of the Stipendiary Magistrate at Dunedin dismissing an information against the respondent who was the holder of a publican's license for the premises in Dunedin known as the Grand Hotel, charging him with having, on 21st December, 1928, sold liquor at a place where he was not authorised by his license to sell the same. The sale was alleged to have been made in Timaru to a person named Breen residing there. The Magistrate upon the hearing of the information found that the respondent had engaged one Smith as a commercial traveller to solicit orders for intoxicating liquor and that Smith, on 23rd October, 1928, called upon Breen, at Timaru, and obtained an order for certain liquor. Breen signed an order in a bound book of order forms belonging to the respondent and Smith forwarded or delivered the book of order forms including Breen's order, to the respondent at his licensed premises in Dunedin, where he, the respondent, accepted Breen's order. The order form was addressed to the licensee of the Grand Hotel, Dunedin, requesting him to supply to the person signing the order the goods specified at the prices mentioned. The terms were stated to be "Delivery on Receipt of Net Cash," and were to be delivered to the address of the person signing the order. Smith did not at any time accept the order on behalf of the respondent; and no executory contract was made off the respondent's licensed premises. In due course the liquor in accordance with, and answering the description in, the order was taken from the cellar at the respondent's licensed premises in Dunedin by the respondent, or one of his servants, and packed in a case which was separately marked for Breen. A list was typed on the licensed premises and forwarded to a carrier at Timaru. Such list set out the names and addresses, including Breen's, of the persons to whom the carrier had to deliver the cases, and the number of each case and the respective amounts payable by the respective purchasers. On 10th December, 1928, those cases were delivered to the New Zealand Express Company from the licensed premises at Dunedin for consignment to Clark, the carrier at Timaru, who was to transmit them to the respective purchasers. Clark, on 21st December, duly delivered to Breen the case containing the liquor ordered by him, and Breen at the same time paid the agreed price to the carrier, Clark, who sent his cheque to the respondent for Breen's and other moneys collected. The Magistrate considered that the sale had taken place on the licensed premises, and dismissed the information.

Currie for appellant.
W. Perry for respondent.

MYERS, C.J., delivering the judgment of the Court, said, the question involved was of academical rather than practical importance, because a very slight alteration of the order form adopted by the respondent would probably bring the case within the decision in **Pletts v. Beattie**, (1896) 1 Q.B. 519; and if that

were done a prosecution could not succeed. The present case was not in its circumstances similar to **Pletts v. Beattie** (*cit. sup.*) inasmuch as the order form did not contain a provision whereby the purchaser of the liquor assented to the appropriation to his order by the respondent at his licensed premises of goods of the description ordered and in a deliverable state. Quite apart, however, from any consideration of the case of **Pletts v. Beattie** there were other authorities by which in their Honour's opinion, the point raised in the present case was concluded. The position might have been different if **Titmus v. Littlewood,** (1916) 1 K.B. 732, stood as an authority in New Zealand. In that case it was held that the words "sell" and "sale" in the section of the English Act corresponding with Section 195 of the New Zealand Licensing Act, 1908, referred to a completed sale, and that a person who on licensed premises merely entered into an executory agreement for the sale of intoxicating liquor was not liable to the penalty imposed by the section. That case, however, was expressly dissented from by a Full Bench of the Supreme Court in **Bryant v. Eales,** (1916) N.Z.L.R. 1065, where it was held that a complete executory contract made off licensed premises constituted an offence under Section 195. Even if **Titmus v. Littlewood** (*cit. sup.*) stood as an authority in New Zealand there might still be a difficulty in the way of a prosecution in the present case by reason of the possibility of its still being held that the circumstances of the present case were so much like those in **Walker v. Walker,** 90 L.T. 88, as to make the decision in that case apply. His Honour referred also to **Strickland v. Whittaker,** 68 J.P. 235, and **Noblett v. Hopkinson,** (1905) 2 K.B. 214, at p. 220. In the present case the Magistrate found that the contract was made on the respondent's licensed premises, and counsel for the appellant admitted that there was a complete executory contract for sale made at the Grand Hotel at Dunedin. Unfortunately the precise facts upon which the Magistrate based his finding were not before the Court and it might well be that although the contract was made in Dunedin it was not made on the licensed premises. The acceptance by the respondent might have been by a letter sent by post in which case it would be at least arguable that a complete executory contract was not made on the licensed premises. That point, however, could not be considered as the facts were not before the Court. In the present case, as in **Crawford v. Nuttall,** (1918) N.Z.L.R. 385, the appeal was on point of law only; and the appellant was in the same difficulty as that in which the appellant found himself in that case. In the circumstances their Honours thought that Mr. Currie's admission was properly made and that both he and the Court were bound by the Magistrate's finding. The present case was comparable with **Guild v. Freeman,** 36 Sc. L.R. 6. In considering the English and Scottish cases their Honours had not overlooked the difference between the terms of a license under the New Zealand Act and those of a license under the English Act. In New Zealand a publican was licensed to sell and dispose of liquors in any quantity on his licensed premises. It might, therefore, have been contended that the making of an executory contract for sale on the licensed premises was not sufficient, but that there must be a complete disposal of any liquor sold at the time when it left the licensed premises; and it might have been contended that in the present case there was not such a complete disposal. Their Honours thought that there were several answers to that possible contention: Firstly, it was true that in **Bryant v. Eales** (*cit. sup.*) the Court had to consider not a publican's license but a wholesale license in which the words "and dispose of" did not appear. The judgment of the Court was, however, referable generally to Section 195 (1) of the Act under which the information was laid. In **Crawford v. Nuttall** (*cit. sup.*) however, the license that the Court had to consider was a New Zealand wine license in which the words: "sell and dispose" did appear, and there was nothing in the judgment of the majority of the Court in that case to suggest that the decision in **Bryant v. Eales** (*cit. sup.*) did not have general application under Section 195 to all licenses; the assumption indeed was the contrary. Secondly, it was to be observed that the language of Section 195 (1) was "No person shall sell," and not "No person shall sell or dispose of." Thirdly, it would seem difficult in any case, taking the subsection as it stood, to hold that it was to be differently construed in its application to different forms of license.

The conclusion at which their Honours arrived, therefore, was that in view of the Magistrate's finding that a complete executory contract of sale was made on the respondent's licensed premises at Dunedin his dismissal of the information was right and must be affirmed.

Appeal dismissed.

Solicitors for appellant: **Raymond, Raymond and Campbell,** Timaru.

Solicitors for respondent: **Lang and Paterson,** Dunedin.

Myers, C.J.
Herdman, J.
Adams, J.
MacGregor, J.
Ostler, J.

September 30; October 10, 1929.
Wellington.

IN RE PANAPA WAIHOPI.

Will—Construction—Native Land—Devise to Trustee Upon Trust for Absolute and Exclusive Enjoyment of Beneficiaries Named—Subsequent Provision That If Any Beneficiary Should Die Without Issue All His Right Title and Interest Which He Had Acquired Under the Will Should Vest in the Children of a Person Named—Beneficiaries Entitled to Fee Simple Subject to Executory Devise in Event of Death Without Issue—Trustee Not a Bare Trustee of Fee Simple for Beneficiaries Named—Succession Orders in Favour of Such Beneficiaries Improperly Made by Native Land Court—Native Land Act, 1909, S. 148—Wills Act, 1837, 1 Vict. C. 26, Section 29.

Originating summons for the interpretation of the will of a Native, Panapa Waihopi. By his will the testator appointed Mahaka Paraone his executor and trustee, and devised all his real estate to his trustee in fee simple. The testator then directed that his trustee should stand possessed of the real estate upon trust, as to the Te Karaka 3 Block, for the absolute and exclusive use enjoyment benefit and advancement of his grandson Rongo Kaimoni; as to the Tapuihikitia Block upon similar trusts for Wiremu Karena; as to Mangatu 3 Block upon similar trusts for Rongo Kaimoni and Wiremu Karena as tenants in common; as to Rangatira and Mangatu Blocks upon similar trusts for Rongo Kaimoni, Wiremu Karena, and Wiremu Mokaraka as tenants in common; and as to all his other lands upon similar trusts for Rongo Kaimoni and Wiremu Mokaraka as tenants in common. The testator then declared that his trustee should have power to sell the whole or any part of his real estate, and to mortgage the real estate or any part thereof for payment of debts, etc. The will then provided as follows: "In the meantime to lease my residuary estate and to accept surrender of leases thereof and generally to manage my residuary estate and I declare that if any one of the beneficiaries under this my will shall die without issue then all his rights titles and interests which he has acquired by virtue of this my last will shall vest in the children of Mahaka Paraone as tenants in common in equal shares." Panapa Waihopi died in November, 1916, and letters of administration with the will annexed of the estate of Panapa Waihopi were granted by the Native Land Court to the Public Trustee on 17th April, 1917, under the power in that behalf given by Section 146 of the Native Land Act, 1909. The estate of the testator thereupon vested in the Public Trustee under Section 146 (2). On the same day the Native Land Court appointed the Public Trustee as trustee for Rongo Kaimoni under Section 172 of the Act, and made succession orders vesting estates in fee simple in the beneficiaries under the will including Rongo Kaimoni, and without reference to the gift over in the event of the death of any beneficiary without issue. Rongo Kaimoni died unmarried and without issue in July, 1927, leaving a will under which his mother, Agnes Horsfall, was the sole beneficiary. Twelve children of Mahaka Paraone survived Rongo. The following questions were submitted by the Native Land Court for determination: (1) Did the Native Land Court make an error or mistake or decide a point of law erroneously in deciding that the interests in Native Land devised by the will of Panapa Waihopi deceased to his executor and trustee in trust for certain persons vested directly in the beneficiaries under the trust by virtue of subsection (3) of Section 148 of the Native Land Act, 1909, and by making succession orders accordingly? (2) What was the nature and extent of the estate devised by the said testator under his will to Rongo Kaimoni, Wiremu Karena and Wiremu Mokaraka therein mentioned respectively? (3) Rongo Kaimoni one of the beneficiaries under the said will having died without issue what (if any) estate did the children of Mahaka Paraone take in the Native Land devised under the will of Panapa Waihopi deceased upon trust for the use and enjoyment of the said Rongo Kaimoni?

Nolan for children of Mahaka Paraone.

Gilfedder for executrix of will of Rongo Kaimoni.

ADAMS, J., said that reading the will without reference to any rules of construction it was not difficult to ascertain the real

intention of the testator. He desired in the first instance to give all his personal estate to his grandson Rongo Kaimoni. As to his real property, he selected three objects of his bounty—Rongo Kaimoni, Wiremu Karena, and Wiremu Mokaraka. Having provided for those three, it then occurred to him that one or more of them might die without issue and he declared that in such case all the rights, titles and interests which the person dying without issue had acquired under his will should vest in the children of Mahaka Paraone as tenants in common. In their Honours' opinion those dispositions created estates in fee simple in the first takers subject to an executory devise to the children of Mahaka Paraone. In support of that proposition their Honours referred to **Edwards v. Edwards,** 15 Beav. 357; **O'Mahoney v. Burdett,** L.R. 7 H.L. 388; **In re Schnadhorst,** (1902) 2 Ch. 234; and **Comiskey v. Bowring-Hanbury,** (1905) A.C. 84. Their Honours did not think the circumstance that the disposition by way of executory devise followed at the end of the powers of management and control vested in the trustees affected the construction. The language of the executory devise was clear and unambiguous and must be construed as an effective gift over in the event of the first takers dying without issue. It appeared from paragraph 10 of the case that, in the application to the Chief Judge of the Native Land Court, the case for the claimant was put on the ground that the succession orders should have been made for life estates only, but that was negatived by the express language of the contingent devise. The interest which was to pass to the children of Mahaka Paraone on the death of the beneficiaries was "all the rights titles and interests which he"—the person dying without issue—"has acquired by virtue of this my will." If the first devisees took life estates only those words would be deprived of all meaning; there would be nothing left upon which the contingent executory gift could operate. The submission of counsel that on the construction their Honours had adopted the executory devise would be void under the rule as to perpetuities, assumed that the words "without issue" imported an indefinite failure of issue, but in a will those words were to be construed to mean a want or failure of issue in the lifetime or at the time of the death of the person dying "without issue" and not an indefinite failure of issue.—Wills Act, 1837, 1 Vict. c. 26 s. 29.

It was, however, submitted by counsel for Agnes Horsfall as executrix of the will of Rongo Kaimoni, that the trustee appointed was a bare trustee within Section 148 (2) of the Native Land Act, 1909, and that the interest devised, therefore, vested directly in the beneficiary under that trust. It appeared from the note of the learned editor of **Lewin on Trusts,** 13th Edn., 1028, that there was some difficulty in arriving at a comprehensive definition of the term "bare trustee," but in their Honours' opinion the trustee of the present will was not a bare trustee. The lands were vested in him upon trust, *inter alia*, to protect the executory devises and that was sufficient to remove him from the category of bare trustees. The testator intended his trustee to retain the title to the land and to be a party to any leases. In that connection their Honours thought that the paragraph of the will quoted above was significant. Their Honours added that the decision was on the special circumstances of the particular case. If their Honours had been obliged to determine that the trustee was a bare trustee the interests of the persons entitled under the executory devises would nevertheless have remained unaffected but would in that case be without adequate protection. The children of Paraone would have had the right to lodge caveats against the titles under the Land Transfer Act or that might have been done by the District Land Registrar.

The answers to the questions submitted were: (1) The decision of the Native Land Court was erroneous in law—(a) in deciding that the interests in Native land devised by the will vested directly in the beneficiaries by virtue of subsection (3) of Section 148 of the Native Land Act, 1909, and (b) by making succession orders accordingly; (2) Rongo Kaimoni, Wiremu Karena, and Wiremu Mokaraka took estates in fee simple defeasible in each case by the death without issue of the beneficiary; (3) Rongo Kaimoni having died without issue the children of Mahaki Paraone took an estate in fee simple as tenants in common in equal shares in all the native land devised by the will of Panapa Waihopi upon trust for his use and enjoyment.

Solicitors for the children of Mahaka Paraone: **Nolan and Skeet,** Gisborne.

Solicitors for Agnes Horsfall: **P. Gilfedder,** Invercargill.

Supreme Court

Blair, J. October 9; 11, 1929. Wellington.

NIXON v. MILLAR AND IRVINE.

Wages Protection and Contractors' Liens Act—Practice—Costs—Claim for Lien Brought in Supreme Court—Claim Within Jurisdiction of Magistrates' Court—Neither Debt Nor Right to Lien Disputed—Costs Allowed Only on Magistrates' Court Scale.

The plaintiff had taken proceedings in the Supreme Court under the Wages Protection and Contractors' Liens Act, 1908, to establish a lien for £268 10s. 7d. Neither the debt nor the plaintiff's right to a lien was disputed. The plaintiff claimed costs on the basis of an action in the Supreme Court.

R. R. Scott for plaintiff.
Parry for defendant Millar.
Putnam for defendant Irvine.

BLAIR, J., said that although the amount was within the jurisdiction of the Magistrates' Court, the plaintiff elected to proceed in the Supreme Court, and asked for costs on the basis of an action in that Court. The reason advanced for proceeding in the Supreme Court was that that Court had rules whereas there were none in the Magistrates' Court, and it was suggested that there was doubt as to the correct procedure in the Magistrates' Court. The practice in the Magistrates' Court in lien proceedings was well settled and His Honour could not accept the contention that a person claiming a lien within the amount of the Magistrates' Court's jurisdiction should select the Supreme Court and then ask the defendant to pay costs on the scale fixed in that Court instead of the more moderate scale fixed in the Magistrates' Court. Stout, C.J., in **Gillanders Bros. v. Reeves,** 23 N.Z.L.R. 417, treated defended lien cases as analagous to a Supreme Court action, but fixed a lump sum for costs. His Honour thought that the costs in the present case should be upon the Magistrates' Court basis. The matter was not defended. His Honour allowed the plaintiff as against the defendant Irvine (the builder) the sum of £7 7s. 0d. and disbursements, including disbursements for registering lien.

Solicitor for plaintiff: **R. R. Scott,** Wellington.
Solicitors for defendant Millar: **Buddle, Anderson, Kirkcaldie and Parry,** Wellington.
Solicitors for defendant Irvine: **Fell and Putnam,** Wellington.

Myers, C.J. August 17; September 26, 1929. Wanganui.

COOPER v. SYMES.

Negligence—Collision—Pedestrian Walking Along Left Side of Road Twenty Feet Wide Run Down by Motor-vehicle Proceeding in Same Direction—Pedestrian Aware of Approach of Overtaking Vehicle—Pedestrian Entitled to Walk Along Carriage-way of Road by Day or Night and Entitled to Exercise of Reasonable Care on Part of Drivers of Vehicles—Accident Due to Failure of Driver of Vehicle to Keep Proper Look-out—Pedestrian Entitled to Assume Proper Look-out Being Kept—No Contributory Negligence on Part of Pedestrian—Quaere Whether Any Rule that Pedestrians Should Keep to Right of Road Exists in New Zealand.

Appeal on fact and law from a judgment of the Magistrates' Court at Wanganui, in an action in which the appellant claimed damages for personal injuries caused by the respondent's negligent driving of a motor car. The accident occurred on 27th April, 1928, between 6 and 7 p.m. on a road called Springvale Road, leading into Wanganui. The road in question was sixty-six feet wide, with a substantial strip of grass at each side. On the right side of the road looking towards Wanganui there was first the wide strip of grass at the side of the road, then a footpath, and then a narrower strip of grass—between which last-mentioned strip and the wide strip of grass on the left side of the road there was a metalled roadway 20 feet wide. The

learned Magistrate found the following material facts: (1) At the time of the accident the plaintiff and her husband were walking towards Wanganui on the left side of the metalled portion of the road, the plaintiff being at least a foot or two from the edge of the grass, and her husband walking on her right. (2) The respondent, who was overtaking the appellant and her husband, was driving on his proper side of the road at the time of the accident at a reasonable speed of about 15 miles per hour. (3) The appellant and her husband were overtaken and knocked down by the motor car, and both sustained serious injuries. (4) The respondent had sufficient lights on his car to enable him to see the appellant and her husband. (5) The respondent was negligent in not keeping a sufficient lookout. (6) The footpath was unmetalled and, on the night in question, muddy, with occasional pools of water, and not fit to walk upon. It was admitted by the appellant and her husband that prior to the accident they had seen a car (which it was subsequently ascertained was being driven by one Glenn) with bright headlights approaching them from the direction of Wanganui; this car, the Magistrate found, was at the time of the accident still some distance (possibly 300 yards) away, and it did not appear to have been suggested by the respondent that he was in any way affected by the lights of that car. It was also admitted by the appellant and her husband that they were aware of the car, which turned out to be the respondent's car, coming behind them. The appellant's husband said that he had looked round two or three times while the plaintiff herself said that she had looked round once. The Magistrate found that the respondent was negligent in not keeping a sufficient lookout, and added that he inferred from the circumstances that he had been driving about the centre of the road and, being faced by the bright lights of an approaching car, had swung over to his left-hand side and so collided with the plaintiff and her husband. The Magistrate took the view that the appellant and her husband, who were on a metalled road only twenty feet in width, with a car with bright headlights approaching them and another car overtaking them in the rear, and who must have known that they occupied a position of some danger, and who appeared to have taken no steps to change that position, were in those circumstances undoubtedly negligent and that their negligence contributed to a great extent to the accident.

Brodie for appellant.

W. J. Treadwell for respondent.

MYERS, C.J., said that in his opinion the Magistrate misdirected himself on the law and on the proper inference to be drawn from the facts as found. He had referred to a rule of the road stated in **Beven on Negligence,** 4th Edn., 684, as follows: "The custom or law of the road is that horses and carriages should respectively keep on the near or left side, and foot passengers take the right-hand, and this is judicially recognised without proof." The Magistrate said that that point was not taken by the defence at the hearing before him—nor indeed was it very much pressed on the argument of the appeal—and that, though he referred to it in his judgment, he did not base his opinion upon it. His Honour did not find it necessary to attempt to determine the question as to whether the rule referred to operated in New Zealand. His Honour was satisfied that it was a rule very little known in this country, and it was desirable in the circumstances to leave the question of its existence open until it expressly arose. In the present case, even if the rule existed in New Zealand, His Honour should still be of opinion that the Magistrate was wrong in his essential conclusions on the question of negligence. Apart from the fact that in the present case there was an express finding that the footpath was not fit for use, it would appear plain that a pedestrian had a right whether by day or night to walk along the carriageway of a road, and was entitled to the exercise of reasonable care on the part of persons driving vehicles along it: **Boss v. Litton,** 5 C. & P. 407; **Anderson v. Blackwood,** 13 R. 443; **McKechnie v. Couper,** 14 R. 345. His Honour referred also to **Graham v. Edinburgh and District Tramways Co.,** (1917) S.C. 7, and **Craig v. Glasgow Corporation,** (1919) S.C. (H.L.) 1; 35 T.L.R. 214. Of course there was a duty on the part of the pedestrian to exercise care; and if he failed to exercise due care and by reason of his own negligence a collision took place between himself and a vehicle whereby he sustained injury, he could not recover against the owner of the vehicle. But His Honour entirely failed to see in the present case any ground for saying that the appellant's injury was due to any negligence on her part. She was not crossing, but walking along, the long straight road. She must be assumed to have known that the metalled portion of the roadway was twenty feet wide and, as she was walking very close to the edge, that there was ample room for the respondent's car to pass without any danger to herself, if it were properly handled. She knew that the respondent's car was lighted and she was entitled to assume that he was keeping a proper lookout and that he must have seen her. Moreover it would appear that when she looked round and saw the car approaching, it was in the centre of the road. If the respondent had kept a proper lookout the accident would not have happened. Even if, which did not clearly appear to be the case, he found it necessary to swerve slightly to the left in order to pass Glenn's car which was approaching him from the direction of Wanganui, but was then apparently about 300 yards off, there was still ample room for him to do so without his running into the plaintiff and her husband. Even if there had been insufficient room the fault would still have been his, because, if he had been keeping a proper lookout, he must have seen the plaintiff and her husband, and it would then have been his duty, if he thought that there was any danger, either to stop or to slow down, or at least to sound his horn in order to warn the appellant and her husband. None of those things did he do; and his reason for not doing any of them was that he had not seen the appellant and her husband; and that failure was due entirely to the fact that he had been negligent in not keeping a proper lookout. In those circumstances it appeared to His Honour to be plain that the respondent's negligence was the cause of the injury, and that he was accordingly liable in damages: **British Columbia Electric Railway Co. v. Loach,** (1916) 1 A.C. 719 at pp. 727, 728; **Colmore-Williams v. Weir,** (1918) N.Z.L.R. 1003. The essential circumstances of the case seemed to His Honour to bear some similarity to those in **Tucker v. Lloyd,** (1916) G.L.R. 660, and were clearly distinguishable from those in **Shearer v. Dunedin Corporation,** 24 N.Z.L.R. 192, which was relied upon on behalf of the respondent.

Appeal allowed.

Solicitors for appellant: **P. L. Dickson,** Wanganui.

Solicitors for respondent: **Treadwell, Gordon and Treadwell,** Wanganui.

Smith, J. September 20; 24, 1929. Auckland.

THOMAS v. THOMAS.

Divorce—Custody of Children—*Decree Nisi* Granted on Ground of Husband's Adultery—Welfare of Children Paramount Consideration—Innocent Party Entitled to Custody Except Under Exceptional Circumstances—Rule that Husband Should in Ordinary Circumstances Have Custody of Male Child Not Applicable Where Husband Guilty of Adultery—Exceptional Circumstances Justifying Younger Child Being Left with Husband—Custody of Elder Child Given to Wife.

Motion by petitioner (the wife) to make absolute a *decree nisi* pronounced on 29th May, 1929, and for the custody of the two children of the marriage. The wife had the custody of the elder child, who was born on 24th July, 1921, and the husband the custody of the younger child who was born on 7th October, 1923. The parties were married on 5th January, 1921, the elder child of the marriage being born some six and a-half months thereafter. The wife had had an illegitimate son before marriage, which was (apparently) not the son of the respondent. The husband served with the Australian military forces during the war. He received for war disability, an Australian Soldiers' Pension of between £16 and £17 per month. Since the war, he had suffered from nervous troubles, but he appeared to have improved progressively. Most of the allegations against him in respect of drunkenness related to the years 1923 and 1924. Though still a nervous man he had since pulled himself together. The wife left her husband in October, 1924, and April, 1925, but returned to her husband after each departure. She left her husband finally in October, 1925. His Honour found that owing to her husband's treatment of her at that time she was justified in leaving the house. The circumstances of her departure were, however, complicated by a letter written to her by one, Macdonald, on 8th October, 1925, in which he asked her not to visit him at the Hospital where he then was, as visitors were coming to see him and might talk. He subscribed himself: "your loving sweetheart, Dave." Infidelity on the part of the wife was not, however, established. The wife made Macdonald's acquaintance while her husband was away receiving treatment at Hanmer, and was evidently on very friendly terms with him. Prior to that occurrence,

viz., shortly before 4th October, 1925, the petitioner had written to the respondent complaining that she was being starved, and resenting his complaints about her, and stating that if she didn't suit, it was "goodbye for ever." She added: "You can have the children if you like." When she left, she took her illegitimate son with her, and left behind the two children of the marriage. She resided with her father and mother, and had, since leaving her husband, supported herself. On 13th November, 1925, and again on 25th November, 1927, she endeavoured to obtain *inter alia* the guardianship of the children in the Magistrates' Court; the first application was not proceeded with, and the second was dismissed. After the wife's departure, the husband engaged various housekeepers for his house at No. 22 Keppell Street. The petition for divorce was founded on proof of adultery with one of them. There was also evidence to show adultery with another woman in his own house. On 21st December, 1928, the elder child left home and went to his mother. The father applied for a writ of *habeas corpus* in respect of that child, and obtained a rule *nisi*. His Honour heard the motion to make the rule absolute, but dismissed the application and discharged the rule. It was agreed between counsel that the evidence on that application should be available on the present application for custody.

Hubble for petitioner.
Mahony for respondent.

SMITH, J., said that after considering the circumstances of the elder boy's departure, which was purely voluntary, and after seeing the boy and considering the whole of the evidence, for the reasons which he had given on the *habeas corpus* application, he came to the conclusion that, in the interests of that child, the custody of the mother should not be disturbed.

The problem really before the Court was the custody of the younger child, almost six years of age. The general rule was that stated by Adams, J., in **Vander Veen v. Vander Veen,** (1923) G.L.R. 244, at p. 244: "The Court considers first the welfare of the children, and secondly the interests of the innocent party." In **Brown and Watts on Divorce,** 10th Edn., 137, it was said that the innocent party was entitled to the custody of the children except under very exceptional circumstances. Where one party had been guilty of the matrimonial offence of adultery, and the other had not, it might be said, as a general rule, that the Court considered that the interests of the children were best served by placing them in the custody of the innocent party. Mr. Mahony had relied upon His Honour's expression of opinion in **Parsons v. Parsons,** (1928) N.Z.L.R. 477, that in all ordinary circumstances it was very desirable that a male child should have the care and guidance of its father. A view to much the same effect was expressed by Williams, J., in **Morton v. Morton,** 14 G.L.R. 271, and by MacGregor, J., in **Re Hylton,** (1928) N.Z.L.R. 145. Where, however, the father was the guilty party to a divorce suit founded on adultery, the circumstances could not be regarded as "ordinary" for the purpose of His Honour's expression of opinion. The rule to be applied was the rule which His Honour had stated. The question in the present case was whether there were very exceptional circumstances sufficient to justify the younger child being left in the custody of the respondent? His Honour thought there were for the following reasons: (1) It was clear that chastity had not been regarded by either party to the suit as a virtue of much consequence in the conduct of life. Nothing was proved against the wife after marriage, and in that respect she was better than her husband. She was not, however, chaste before marriage, and she was at least "philandering" with another man while her husband was receiving attention for his war disabilities at Hanmer. The Court had no very decisive choice between the parents on the ground of sexual morality. (2) When the wife left the husband about the time Macdonald's letter was written to her, she took only her illegitimate son with her, and she told her husband that he could have the children of the marriage. (3) The wife's application for custody of the children was dismissed by the Magistrate in November, 1927, although it was true that, at that time, the adultery of the husband had not been proved. (4) The husband maintained both children from October, 1925, to December, 1928, when the elder boy transferred himself to his mother. Since December, 1928, the husband had maintained and cared for the younger boy. His Honour had seen the boy, not for the purpose of ascertaining his wishes, but for the purpose of seeing how he was cared for; and the result must be regarded as satisfactory. (5) The wife would probably be fully taxed to care for the elder boy in the home of her parents. Those parents were both elderly and the wife's mother was blind. The wife at present attended to her mother and would no doubt have the care of both parents upon her hands.

It would, His Honour thought, be disastrous if the respondent continued to bring his younger son up in a house of illicit intercourse. The boy was entitled to a better example from his father. On the other hand, it would also be disastrous if the petitioner gave the elder boy any similar example. In His Honour's judgment, the best course to take, having regard first to the interests of the children and next to the claims of the petitioner, was to order (a) that the petitioner (the wife) do have the custody of the elder boy until the further order of the Court, and (b) that the respondent (the husband) do have the custody of the younger child, until the further order of the Court. Neither child was to be removed out of the jurisdiction of the Court without the further order of the Court. The petitioner was to have reasonable means of access to the younger child, and the respondent to have reasonable means of access to the elder child. Probably the parties would be able to arrange terms of access, but, if not, His Honour would give directions as to the times and modes of access. Liberty to apply was reserved to each party. The nature of the order would make it incumbent upon each parent to take care of his or her own conduct, and to take proper care of the child committed for the present to his or her custody. Decree *nisi* for dissolution of marriage made absolute.

Solicitors for petitioner: **Meredith, Hubble and Ward,** Auckland.

Solicitors for respondent: **Mahony, Dignan and Foster,** Auckland.

Kennedy, J. August 5, 9; October 7, 1929. Dunedin.

KEKLER v. MAGAN.

Contract—Statute of Frauds—Sufficiency of Memorandum—Offer to Purchase Signed by Defendant and Accepted by Vendor—Prior Promise by Vendor to Instal Gas Cooker and Paint House in Event of Defendant Buying House—No Reference to Such Promise in Written Offer—Promise Merely Collateral Undertaking and Not Term of Contract of Sale—Not Condition Precedent—Memorandum of Contract Sufficient.

Action by plaintiff against defendant to recover £230 as damages for breach of a contract to purchase the plaintiff's property for £1,650, which contract was alleged to have been made on 23rd March, 1929. Four days later the defendant repudiated it and in June, 1929, the plaintiff resold the property for £1,450. It appeared that the defendant who himself had a small house property, was taken by the agent for the plaintiff to see the plaintiff's property, and after inspection the defendant signed an offer, which the plaintiff accepted. The writing produced was in the form of a complete contract. The defendant suggested that he desired the words "subject to disposing of my property" to be inserted in the offer but he was informed by the plaintiff's agent that an offer in those terms would not be considered, and he signed the offer without those words. Prior, however, to the contract being signed mention was made of a gas cooker and the plaintiff said: "If you buy this house, you can select a range of your own choosing," or used words substantially to that effect, intimating that he would at his expense instal a gas cooker if the plaintiff purchased the house. The evidence also established that the question of painting was discussed prior to the contract being signed and that the plaintiff promised to paint the house if the defendant bought. No mention was made in the offer to purchase either of the gas cooker or of the painting. The principal question arising was whether there was a sufficient memorandum in writing of the contract to satisfy the Statute of Frauds.

Sinclair for plaintiff.
Hay for defendant.

KENNEDY, J., said that if a promise to supply a gas cooker and to paint had been part of the terms of the offer and not merely a collateral agreement, then there would not exist any memorandum or note in writing of all the terms of the contract and the contract would be unenforceable. If, however, the terms as to the gas cooker and as to painting were not terms of the agreement for sale of the land but terms of collateral agreements, which operated by way of inducement to the defendant to sign the contract of sale, then the contract for sale might be enforced if it were in writing although there

was no note or memorandum in writing of the collateral agreements. His Honour was of opinion that the undertaking as to painting, if it rose above the level of a mere intimation of intention, was a collateral undertaking and that if it were formally embodied in words, it would, having regard to the circumstances under which it was uttered, have amounted substantially to the following: "If you become a buyer, I will paint the house." The undertaking as to the gas cooker was in substantially identical terms. Even if the undertaking as to the gas cooker were not sufficiently definite to permit of its enforcement by the defendant, if he had completed the agreement for the sale of the land, that would be no answer to the plaintiff's claim to enforce the contract for the sale of the land, all the terms of which had been agreed on. The distinction between an undertaking which amounted to a collateral agreement and an undertaking which was one of the terms of a contract for the sale of land was pointed out in **Angell v. Duke,** L.R. 10 Q.B. 174. His Honour did not think, although the contract sought to be enforced was a contract for the sale of land, that there was any essential difference between the present case and the cases of **Angell v. Duke,** L.R. 10 Q.B. 174, **Mann v. Nunn,** 43 L.J.C.P.N.S. 241, and **Wallace v. Stevenson,** 16 N.Z. L.R. 166, for the words of the Statute had reference to "contract for sale of land or any interest in or concerning land," and those words applied as well to a sale as to a lessee of land. The promises, if such they were, were not, as in **Watson v. Raymond,** 9 N.Z.L.R. 216, conditions precedent. They might be fulfilled subsequent to the agreement for sale and subsequent even to the completion of the contract of sale by transfer of the land. They were anterior to the contract for the sale of the land and, if there had been no contract of sale, neither party would have any cause of action against the other on the promises. After the undertakings had been given, it was still open to the defendant to purchase or not as he might please. At most the undertakings were collateral agreements inducing the contract of sale. It followed then that all the terms of the contract of sale of the land were in writing, that the contract was enforceable and that the defence failed.

Judgment for plaintiff.

Solicitors for plaintiff: **Aspinall and Sim,** Dunedin.
Solicitors for defendant: **Smith and Lousley,** Dunedin.

Kennedy, J. July 17; October 9, 1929. Auckland.

BLACKBURN v. LEDGER.

Conversion—Partnership—Bill of Sale—Launch Owned by Three Partners—Mortgage by Two Partners of Their Shares to Third Partner—Launch Seized by Grantee for Alleged Default in Payment of Interest and Sold by Auction to Grantee's Agent—No Default at Time of Sale—Possession of Grantee Before Sale Lawful—Sale to Grantee's Agent Invalid—Sale Changing Neither Possession Nor Ownership of Launch—No Conversion—Assignment of Share in "Vessel" Not an Instrument for Purposes of Chattels Transfer Act—Launch a "Vessel"—Chattels Transfer Act, 1924, Sections 2, 50.

Appeal on fact and law from the decision of a Stipendiary Magistrate giving judgment for the respondent for damages for the wrongful seizure and conversion of a launch. The appellant and the respondent and one other were in partnership as fishermen and each partner owned a one-third share in the launch. The appellant advanced a sum to his partners to enable each partner to purchase his one-third share in the launch and the partners to whom such advances were made assigned by way of mortgage their shares in the launch to secure the sum so advanced. The appellant claimed that default had been made in payment of interest and in observance of the covenants of the instrument, and took possession of the launch and sold it on 16th April, 1928. The sale was made by auction to a person who was the agent of the appellant.

The main contest before the Magistrate was whether default had been made in the fulfilment of the covenant for payment of interest and in the observance of certain other covenants which were said to be implied. The learned Magistrate found that interest was not in arrear, the interest having been paid to the solicitor for the defendant and that the defendant was so informed and approved.

Quartley for appellant.
Trimmer for respondent.

KENNEDY, J., said that it had not been shown that the Magistrate was wrong in his findings of fact. Counsel for the appellant and the respondent at first made their submissions upon the assumption that the covenants implied in instruments by way of security and set out in the Fourth Schedule to the Chattels Transfer Act, 1924, were implied in the security held by the defendant. The document followed very closely the form of an instrument by way of security set out in the First Schedule to the Chattels Transfer Act, 1924. The two partners, the grantors, were expressed to be the owners of one-third share each in the launch and in consideration of £138 13s. 4d. advanced to them they purported to assign and transfer their shares in the launch to secure repayment of the sum so advanced on 20th December, 1928, with interest in the meantime payable quarterly. No covenants were expressed to be implied. The document was filed for registration in the Supreme Court Office as an instrument by way of security, registrable under the Chattels Transfer Act, 1924. Section 2 of the Act defined an instrument and provided that an instrument did not include the following: "(d) Transfers or assignments of any ship or vessel or any share thereof." The launch in question was of sufficient size for several persons to proceed to the deep sea and it was propelled by its own engines. In His Honour's opinion it was a "vessel" within the meaning of that word where used in Section 2 of the Act. The same word was used in the English Bills of Sale Acts and had been held to apply to anything ordinarily called a vessel but not to a mere boat: see **Gapp v. Bond,** 19 Q.B.D. 200. It followed that the assignment was not an instrument by way of security within the meaning of the Chattels Transfer Act, 1924, and that the covenants, provisoes, agreements or powers to be implied by Section 50 of that Act in instruments by way of security were not implied in the document given to the defendant. A mortgagee of a chattel was of course entitled to sell the subject of the security upon non-payment of the debt, when a day had been fixed for payment, but, on the Magistrate's findings of fact as to the payment of interest, such an implied power was not exercisable. No facts, then, appeared which authorised the defendant to realise his security.

That, however, did not conclude the case as against the appellant. He was the owner of a one-third share in the launch and he was equally entitled, with his co-owners and partners, to possession of the vessel. Although the appellant did send a notice, received by the respondent after the purported sale on 16th April, 1928, he did not exclude the respondent, in fact, from possession and the appellant's possession was lawful and not unlawful. The plaintiff suffered no injury prior to the purported sale from the so-called seizure. That seizure, in fact, was a mere matter of words rather than of substance and nothing was done by the appellant up to the date of the sale for which an action for conversion at the suit of the respondent might lie. The sale on 16th April, 1928, was alleged to have been a conversion, but it appeared at the trial that the sale was merely a paper sale because one Dawson, who bought at the auction, was the agent buying for the appellant who in fact could neither legally sell nor could he legally buy in. The appellant after the sale remained as he was before, the owner of a one-third share and a mortgagee of the two one-third shares of his partners, and the respondent still retained his interest as mortgagor in the one-third share in the launch. Neither the possession nor the ownership of the launch was changed. The defendant subsequently disposed of the launch to a stranger but that was not a matter of complaint in the present action and it was not necessary in this judgment to make any observations thereupon.

Appeal allowed.

Solicitor for appellant: **A. G. Quartley,** Auckland.
Solicitors for respondent: **Connell and Trimmer,** Whangarei.

"There is a tendency to mar, and occasionally to obliterate, the strict and clear line of demarcation between the executive and the magistracy and to substitute tribunals uncontrolled by any salutary rules of evidence obtaining in the Courts."—Mr. Justice Eve.

"One must be as careful in small things as in a million pounds' worth. Time is not wasted in doing justice."

—JUDGE TOBIN.

Professional Discipline.

The Disciplinary Jurisdiction of the Supreme Court of New Zealand over the Legal Profession.

By H.F. von Haast, M.A., LL.B.

(*Concluded from p. 313*)

Neglect and delay in the transaction of a client's business may be so gross, even in the absence of any evidence of fraudulent misappropriation, as to amount to professional misconduct, calling for the exercise of the Court's disciplinary jurisdiction. In *In re W. C. Moseley*, (1925) 25 N.S.W.S.R. 174, the solicitor, who had received £25 from a client to cover the whole costs of divorce proceedings up to decree *nisi*, neglected and delayed proceedings and improperly exacted from the client a fee for counsel, and in another case received £20 from another client on account of costs of divorce proceedings, and did nothing for two years except ask the advice of a private enquiry agent and retained the money during that time. In these circumstances the Supreme Court of New South Wales considered that the professional misconduct of the solicitor called for the exercise of its disciplinary jurisdiction but contented itself with a severe censure, ordering him to repay moneys to his clients, and to pay the cost of the proceedings.

Disreputable behaviour and sexual immorality are charges that very seldom appear in the record in the law reports of disciplinary proceedings against practitioners. In *In re Weare*, (1893) 2 Q.B. 439, a solicitor had been convicted of allowing houses, of which he was the landlord, to be used by the tenants as brothels. The Court held that conviction for a criminal offence *prima facie* makes a solicitor unfit to continue on the rolls, but the Court has a discretion, and will inquire into the nature of the crime, and will not, as a matter of cause, strike him off because he has been convicted. Lopes, L.J., at p. 448, supplied this test: "Is the Court, having regard to the circumstances brought before it, any longer justified in holding out the solicitor in question as a fit and proper person to be entrusted with the important duties and grave responsibilities that belong to a solicitor?" The solicitor was struck off. *In re Baillie*, (1915) 34 N.Z.L.R. 705, is interesting for the dictum of Denniston, J. In that case there were two grounds for the motion to strike off: (a) what Denniston, J., described as a clear case of embezzlement of a client's money, (b) disreputable conduct, failure to maintain wife and children, resulting in sentences of imprisonment with hard labour, living in adultery with a woman of whose illegitimate child he was adjudged the father and towards the maintenance of which child he was ordered to pay a weekly sum followed by sentences of imprisonment for failure to keep up his payments, and drunken and disreputable habits of life. In regard to charge (b) Stout, C.J., said (p. 710): "Misconduct need not be confined to professional misconduct; it is sufficient if the conduct is disreputable and the record of the conduct of this solicitor regarding his wife and his mistress can bear no other name." Denniston, J., said (p. 712): "The second ground—that he had been for a lengthy period guilty of conduct showing that he is unfit to remain on the roll—is also, in my opinion, established." The learned Judge added: "The fact that a man is living an adulterous life, even if it is accompanied by neglect of his wife and family, is not, in my opinion, a matter of which the Court can be called on to take notice; but if such conduct is obtruded upon public notice, associated with Police Court proceedings resulting in sentences of imprisonment with hard labour, even if the latter is not actually undergone, then the matter becomes different."

In applications for readmission, the practitioner must show affirmatively that the Court, on solid and substantial grounds, can regard him as a fit and proper person to be trusted. He must show affirmatively not only that since his striking off his conduct for a considerable period has been honourable and irreproachable but that his intrinsic character has undergone a complete change—that, to use the words of Isaacs, J., in *Incorporated Law Institute of New South Wales v. Meagher*, 9 C.L.R. 655, at p. 681: "His purgation is complete, his repentance real, his determination to act uprightly and honourably so secure that he may fairly be re-entrusted with the high duties and grave responsibilities of a minister of justice. He must show, to use the words of Cockburn, C.J., in *In re Pyke*, 34 L.J. (Q.B.) 121, at p. 123, that, "having suffered the humiliation, and all the serious consequences as affecting his interests in life, which such a sentence must necessarily carry with it, he has been awakened to a higher sense of honour and principle." "It is necessary for the Court," said Ferguson, J., in *Ex parte Meagher*, (1919) N.S.W.S.R. 433, at pp. 452, 453, "to look not only to his conduct, but also to his state of mind in regard to his past errors." There must be a complete repentance and a determination to persevere in honourable conduct. If since the striking off the practitioner's conduct has been such as to give rise to suspicion of dishonourable dealing, such conduct "is to be regarded not as a first offence, if offence it be, committed by a person of previously blameless character, but as one committed by a person whose reputation is already grieviously tainted, and who has been already convicted of an offence for which nothing short of removal from the rolls would have been an appropriate punishment." *Incorporated Law Institute of New South Wales v. Meagher* (*cit. sup.*) at pp. 665, 666, per Griffiths, C.J. But if in spite of an honourable and upright life in the strong light of public observation, of no suggestion of any lapse from strict integrity, of tenure of the highest public positions and of esteem both by well known citizens and members of the legal profession, the practitioner "remains so deficient in his perception of the difference between what is right and what is wrong, between what is honourable and what is dishonourable, that he fails to see that he has been guilty of any wrongful or dishonourable conduct in the past," the Court cannot "say that the applicant can be trusted to have any keener perception of that difference in determining his conduct in the future" and must refuse him re-admission: *Ex parte Meagher*, (1919) 19 N.S.W.S.R. 433, at p. 450, per Gordon, J.

The leading case on the subject is *Re Meagher*, which ran through several phases and is an interesting study of psychology. The case is reported in, (1909) 9 C.L.R. 655, and in (1919) 19 N.S.W.S.R. 433. In 1896 Meagher was struck off the roll of solicitors for being a party to a conspiracy to pervert the course of justice in connection with the Dean case. He made applications for re-instatement in 1900, 1902, 1904, 1906 and 1909. In the last year the Supreme Court by a majority granted his application, but its decision was reversed

on appeal by the High Court of Australia and his re-admission refused on the ground that his association with one Willis in land transactions was such that he was not a person who could be safely trusted by the public to discharge with honour and fidelity the high and important functions of a solicitor of the Supreme Court. The true question was held by Higgins, J., at p. 692, to be "not whether the respondent has been proved almost conclusively guilty of misfeasances since 1896, but whether he has proved that notwithstanding his misconduct before 1896 he is now a 'fit and proper' person. The presumption in favour of innocence is not applicable. The respondent has been found guilty in 1896 of misconduct such as showed him to be unfit for the office of a solicitor. As he has shown himself to be capable of such misconduct, has he shown that he is now incapable of it, or, at the least, that he is no longer likely to err in the direction of deception? It is not his reputation that is in question, but his intrinsic character." In 1896 Meagher admitted his guilt and in his earlier applications for re-admission there were professions of contrition. But when he applied to the Supreme Court of New South Wales in 1919, appealing in person, fortified by an affidavit setting out the positions he had held as Speaker of the Legislative Assembly, as Lord Mayor of Sydney (*inter alia*) and of his public service, and by a memorial from solicitors who were prepared to engage in professional relations with the applicant, should he be re-admitted, and a list of prominent citizens who had every confidence in his integrity and would be willing to entrust him with their business, there was, to quote Cullen, C.J., a complete retrogression from those professions. The learned Chief Justice said: "The fact that the applicant has seen fit on this occasion to attempt to excuse, or even to palliate the conduct which was so strongly condemned by the Courts on those occasions, and even to charge the Courts with harshness and injustice in their dealings with it, shows that the previous exercises of the disciplinary powers of the Court leave him unchanged in his conceptions of that standard of conduct which the Courts are bound to exact from those practitioners whom it takes the responsibility of accrediting to the public." In every other respect the applicant had proved himself entitled to readmission for, as Gordon, J., said at p. 450, "For the past ten years he has lived, not in the seclusion of private life, but in the full glare of public life, and during that time no act in the slightest degree dishonourable or discreditable is proved or suggested against him, but on the contrary he is shown to have received honours and distinctions, to have been elected to and held high offices, and to have earned the esteem of well-known and highly esteemed citizens of this city and of many members of the legal profession." But the same learned Judge said: "I am unable to say that I am satisfied that the applicant, who is so deficient in his perception of the difference between what is right and what is wrong, between what is honourable and what is dishonourable, that he fails to see that he has been guilty of any wrongful or dishonourable conduct in the past, can be trusted to have any keener perception of that difference in determining his conduct in the future." The Court, therefore, refused to re-admit him. The last act of the drama was the enactment of a statute by the Parliament of New South Wales admitting Meagher to practise as an attorney, solicitor and proctor of the Supreme Court, as if he had been admitted on the passing of the Act, giving him all the rights, privileges and obligations of such practitioners, including the right of audience, and making him subject to the discipline of the Supreme Court in respect of any act omission or conduct subsequent to the passing of the Act. *In re Meagher* was followed in New Zealand in *In re Lundon*, (1923) N.Z. L.R. 236, and (1926) N.Z.L.R. 656.

In the former case it was held that although the Law Practitioners Act, 1908, contains no express provision as to the re-admission of practitioners who have been struck off the rolls, a jurisdiction to re-admit is vested in the Supreme Court, to which the practitioner must apply in the first instance, applying for a new status, based on his existing qualifications, just as if he had not been previously admitted at all. The Supreme Court in such case would exercise a wise discretion by ordering the motion for re-admission to be removed into the Court of Appeal. The Court of Appeal held that proof that Lundon had led an honest life as a farmer for six years was not sufficient proof that he had become fitted to withstand those temptations to dishonesty and abuse of power which would assail him if he were reinstated in the legal profession. He applied again in 1926. The affidavit he had filed showed that, though his farming venture resulted in insolvency and loss to his creditors, he had been industrious and gained the respect of his neighbours, and that subsequently for three years he had acted as confidential clerk and secretary to the owner of a milking machine business, but though it was sworn that the scope of his duties provided a very definite and sufficient test of his fidelity, honesty and honourable dealings with his employer and with customers and the general public, the affidavits gave no information as to his duties and responsibilities with respect to the receipt and disbursement of moneys. Then there were testimonials from gentlemen holding respectable positions and a "round robin," signed by many Auckland solicitors, representing that he was then a fit and proper person to be admitted. On this material the Court was not prepared to say that the evidence satisfied them that, upon solid and substantial grounds, they were justified in holding out to the public that the applicant was a fit and proper person to be readmitted as a solicitor.

The foregoing cases illustrate the serious responsibility that rests not only upon the Supreme Court but also upon the Law Societies of the Dominion, not only to themselves but also to the general public, to see that there stand in the ranks of an honourable profession only those members worthy of public confidence.

Consolidation of Statutes.

In Victoria the Statutes in force have been consolidated and the statute law of that State will now be obtainable in seven volumes. With the new Acts an explanatory paper of over a hundred pages will be issued directing attention to the changes in law and procedure, the removal of anomalies and the general re-arrangement of titles and subject-matter. When it is remembered that the last general consolidation of Statutes in Victoria was completed as recently as 1915, it is apparent that New Zealand can learn much from that State in such matters. Our present practice of the consolidation each year of one or two of the more important Acts, while no doubt commendable on the principle of half a loaf being better than no bread, must certainly tend to postpone, and not to hasten, a very much needed general consolidation.

London Letter.

Temple, London,
28th August, 1929.

My dear N.Z.,

It is no use my pretending that anything has occurred or that, if anything has occurred in the legal world, I am aware of it, in this period in the dead centre of our Long Vacation. The re-dispositions of Yorkshire County Court circuits are a matter of little moment to me, and of still less moment to yourselves. As they do not even include the appointment, as yet, of a new County Court Judge to take the place of the retiring Judge, there is even no scope for personal allusions. Whether or not you have the counter-part in New Zealand of our County Court system I do not even know. It is, to the layman, most familiar as a debt-collecting machinery, and a slow-moving and merciful machine at that; but it is, in actual fact and to those concerned, something very much more. It is the Court of the small, the less well-to-do litigant; in conception it is the model of progressive civilisation, in that it assures justice even in what the wealthier world may regard as trifles; and in development it achieves much good in the administration of justice and is unencumbered with most of the detrimental diseases which affect litigation these days, the mischiefs of delay and expense.

Traditionally at our Bar, acceptance of a County Court Judgeship is a confession of failure, possibly, and the abandonment of ambition always. The salary is small, and is open to the criticism appropriately directed at your Judicature but not to be applied to ours of the High Court: that the reward is unnecessarily meagre and unnecessarily calculated to make unavailable the right men. It is said that this is a state of affairs which was due to be improved upon, even if the Conservative Party was returned again to power at the last election; and that it is a state of affairs bound to be remedied, now that we have in fact a Labour Government. But beyond an *obiter dictum* of the new Lord Chancellor, at a City function towards the end of last term, there has as yet been no indication of any sweeping reform in this direction. The interest, therefore, in the forthcoming appointment of a new County Court Judge is but vague and fleeting; little more curiosity animates us, in the context, than that of seeing, if we are to see, the state of affairs of another Leader's practice, and we shall realise and shall know, if a King's Counsel is appointed and he is a known man, that his practice was smaller or more precarious than we had supposed.

It is only in the Police Courts that any legal matters take shape, this month. These have not been wholly routine or devoid of interest to such lawyers as are so devoted to law that, even on holiday, they must be watching it. The theft of motor-cars, for the temporary purpose known as "joy-riding" is, thus, a current subject which has given rise to most wonder and comment. The Larceny Act prevents the theft being a theft at all; and there is no substantial offence with which the thief, as undoubtedly the offender is according to all ethical considerations, can safely and effectively be charged. Magistrates in or about London are so plagued with the thing, that they intend, it is reported, an official application to the powers that be to alter the law so that the enterprise may be a crime. I do not know that lawyers, at large, are likely to sympathise readily with the project. It savours too much of legislating arbitrarily for a particular class, and a moneyed class at that. Motorists, moreover, do not, as an entity, recommend themselves very warmly to lawyers inasmuch as they are themselves so disposed to lawlessness. If every man in a motor car, or driving it, made it his business to learn the law regulating his driving, the world would, in England at any rate, be a vastly more safe place to live in. Though we may be motorists ourselves, on occasion, we are human beings all the time; and we must, if we are lawabiding, resent the mischievous disregard of rules by the nasty minority of motor-drivers, the tolerance of that minority, and the reluctance or omission of the majority to deal with it or have it dealt with. The usual toll of life, exacted upon the roads this holiday month, brings into prominence this subject at the moment.

The visit of American lawyers to London, upon which I believe I remarked in my last, is still a matter discussed, with appreciation of their appreciation of our systems. The conviction of a young American citizen and his sentence to five months imprisonment, for manslaughter by his motor-driving, came as a curiously apt incident about the time of this visit; and you will have seen that the proceedings, before Travers Humphreys, J., excited the admiration of the United States press, for its impersonality, its impartiality, its expedition, and its inevitability. As the *Law Journal* most wisely remarks, we, here, should do well to turn our eyes to the system and administrations of law in other countries, for our information and (if we can ever bring ourselves to contemplate such a thought) for our possible improvement. And this seems to me to warrant the principal impression I brought away with me from the United States in the early part of this year: the formidable degree of the intelligent American's modesty at heart which argues a dangerous tendency to learn, and learning, to get ahead of us even in those matters wherein we feel most superior and are most ready to teach.

It is announced that a new Borough Quarter Sessions is to be created at Southend, and you are probably completely mystified (if you have ever had to study the matter) to know what principle, if any, governed the selection in the past of the hundred odd boroughs which have their separate Quarter Sessions jurisdictions. There is not, and never has been, any principle that I know of; the selection has just happened, from time to time, and there the result is. There is further announced for the second week in next October, a meeting of the Committee, representing Great Britain and the Dominions, to enquire into the wider legislation, especially in shipping matters; and the period which this letter covers has seen the appointment and the operation and the decision of the Board of Arbitration in the cotton wages dispute, presided over by that very remarkable man, Mr. Justice Rigby Swift, a man as much detested by those who do not like him as he is admired and liked by those who do. The reason for this is simple, and has already occurred to you, as you read: he is a man of marked character, great ability, sharp humour and utter inability to suffer fools, even fools who are not fools really given time to get over their timidity, gladly. I have a great admiration for his speed of thought and his admirable gift of language, displayed to perfection in his summings-up. So much as it is given to the humble to get to know the great,

I have got to know him, and say in the hope that he may never know I have dared to say it, I like him immensely. I have the feeling that if a Judge ever is given reason to suppose that you profess a personal liking for him, he will never (just to be on the safe side) give you a fair, or at least a pleasant, run in his Court again. I do not suppose you will be interested in our new Rules of the Supreme Court relating to company matters, and I do not propose to tell you about them.

I have only to add that there is another High Court Judge of the King's Bench Division at present in these parts, with his family. His offspring and mine happen to be great friends, and his wife and mine are the same. The association of these unreasonable and ungovernable people resolved, the other night and at my house, to embark upon a series of what are known as "dumb charades." You may conceive my anxiety, with regard to the conduct of any serious case I may hereafter have in that Judge's Court, while I watched him compelled to illustrate possible rhymes to "Hug," first by creeping about on the floor and pretending to be a "slug," and then by dressing as a desperado and acting the "thug." As you very rightly say, this is a matter which ought not then to have been, and in any case shall not now be, carried further.

Yours ever,

INNER TEMPLAR.

Silence in Court.

Swearing in a new metropolitan magistrate recently, a learned Judge is said to have advised him not to talk much on the bench. That wise judges and magistrates say very little is an old story; so is the advice "Never give reasons; your decisions will probably be right, but your reasons are sure to be wrong." While it is perfectly true that a too fluent tongue is dangerous in the occupant of the bench, likely to betray him into error or indiscretion, it is easy to over-estimate the wisdom of sphinx-like silence and inscrutability. Certainly, the magistrate who constantly interrupts witnesses is sure to confuse them. If he keeps interposing and taking the case out of counsel's hands, he embarrasses him and spoils the conduct of his case. Moreover, if he talks too much, he is probably not listening and watching the demeanour of the witnesses as closely as he might. Nevertheless, the magistrate who hardly ever breaks silence is not necessarily profoundly wise. Those who have the handling of a case are often helped a very great deal by a timely intervention, explaining a tentative opinion so as to encourage argument or to direct it to the essential points of the case. To have no sign at all from the bench from start to finish means that no risk can be taken by shortening the proceedings or restricting the arguments; whereas an intimation that the magistrate regards certain matters as irrelevant or unimportant and desires the issues to be confined within certain limits, defines and lightens the task of the advocate or the litigant. Without it, he has not the faintest notion of what, if any, impression he is making. Indeed, he may almost be pardoned if he sometimes wonders whether he has the undivided attention of the bench. Occasional interruptions help far more then they hinder, provided they are (as they would be, one may assume) both timely and courteous.—"*Law Journal*."

Bench and Bar.

The Hon. T. M. Wilford, Minister of Justice, has been granted the Letters Patent of King's Counsel. While politics have of late years claimed so much of Mr. Wilford's attention that he has recently been seen but little in Court there is not the slightest doubt that Mr. Wilford's notable preeminence in the past as a jury advocate is ample justification for the appointment. As no King's Counsel appointed since the passing of the Law Practitioners Amendment Act, 1915, can practise as a solicitor, or in partnership with a solicitor, Mr. Wilford has retired from the firm of Wilford, Levi and Jackson, the practice being continued by Mr. P. Levi and Mr. P. W. Jackson under the style of Levi and Jackson.

The name of the firm of Tripe, Herd and Herd, Wellington, has been changed to Herd and Herd.

Vexatious Delay for Witnesses.

Under the conditions existing in this country it is generally found practicable to give a witness some idea, at all events, of the time when he is likely to be required to give evidence; but even with us witnesses are frequently subjected to vexatious delay. Mention has lately been called to the matter in England by the observations of Judge Gwynne-James at Bath County Court, when fining a medical practitioner two guineas for failing to obey a subpoena. "The Judge," says the *Law Journal*, "mentioned two recent cases which had occurred on his Circuit where medical men refused to give evidence in Court on behalf of their patients unless they were paid special fees; in one the doctor demanded a fee of twenty guineas. The fact is that a medical witness is bound to attend on being served with a subpoena, and to be given his conduct money, with a fee of one guinea, which in special circumstances may be increased to a fee not exceeding five guineas. For failure to obey, the doctor is liable to fine and imprisonment for contempt of Court. There can be no doubt that this legal *obligatur* operates with great hardship on members of the medical profession; especially since the increase in the number of running-down cases, where medical evidence is almost invariably required. It is equally certain that their attendance must be enforced, and that there is an appreciable difference in value between a willing and an unwilling witness. An increase in the fee allowable would not meet the difficulty. Far more important, in our view, is the frequency with which doctors are summoned to attend Court at a time when the case cannot possibly be heard. A medical man is, in consequence, often kept waiting for a day or for days while his practice and his patients are suffering. The approximate timing of cases would effect a marked improvement, and this reform cannot be regarded as impracticable. Meanwhile, the doctors must remember that fine and imprisonment are greater evils than the vexatious delay which so often follows the act of obedience to a subpoena."

Some Queer Laws.

The above title is perhaps not, strictly speaking, quite correct. Any action or institution which may be described as "queer" is, in that case, meant as unsound, possessing no discoverable motive or purpose. But "queer" laws are only mysterious, erratic or eccentric when regarded objectively. To the sympathetic student of English laws and legal customs, every statute, however grotesque it may appear to the twentieth century, had its definite basis of utility, which was sometimes, too, a basis for the preservation of society.

Very recently, a "queer" bylaw was introduced in Biarritz, by which the *gens d'armes* were empowered to arrest any fat man or woman who might be dressed in such inartistic garments as to offend, not the public sense of decency, but the public sense of aestheticism. Such a law might seem amusing to us, but it certainly has its basis of utility, inasmuch as aesthetic conduct and moral conduct intertwine very closely. It is sometimes extremely difficult to differentiate, in a court of law, between the moral aspect of an action and its aesthetic aspect. What may have been assumed to have shocked a witness's sense of decency, may really, have offended merely his eyesight.

In the same way the curious statute enforced during the reigns of both Richard II and Henry IV, making it compulsory for men to practise the game of archery on Sundays, had its basis of utility in preparing the people for a state of war. Blackstone quotes another remarkable statute which was still unrepealed in his own day and endured until the reign of Queen Victoria. This was an Act (10 Edw. I) which ordained that no man should be served at dinner or supper with more than two courses, except upon any great national holiday, when he could be served with three courses. A concomitant law made the wearing of expensive garments (according to contemporary fashion—piked shoes, short doublets, and long coats) a criminal matter. The motive of such laws was possibly to keep the money concentrated in a few hands and available to the King's tax-gatherers.

It was a queer law, introduced by James I, which prevented England from probably being, in our day, a great tobacco-producing country. Before 1624, when the Abolition Order was carried out only too effectually, a good deal of tobacco-cultivation was in progress in England, especially in Gloucestershire. The law of James I empowered every sheriff to uproot all tobacco plants, and so this part of English agriculture speedily perished. The reason for such an odious proclamation seems almost to arise from some erratic spitefulness of the monarch responsible for it. Its real reason, of course, was to facilitate the collection of revenue upon tobacco, it being so much easier to levy a duty at the Customs House upon importation from Virginia or Bermuda (where it was then extensively grown) than to collect a tax from every individual tobacco planter in England.

It is strange to find that domestic fires were once taxed in England. "Smoke-farthings" and "hearth-money" were levied for the benefit of the King and of the clergy in the latter half of the seventeenth century, and there was even, at that time, a window-tax, so that the people had even to pay for their sunlight.

Daines Barrington, the celebrated archaeologist, mentions an extraordinary legal ritual (a "queer law") designed to prove the innocence or guilt of a prisoner upon trial. This was the bread-and-cheese ordeal. The food was blessed by a priest and the prisoner made to eat it. If he were able to swallow it, then he was adjudged innocent and acquitted, but if he choked in the ordeal, then he was adjudged guilty and received the consequences. "Hence, perhaps," remarks Barrington, "the expression, 'I wish it may choke me.'" Fortunately, though it may be still true that a prisoner's demeanour plays a large part in a magistrate's verdict, our rules of psychology are rather less rough-and-ready than the bread-and-cheese judgment.

One wonders whether the sensational cases, such as the recent Croydon inquest, which are so prominently featured in the newspapers, would still attract large queues of court spectators if an admission fee were charged. Such a suggestion, we know, could be promptly pooh-poohed on the ground of public interest, but it is interesting to find, in the "queer" statutes 13 Edw. I, c. 42-44, that admittance to the law courts by outsiders was charged one penny: equivalent to about one-and-threepence nowadays. The statute, it should be noted, directed that the defendant and plaintiff should not be charged admission.

Some time ago interest was aroused in a judgment upon a girl indicted for whistling in an English churchyard. Upon appeal the judgment was reversed, so that one may fairly conclude that offences committed in a churchyard are now no more culpable, in the eyes of English law, than those committed elsewhere. This was not the case in former years, when, according to the Statute 6 Edward VI, the offence of striking in a churchyard was punished by cutting off the delinquent's ears. The basis of utility, in this instance, however, was more than one of veneration, for it was instituted to prevent dangerous riots between the Papists and the Protestants upon the final establishment of the Reformation. Nevertheless, Barrington, writing in 1775, notes that not many years previously there was an indictment under the same Act at the quarter sessions in Somersetshire. Striking in the King's Palace was once regarded as perhaps the highest outrage of all, and was, until the repealing act of George IV, punishable by perpetual imprisonment and fine at the King's pleasure, and also with the loss of the offender's right hand. Baker's "Chronicle" describes the arraignment of one such delinquent:—

"On the 10th of June, 1541, Sir Edmund Knevet of Norfolk, was arraigned before the officers of the Green Cloth for striking one Master Cleer within the tennis court of the King's House. Being found guilty, he had judgment to lose his right hand, and to forfeit all his lands and goods . . . the said Knevet confessed and humbly submitted himself to the King's mercy; only he desired that the King would spare his right hand and take his left: 'Because,' said he, 'if my right hand be spared, I may live to do the King good service,' of whose submission and reason of his suit, when the King was informed, he granted him to lose neither of his hands, and pardoned him also of his lands and goods."

Then there is the curious list of exceptions made from time to time to the original Sabbath Observance Act of 1677. The statute itself contains an exemption in favour of cook's chops, and was later extended to the baking of meat, puddings and pies on a Sunday; this being regarded as "a work of piety and necessity."

One justice is said to have observed at the time that "it was as reasonable that the baker should bake for the poor, as that the cook should roast or boil for the magistrates." In the same reign, too, exception was made "for the crying or selling of milk before nine o'clock in the morning or after four of the clock in the afternoon." By a law of 10 Will. III, mackerel were permitted to be sold on Sundays before or after divine service; though why such a special mark of favour should be shown to mackerel is still obscure. At any rate it proved to be the thin edge of the wedge, for a provision was afterwards recognised by the 2nd of Geo. III, also in favour of fish carts travelling on Sundays.

A discussion on the theme of the Queer Laws of other days must inevitably lead to the question of those quaint and effete laws which still encumber the statute book, and which still survive both in England and in this Dominion under frequent protest from judges and magistrates. In England hardly a day passes when some one in legal authority does not call for the complete overhauling or revision of some law which has long outgrown its original purpose of utility. All laws, however freakish they may appear on the face of things, were designed for a specific and reasonable purpose (whether that purpose was equitable or not). The only laws which are really queer and which may really be called freakish or eccentric, are those which, suited to meet the manners and philosophy of another age, still linger in their fusty obsolescence, to harass modern judges and modern seekers of justice.

Official Memoranda.

The protest recently made in the correspondence columns of the *Times* against the tendency of Government Departments, when issuing explanatory memoranda relating to new statutes, to endeavour to interpret such statutes instead of merely to explain the machinery necessary for their working, serves to bring into prominence another aspect of "departmental aggression" upon which the Lord Chief Justice and other eminent legal authorities have been moved to make comments. The particular complaint referred to was a "Memorandum as to Compilation of Special Lists" issued shortly after the Rating and Valuation (Apportionment) Act became law. *The Justice of the Peace* commented as follows on the matter: "There is no doubt that the extent to which this memorandum purports to give the legal construction to be placed on various sections of the Act, goes far beyond what might be expected in an 'explanatory' memorandum. That an official publication of this character should be quoted before an assessment committee, as alleged, is certainly most improper. If that sort of thing were permitted, we should soon do away with the necessity for law reports, and the dicta of anonymous officials in Whitehall would have the force of judgments of the courts—an intolerable state of affairs." So far we, in New Zealand, seem to have been spared this latest type of departmental interference.

"If the scales of justice hang anything like even, throw into them some grains of mercy."

—Lord Kenyon.

Forensic Fables.

THE CAREFUL LAWYER WHO COULD NOT MAKE UP HIS MIND.

There was Once a Careful Lawyer who, as the Result of a Variety of Unexpected Circumstances, Found Himself Elevated to the Bench. The Careful Lawyer was not Entirely Satisfied that he had the Necessary Qualifications for Judicial Office, and his Misgivings were Shared by those who Knew him Best. For Most Unfortunately, he could not Make Up his Mind. In Chambers the Careful Lawyer Got on Well Enough by Affirming the Order of the Master and Directing that the Costs should be Costs in the Cause. And in Jury Cases the Careful Lawyer Discovered that it was not a Bad Plan to Read over the Evidence to the Jury and Ask them Such Questions as Counsel Suggested. But as a Rule the Careful Lawyer Found himself Sadly

Puzzled. On Circuit he Spent Sleepless Nights Wondering whether the Prisoner ought to Have Two Months with Hard Labour or Three Months in the Second Division; and when he Tried a Non-Jury Case it was his Custom to Reserve his Judgment for so Long a Period of Time that he Often Forgot what the Case had been About. One Day, for a Change, they Put the Careful Lawyer in a Divisional Court. It was Hoped that he would Find the Job an Easy One. But the Careful Lawyer was so Bothered by Trying to Decide, whilst the Other Judgments were being delivered, whether he should Say that he Agreed with them or that he Concurred with them, that he had a Nervous Breakdown from which he Never Recovered.

Moral: *Toss Up.*

Magistrates and the Press.

The magistrates of the Gore Division of Middlesex have intimated to the local Press that facilities for obtaining the addresses of prisoners and defendants appearing at the Wealdstone and Hendon Petty Sessions will no longer be afforded. It has been explained that their view is that the Press should not have any more information concerning the cases than the public attending the Courts. On the official list of cases to be heard no addresses are given and only a bare description of the charge. Previously full details of charges and summonses have been available. Representations have (says *The Times*) been made to the magistrates urging them to reconsider their decision.

Bills Before Parliament.

The following completes our summary of the provisions of the Bills introduced into Parliament during the Session just ended. It is probably unnecessary to remind readers that many of these Bills, including some of those summarised below, have failed to become law; others, again, have reached the Statute-book in a very much modified form.

Customs Amendment. (Hon. Mr. Taverner). Increasing rate of primage duty by 1 per cent; S. 15 of Customs Amendment Act, 1921, amended.—Cl. 2. Increased rate of primage duty not to apply with regard to goods enumerated in Schedule after 31st March, 1930.—Cl. 3. Nothing to conflict with Schedule of customs duties and exemptions relating to goods from South Africa contained in Order-in-Council of 7th September, 1925.—Cl. 4. Increased primage duty to come into force in Cook Islands on day determined by Governor-General by Order-in-Council.—Cl. 5. Ratification of resolution by House of Representatives of 1st August, 1929, increasing rate of primage duty.—Cl. 6. Governor-General may by Order-in-Council prescribe with respect to goods imported into New Zealand after date specified (not earlier than 31st March, 1930) that primage duty shall be payable as if this Act had not been passed.—Cl. 7.

Rural Intermediate Credit Amendment. (Rt. Hon. Sir Joseph Ward). Power of Commissioner to authorise officers of Board to sign on his behalf documents or instruments shall include power to authorise execution under seal: not necessary to validity of any transfer, assurance, consent, document, or instrument executed as provided in S. 6 of principal Act that seal of Board be affixed thereto.—Cl. 2. S. 7 of principal Act as to method of execution of documents under seal of Board amended.—Cl. 3. Increase to £2,000 of amount that may be lent by association to any one shareholder: S. 50 of principal Act amended accordingly.—Cl. 4. Increase to £2,000 of amount that may be lent to any one person without intervention of association: S. 63 of principal Act amended accordingly.—Cl. 5. Further provision for surrender of shares by shareholders in associations: S. 56 of principal Act amended.—Cl. 6. Associations to be exempt from annual license fees under Part X of Stamp Duties Act, 1923.—Cl. 7. All declarations of trust, conveyances, transfers, assignments, assurances, bonds, securities, guarantees, mortgages, assignments or transfers of mortgages, or other like instruments executed for purpose of complying with any requirements of the Board or of an association in relation to any advance made by the Board or by any such association to be exempt from stamp duty: S. 72 (1) of principal Act repealed and substitution therefor.—Cl. 8. Minister of Stamp Duties may from time to time agree with Board to exempt from stamp duty all cheques and receipts issued or given by the Board in consideration of the payment by the Board of such sums as may be agreed upon by way of composition for such stamp duty.—Cl. 9. Provision as to contents of annual report of Board.—Cl. 10.

Native Land Amendment and Native Land Claims Adjustment. (Hon. Sir Apirana Ngata). The usual annual budget of amendments of general and special application to Native Land Laws. Some 65 clauses.

Products Export Amendment. (Hon. Mr. Forbes). S. 2 of Products Export Act, 1908, amended by adding word: "tobacco" after word "hops" in definition of term "Products."—Cl. 2.

Nurses and Midwives Registration Amendment. (Hon. Mr. Stallworthy). For purposes of principal Act term "hospital" means either a public hospital under the control of a Hospital Board constituted under Hospital and Charitable Institutions Act, 1926, or a private hospital for time being licensed under Part III of that Act.—Cl. 2.

Slaughtering and Inspection. (Hon. Mr. Forbes). Consolidating and amending law relating to slaughtering and inspection of stock and inspection of meat for consumption in New Zealand and for export. Inspectors and other officers may be appointed.—Cl. 3. Powers of entry of inspectors.—Cl. 4. Stock for human consumption or export to be slaughtered in licensed premises.—Cl. 5. Exemptions from requirements as to slaughter of stock and sale of meat.—Cl. 6. Licensing of ordinary slaughterhouses.—Clauses 7 to 9. Establishment of abattoirs.—Clauses 10 to 14. Licensing of abattoirs.—Clauses 15 and 16. Notice that abattoir available for slaughtering.—Cl. 17. Slaughtering in ordinary slaughterhouses in abattoir district to cease when abattoir established.—Cl. 18. Sale of meat in abattoir district.—Cl. 19. Fees and charges.—Cl. 20. Revision of fees and charges.—Cl. 21. Minister may draw up scale of charges and fees if controlling authority fails to do so.—Cl. 22. Delegation of power to establish abattoir.—Cl. 23. Abattoir may be established in common.—Cl. 24. Abattoir district may be extended to include contiguous district.—Cl. 25. Licensing of meat-export slaughterhouses—Clauses 26 to 30. Slaughtering inspection and branding of stock.—Clauses 31 to 35. Diseased meat and stock—Clauses 36 and 37. Compensation for stock found diseased on slaughter.—Cl. 38. Insurance fund in respect of condemned stock.—Cl. 39. Identification of stock slaughtered.—Clauses 40 to 42. Stolen stock.—Clauses 43, 44. Export of meat: meat exporters' licenses.—Clauses 45 to 48. General provisions as to cleanliness; prevention of undue suffering to stock; allowing drainage to flow into stream; shooting at stock; blowing and spouting of meat; feeding and keeping of swine; obstruction of inspectors; punishment of offences, etc.—Clauses 49 to 60. Governor-General may by Order-in-Council declare any animal to be stock for purposes of Act.—Cl. 61. Power to make regulations.—Clauses 62 and 63. Repeals and savings.—Cl. 64.

Local Legislation. (Hon. Mr. de la Perrelle). Some 60 clauses of local application.

Reserves and Other Lands Disposal. (Hon. Mr. Forbes). Providing for the sale, reservation and other disposition of certain reserves, Crown lands, endowments, and other lands, and validating certain transactions.

Railways Authorisation. (Hon. Mr. Ransom). Governor-General authorised to undertake or enter into contracts for construction of certain railways in Schedule.—Cl. 2. Cost to be paid out of moneys appropriated for that purpose by Parliament.—Cl. 3. Act deemed to be a special Act for purposes of Public Works Act, 1928, "which Act is so far as applicable hereby incorporated with this Act."—Cl. 4.

Shipping and Seamen Amendment. (Hon. Mr. Cobbe). Act to come into operation on day on which His Majesty's assent thereto is notified by the Governor-General by proclamation or on such later date (not later than three months after such publication) as is specified in the proclamation.—Cl. 1. Following provisions relative to conditions to be complied with by applicants for third-class engineers' certificates repealed:—S. 22(5) of Act of 1908; so much of 2nd Schedule to Act of 1909 as relates thereto; S. 2 of Act of 1911; S. 3 (2) of Act of 1913.

Town Planning Amendment. (Hon. Mr. de la Perrelle). Part I: Miscellaneous amendments to principal Act. Distinction between term "regional planning scheme" as used in principal Act and that term in its true technical sense: expression "extra-urban planning scheme" substituted accordingly in principal Act for expression "regional planning scheme"—Cl. 2. Removing statutory obligation as to time within which preparation of town-planning schemes must be completed.—Cl. 3. Amending provisions of principal Act defining and restricting the rights of compensation in respect of operation of town-planning schemes.—Cl. 4. Pending completion and approval of scheme under principal Act, local authority may prohibit the erection of any building or carrying-out of any work that would contravene scheme.—Cl. 5. Part II: Regional Planning Schemes. Authority for preparation of regional planning schemes.—Cl. 6. Regional planning scheme to serve as model and adherence to its provisions to be optional and not compulsory.—Cl. 7. Local authorities may unite in preparation of regional planning scheme.—Cl. 8. Regional planning committee.—Cl. 9. Associate members of regional planning committee.—Cl. 10. Functions of regional planning committee.—Cl. 11. Regional planning committee may appoint a sub-committee.—Cl. 12. Regional planning committee to continue in existence until dissolved.—Cl.13. Committee to prepare estimate of cost of preparation of regional planning scheme.—Cl. 14. Town-planning Board to appoint a local authority which shall be responsible for expenditure incurred by regional planning committee.—Cl. 15. Members of regional planning committee to be entitled to refund of expenses.—Cl. 16. Governor-General empowered to make "all such regulations as may be deemed necessary in relation to preparation of regional planning schemes.—Cl. 17.

Divorce and Matrimonial Causes Amendment. (Mr. Barnard). S. 10 of principal Act amended by adding following additional ground for divorce: "(l) That the petitioner and respondent

are parties to a decree of judicial separation or a separation order made by a Court in any part of the British Dominions having jurisdiction to grant decrees of judicial separation or separation orders and that such decree or order is in full force and has been in full force for not less than three years. Cl. 2.

Cinematograph Films Amendment. (Hon. Mr. de la Perrelle). Provisions of Ss. 16 and 17 of principal Act, so far as they require the incorporation in films of photographic reproductions of certificates of Censor and Registrar not to apply to sound-picture films: in case of such films the contents of such certificates shall be exhibited as prescribed by regulations under principal Act: duty of renters to supply prescribed reproduction of such certificates to exhibitors: S. 43 (d) of principal Act amended.—Cl. 2. Modification of restrictions with respect to contracts for advanced bookings: S. 37 (1) of principal Act amended by omitting word "six" and substituting word "nine": S. 87 not to apply, as regards limitation of time within which agreements for the supply of films may be entered into, to agreements under which supply is to be completed within 18 months from date of agreement.—Cl. 3.

Meat Export Control Amendment. (Mr. Lysnar). S. 2 (3) of principal Act repealed.—Cl. 2. S. 2 of principal Act amended.—Cl. 3. S. 2 (2) (b) of principal Act amended and substitution therefor.—Cl. 4. Date of election of producers' representatives.—C. 5. S. 2 (4) of principal Act repealed and substitution therefor.—Cl. 6. Oversea companies not to acquire further interests in freezing works.—Cl. 7. Oversea companies to sell existing works to local companies.—Cl. 8. Pending or failing sale works to be carried on on a joint basis.—Cl. 9. Work to be carried on on owner's account if oversea companies disregard law.—Cl. 10.

Taupiri Drainage and River District. (Hon. Mr. de la Perrelle). A public bill making provision with respect to the drainage of certain lands in the watershed of the Mangawhara River and the protection of such lands from damaged by floods.

New Zealand University Amendment. (Hon. Mr. Atmore). Council of University hereafter to be known as Senate.—Cl. 2. Person employed by University or constituent colleges, if amount paid to him in any financial year does not exceed £50, not to be ineligible for membership of Senate.—Cl. 3. S. 20 of Act of 1926, as to constitution of Entrance Board, amended.—Cl. 3. Provisions as to subsidies on voluntary contributions amended.—Cl. 5. Financial year of University to end on 31st March, 1926.—Cl. 6. Statutory grant of £3,845 per annum to University restored.—Cl. 7.

Local Elections and Polls Amendment. (Mr. McCombs). Empowering local authorities to adopt system of preferential voting.

Finance. (Rt. Hon. Sir Joseph Ward). The usual annual miscellany. Some 65 clauses.

Transport Department. (Hon. Mr. Veitch). Providing for Minister of Transport.—Cl. 2. Establishment of Transport Department: Acts in Schedule to bind the Crown.—Cl. 3. Appointment of Commissioner of Transport and other officers of Department.—Cl. 4. Wide powers of regulation-making.—Cl. 5.

Appropriation. (Rt. Hon. Sir Joseph Ward).

Land Drainage and River Protection. (Hon. Mr. de la Perrelle) This Bill of 190 clauses reached us too late for summary in this issue.

Private Bill.

Roman Catholic Bishop of Auckland Empowering.

Rules and Regulations.

Samoa Act, 1921.—Revocation of Clause 4 of Samoa Immigration Amendment Order and amendment of sub-clause 1 (paragraph b) of Clause 6.—Gazette No. 67, 10th October, 1929.

Post and Telegraph Act, 1928. Postage rates on parcels for United States of America.—Gazette No. 72, 24th October, 1929.

Harbours Act, 1923. Amended regulations as to qualifications of harbourmasters and pilots.—Gazette No. 72, 24th October, 1929.

Cinematograph Films Act, 1928. Cinematograph Films (Storage, Exhibition, and Renting) Regulations, 1929.—Gazette No. 64, 23rd September, 1929.

Legal Literature.

Questioned Documents.

Second Edition: By Albert S. Osborn. (pp. xxiv: 1004: xxv: Boyd Printing Co.; Carswell Co. Ltd.; Sweet & Maxwell Ltd.).

Favourable reviews from all quarters greeted the first edition of Osborn's *Questioned Documents* when it appeared just on twenty years ago, and this new edition, brought up-to-date with modern scientific knowledge, is welcome indeed. Intended to assist in the discovery and proof of the facts in any investigation or legal inquiry involving the genuineness of a document, the work, so far as this reviewer is aware, deals with a subject not adequately treated in any other legal text-book. Every kind of forgery is discussed with the greatest detail and thoroughness. The author deals first with such matters as the preliminary examination and care of questioned documents and explains the use of photography and the microscope and other special instruments for assisting in the detection of forgeries. Handwriting is discussed from every viewpoint—movements, alignment, pen-position, pen-pressure, shading, arrangement, size, proportions, spacing, and slant are a few of the topics dealt with—and the author explains the methods adopted by the experts in determining questions of disputed handwriting. Simulated forgeries, guided-hand signatures, traced forgeries, and anonymous letters form the subjects of separate chapters. The importance of such matters as ink and paper in considering allegations of forgery is ably treated. Questions frequently arise as to the order of writing on a document and here separate chapters are found dealing with crossed strokes and the writing in the document. There are most interesting chapters on erasures, additions, and substitutions in documents and a full treatment of a matter of great importance nowadays, questioned typewriting. The book is illustrated throughout with representations of writings of various sorts, and of instruments devised to test their genuineness—these illustrations are excellent and a most valuable feature of the work. A reviewer cannot do better, on the whole work, than adopt the words of Professor Wigmore, in his introduction: "The book abounds in the fascination of solved mysteries and celebrated cases, and it introduces us to the world-wide abundance of learning in this field."

Osborn is absolutely indispensable to any lawyer who has to consider any question of the genuineness of a document.

New Books and Publications.

The Law of Husband and Wife. By G. F. Emery, LL.M. (Effingham Wilson). Price 5s. 6d.

Shipping Documents. Second Edition. By A. J. Hodgson. (Effingham Wilson). Price 6s.

Smith's Leading Cases. (2 Volumes). Thirteenth Edition. By Sir T. Willes Chitty, A.F. Denning and C. P. Harvey. (Sweet & Maxwell Ltd.). Price £5.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"Under the stern panoply of the law there are human beings." —*Sir Henry Page Croft, M.P.*

Vol. V. Tuesday, November 26, 1929 No. 20.

Peremptory Challenge of Jurors.

The right of peremptory challenge of jurors in criminal cases has been recently brought into prominence in England by the course taken by counsel for the accused in two successive cases before the Recorder of London at the Central Criminal Court. In the first case—a charge of a sexual offence against a female child aged eight—counsel for the defence successfully objected, by means of his right of peremptory challenge, to all women serving on the jury, and in the second, which concerned the possession of house-breaking implements, the accused's counsel challenged peremptorily the whole twelve members of the jury. We, in New Zealand, have not yet followed England's example in permitting women to serve upon juries, and, whatever view may ultimately come to prevail upon the question, there is no doubt that any proposal directed towards that end would meet, in this country, with very considerable opposition, and, although it may be that as regards cases of the class to which that first-mentioned belongs there is something to be said for the learned Recorder's view that the assistance of women jurors is of great advantage, few New Zealand lawyers are likely to agree with his observation as to the right of peremptory challenge: "I object to the practice, but I cannot stop it."

So far as can be gathered from our English contemporaries it seems that the right of peremptory challenge has fallen into disuse, or at all events has been exercised but rarely in recent years. The *Law Times* speaks of counsel as having "availed himself of the *old* right of peremptory challenge devised for the protection of felons in the days of formidable subsidiary penalties." The *Justice of the Peace*, always in touch with criminal practice, refers to the "*antiquated* right of peremptory challenge of jurors in cases of felony"; and the *Law Journal* and *Solicitors' Journal* both agree that it is unusual for the right of peremptory challenge, which admittedly exists, to be exercised. So astonishing is this to the New Zealand practitioner who is accustomed to seeing in every case in which a jury is involved, whether criminal or civil, the right of challenge vigorously invoked, counsel—with a little embarassment occasionally, perhaps, to the juror challenged within an inch of taking his seat—endeavouring to conserve their challenges by announcing them only at the latest possible moment, that one at once inquires whether there is any material difference between our law and the English law on the matter likely to account for the desuetude of the right in England while it is so universally, and so zealously, availed of here.

It seems that in England peremptory challenges are allowed to the defence in all cases of treason and felony, but not in cases of misdemeanour. In certain cases of high treason the number is thirty-five: in other cases of treason, and in murder and all other felonies the number is twenty. In cases of misdemeanour, though no right of peremptory challenge exists in England, it is usual for the officer on application to him, to abstain from calling any reasonable number of names objected to either by the prosecutor or by the defence, taking care that enough are left to form a jury, and this practice has, although there is no modern reported illustration of it, often been sanctioned by the Court: *Archbold*, 27th Edn., 197, 198. No right of challenge without assigning cause exists, curiously enough from our point of view, in civil cases: *Creed v. Fisher*, (1854) 9 Exch. 472; *Pearse v. Rogers*, (1860) 2 F. & F. 137. It may be that the very lack of reason in the English law is in part responsible for the right of peremptory challenge having fallen into disuse. Why a right of challenge in some criminal cases and not in others? Why no right of challenge in civil cases? What justification is there now for the different number challengeable in some cases of treason? Further, even the practice as regards the exercise of the right does not seem to be settled and different methods of empanelling a jury are adopted in different counties—*Roscoe*, 15th Edn., 279: this apparently explains what to us seems the unusual method adopted in the second of the cases mentioned above of peremptorily challenging the twelve jurors, not one by one, but after twelve have been called, and before they have been sworn.

But while these apparent anomalies in the English law and the absence of settled procedure may in part account for the right having come to be regarded as obsolete, probably more is due to the fact that in England juries are drawn from very large and densely populated areas with the result that in any given criminal case the jurors are persons of whom and of whose sympathies the accused and his counsel know absolutely nothing; in such circumstances a peremptory challenge would generally be a leap in the dark. In New Zealand, however, it is very different. In the country centres where the Supreme Court sits on circuit it may in some cases—though this is, of course, the exception rather than the rule—be found extremely difficult, even making full allowance for the exercise of the right of challenge, for one or other of the parties to obtain a fair and impartial trial by jury, and to prevent such a state of affairs a change of venue has to be ordered as in *Dahl and Co. v. Allen*, 13 G.L.R. 126; *Reedy v. Westport Harbour Board*, (1916) N.Z.L.R. 352, and *Gawler v. Douglas*, (1916) N.Z.L.R. 706. In almost every case in such centres it is found that some of the jurors on the panel are personally known to one or other of the parties or his advisers, and it is then that the desirability of the right of challenge becomes at once apparent. The same state of affairs exists, though of course to a lesser extent, even in our four chief Supreme Court centres. And there are always other matters, which it is unnecessary to state at length, but of which may be mentioned as illustrations the occupations of jurors as shown on the jury panel and what Blackstone has described as the "sudden and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," which guide counsel in their exercise of this right. It is indeed difficult to conceive that in New Zealand such an important factor in the administration of justice as the right of peremptory challenge will ever fall into disuse.

Court of Appeal.

Myers, C.J.
Herdman, J.
Adams, J.
MacGregor, J.
Ostler, J.

September 26; October 10, 1929.
Wellington.

RAYNER v. THE KING.

Crown Suits—Practice—Discovery—Suppliant in Suit Against Crown Commenced by Petition of Right Not Entitled to Discovery from Crown—Observations as to Practice of Crown as to Discovery—Crown Suits Act, 1908, Ss. 27, 34—Rule 161 of Code of Civil Procedure.

Notice of motion filed by the Solicitor-General for an order setting aside an order of discovery taken out in a petition of right by the suppliant in purported pursuance of Rule 161 (a) of the Code of Civil Procedure. By consent the motion was removed into the Court of Appeal.

The Solicitor-General (Fair, K.C.) and Currie for Crown.
Gray, K.C., and James for suppliant.

MYERS, C.J., delivering the judgment of the Court, said that it seemed tolerably plain that Rule 161 (a) was never intended, and its language was not sufficient, to authorise the taking out of such an order as against His Majesty. That indeed was scarcely disputed; and the Court was invited not to dispose of the matter upon technical grounds arising under Rule 161 (a), but to consider and deal with the case as if the order of the 13th March had been made on application in that behalf under Rule 161 and the present proceeding were an application to set aside such order. In other words the Court was invited to consider the neat question whether an order for discovery could be made against the Crown in a suit commenced by petition under Part II of the Crown Suits Act, 1908, and the argument proceeded on that basis.

It was clear that in England an order for discovery against the Crown could not be made. That was admitted by Mr. Gray; but he contended that the English authorities had no application in New Zealand, having regard to the provisions of the Crown Suits Act, 1908, and he relied upon the decisions in cases arising under the Australian Acts, which he contended were applicable to the New Zealand statute. Their Honours thought that the English decisions were, and that the Australian cases were not, applicable in that respect to our Crown Suits Act. His Honour read Section 34 of the Act and said that subject to one particular matter that would be referred to later, the Section was similar, in all material respects, to Section 7 of the Petitions of Right Act, 1860, of the Imperial Parliament. His Honour referred to and discussed **Thomas v. The Queen,** L.R. 10 Q.B. 44; **Tomline v. The Queen,** L.R. 4 Exch. 252; **Attorney-General v. Newcastle-upon-Tyne Corporation,** (1897) 2 Q.B. 384; **In re La Societe les Affreteurs Reunis and the Shipping Controller,** (1921) 3 K.B. 1, and said that the whole question for determination in the present case seemed to be whether Section 34 of the Crown Suits Act was substantially different from Section 7 of the Petitions of Right Act, 1860, or whether Section 27, to which reference would be made later, affected the position.

While Section 34 of the New Zealand Act, like Section 7 of the English Act, enacted that "so far as the case may be applicable" the laws, statutes, and rules in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and of taking evidence, set-off, limitations, and appeal in personal actions between subject and subject, and the practice and course of procedure of the Court in its legal and equitable jurisdiction respectively for the time being in reference to such suits and personal actions should be applicable and apply and extend to proceedings on a petition under Part II of the Act, the New South Wales statute which the Privy Council had to consider in **Jamieson v. Downie,** (1923) A.C. 691, 92 L.J.P.C. 185, like the statutes in all the other cases upon which Mr. Gray relied, first of all provided for a petition being defended by a nominal defendant, and then further provided that the proceedings and rights of parties should as nearly as possible be the same as in an ordinary case between subject and subject. The power to ask for and obtain discovery was spoken of in many decisions as being a "right"; and in **Commonwealth v. Miller,** 10 C.L.R. 742, Isaacs, J., at pp. 754-755 referred to the authorities and said that he had no doubt that the power to ask for and obtain discovery was a "right" within the meaning of Section 64 of the Judiciary Act, 1903 (Com.), which enacted that in any suit to which the Commonwealth or a State was a party the rights of parties should as nearly as possible be the same as in a suit between subject and subject. At p. 755 the learned Judge referred to **Ramsden v. Brearley,** 33 L.T.N.S. 322, where Lush, J., distinguished between the right and the remedy. Both Isaacs, J., (p. 753) and Higgins, J., (p. 757) based their opinion solely on the construction of Section 64. Griffiths, C.J., at p. 746, spoke of the obtaining of discovery as a right, a right which continued to exist unless taken away, and, he added: "It is one of the rights conferred by Section 64." And in **Jamieson v. Downie** (*cit. sup.*) Lord Buckmaster spoke of "the general right of the Crown to resist discovery."

Their Honours had already said that so much of Section 34 of the New Zealand Act as they had been considering appeared to be in all material respects similar to Section 7 of the English Act. That being so, the same distinction as was shown by the judgment of the Privy Council in **Jamieson v. Downie** to exist between the position in England and that in New South Wales in regard to discovery existed, in their Honours' opinion, as between New Zealand and New South Wales. Inasmuch as the other Australian authorities relied on by Mr. Gray all depended upon statutory provisions similar to those of the New South Wales Act under consideration in **Jamieson v. Downie** and were, therefore, distinguishable, their Honours did not think it necessary to refer to them further; but it was not unimportant to observe that in Victoria, in 1887, in **Regina v. The National Insurance Co.,** 13 V.L.R. 301, under a section of a statute in terms similar to Section 7 of the Petitions of Right Act, 1864, the Court followed **Thomas v. The Queen** (*cit. sup.*).

The difference between Section 34 of the New Zealand Act and Section 7 of the English Act was that the former contained the words "and all other laws, statutes, and rules available as between plaintiffs and defendants in personal actions between subject and subject," in substitution for the words in the English Act, "and proceedings in error in suits of equity and personal actions between subject and subject." Their Honours did not consider, however, that the difference was a material one. The whole Section, in their Honours' opinion, dealt only with matters procedural; and the words "and all other laws," etc., were words *ejusdem generis* with those preceding and following. The Section opened, as the English Section did, with the words: "So far as the same may be applicable," and in their Honours' opinion the same difficulties existed as in England in the way of ordering discovery against the Crown and for the same reasons.

Alternatively Mr. Gray relied upon Section 27 of the Crown Suits Act, 1908. There again it seemed to the Court that the Section dealt only with matters of procedure and practice, and did not confer any new rights upon the suppliant, or take away any of the rights of the Crown. The mere fact that other Sections of the Act might confer new rights of action against the Crown did not of itself, as it seemed to their Honours, affect the construction of either Section 34 or Section 27.

Their Honours were, therefore, of opinion that a suppliant was not entitled to an order of discovery as against the Crown on a petition of right under Part II of the Crown Suits Act, 1908, and that the order for discovery taken out by the suppliant must be set aside.

Their Honours might add, and in doing so they said no more than had been said by the Courts in some of the English cases, that the practice of the Crown always had been to give an opposite party inspection of relevant documents without any order for discovery, subject only to considerations of public policy; and it was to be hoped that no departure would be made in this or any other case from that fair and proper practice. Whether or not any application was made in the present case for inspection prior to the issue of the order for discovery the Court was not informed, but plainly, the order having been taken out, it was proper and necessary for the Crown to move to set it aside in order to obtain a determination on a question of considerable general importance. It might be that, in view of the increased and increasing activities of State Departments in modern times, an alteration of the law in regard to discovery and cognate questions was desirable, but that of course was a matter entirely for the Legislature.

Order set aside.

Solicitors for suppliant: **Hall Skelton and Skelton,** Auckland.
Solicitor for respondent: **Crown Law Office,** Wellington.

Supreme Court

Herdman, J. September 12; October 3, 1929.
Auckland.

TURKINGTON v. PHELAN.

Local Government—Municipal Corporation—Transport Board—Power of Local Authority to Remove Member or Members of Board Appointed by It and Appoint "Another and Others"—No Power to Remove Member Without Appointing Another Member in Substitution—Removal of Six Members and Subsequent Re-appointment of Same Members *ultra vires*—*Status quo* Remaining and Original Appointments Unaffected—Plaintiffs Claiming Right to Elect Members in Place of Members Removed—Question of Interference With Public Right—Attorney-General Necessary Party to Proceedings—Supreme Court Without Jurisdiction in Proceedings by Reason of Special Statute Empowering Magistrates' Court to Determine Whether Member "Incapable of Holding His Office" and Taking Away Jurisdiction of Supreme Court—Auckland Transport Board Act, 1928, Ss. 6, 10, 11, 14, 76.

Proceedings under Rule 464 of the Supreme Court Code to obtain an order of the Court removing the defendants from office or declaring who was entitled to hold the office in question. On 8th November, 1928, the Auckland Transport Board Act, 1928, came into force, and on 15th November, 1928, the Auckland City Council, acting under the powers conferred upon it by Section 6 (a) of the Act, appointed the six defendants to be members of the Auckland Transport Board. Those gentlemen on that date were all members of the Auckland City Council. At an election for the City Council held on 1st May, 1929, the defendant, Allum, was a candidate for election but was defeated at the polls. On 3rd May, 1929, Allum wrote a letter to the Mayor of Auckland enclosing a letter addressed to the Secretary of the Auckland Transport Board in which he tendered his resignation as a member of that corporation. That letter was never delivered to the Secretary of the Transport Board. On 22nd May, 1929, the Town Clerk sent out a notice of a special meeting to members of the Auckland City Council, stating that the business of the meeting would be (1) to deal with Mr. Allum's resignation from the Board, and (2) to consider a motion by Councillor Bloodworth. The motion referred to was a motion that in pursuance of the powers vested in it by Section 6 (a) of the Auckland Transport Board Act, 1928, the Council should remove from membership of the Auckland Transport Board the six persons whom the Council elected to membership of the Board on November 15th, 1928. The Council duly met on 28th May, 1929, and carried the motion. Allum having been removed from the Transport Board as a result of the motion it was assumed that the necessity for a consideration of Allum's letter to the Mayor disappeared. The special meeting was then adjourned to 30th May, 1929, for the purpose of appointing six members of the Board. The members of the Council were notified of the date upon which this meeting was to be held and of its purpose. The meeting was duly held and, after several abortive attempts to fill the vacancies on the Board, Councillor Paterson submitted a motion: "That individual nominations be received, and if in excess of six, a vote of Council be taken and on a majority vote of Council be appointed." The motion was carried and the Council then proceeded to receive nominations and to make their selection. The voting for the various nominees was conducted openly by a show of hands, the result being that Messrs. Phelan, Baildon, Ashley, Entrican, Coyle, and Allum received the highest number of votes, and were declared by the Mayor to be elected members of the Board. Thus the members of the Board who were removed from office on 28th May were re-appointed on 30th May. It was contended that these appointments were invalid.

Northcroft for plaintiff.
Johnstone and Stanton for defendants.

HERDMAN, J., said that it was submitted on behalf of the plaintiffs that the appointments made on 30th May were invalid for two reasons: first the notice convening the special meeting should have stated that appointments were to be made to fill the vacancies on the Board caused by the removal of the defendants; and secondly, the Act did not authorise the re-appointment of members who had been removed from office but contemplated the appointment of persons other than those who had been deposed. The Section spoke of "another or others." To the latter argument it was replied by the defendants that a consideration of the provisions of the Statute showed that, unless there was in existence a resolution of the Council which proved that a change in the personnel of the representatives of the Council had been brought about by new appointments, the original appointments stood. In the present case, notwithstanding various attempts made to nominate new members to the Board, the proceedings terminated without any change having been effected. The very men who held office under the appointment dated 15th November, 1928, were again selected by the Council on 30th May, 1929.

That brought His Honour to a consideration of the provisions of the Statute. After referring to the title of the Act and to Section 76, His Honour quoted Section 6 (a), the provision under which Mr. Bloodworth and his fellow Councillors acted. Subject to the special provision contained in Clause (d) and subject to any extraordinary vacancy occurring in the meantime, the members of the Board remained in office until the first Wednesday in May in the year 1931. But for the existence of Section 6 (d) the position of members of the first Board was quite clear. Once elected at a special meeting of the Council their position appeared to be identical with that of members of a Board who would be elected at the general election of members of the Board on the first Wednesday in May, 1931, subject to the qualification that the term of office was not the same and the first Board might be reconstructed under Section 6 (d); but it was plainly the intention of the Legislature that the first Board should be the creation of the constituent local authorities and not of the electors. If, as Mr. Northcroft claimed, the places of the six deposed members were to be filled by the electors, then the principle of appointment by the local authorities was violated.

At any time between the first Wednesday in May, 1929, and 31st May, 1929, the Council might step in and remove a member or members. It could remove one member on one day and another on another day or it could remove all the members on one day. Excepting in the case of an extraordinary vacancy, that right to interfere with the composition of the Board was the peculiar prerogative of the local authority. No one else was authorised to exercise that power and it could be exercised during a limited period only. If the Council removed members His Honour thought that it was obliged to fill up the gaps in the ranks. Apart from the provision contained in Subsection (d) no machinery appeared to exist which would enable a local authority or electors to fill up a vacancy caused by removal under that subsection. The act performed by the local authority under Section 6 was not, in His Honour's opinion, an "election" within the meaning of the Local Elections and Polls Act, 1925. His Honour must assume that the Legislature intended that the full complement should be maintained, so, if a removal was made but no fresh appointment followed, the removal had no effect. Paragraphs (a), (b) and (c) of Section 6 of the Act created a definite obligation. Those provisions were mandatory. A duty was imposed upon the local bodies from which they could not escape. The local bodies were bound to set about constituting the first Board in the manner prescribed by the Act, and when they set about changing the personnel of the Board under paragraph (d) they could not stop halfway but must complete the operation. In an attempt to interpret Subsection (d) of the statute, the main purpose of the provision must not be lost sight of. The Legislature obviously intended to give to newly-elected members of a local authority commencing their career on the first Wednesday in May, 1929, a power to review appointments made by their predecessors in office and to substitute other members for those holding office. They were authorised to effect a substitution. The expression "substitutionary appointment" was used in the subsection. They were not, His Honour thought, authorised to remove a member only. Once the process of substitution was commenced it was necessary to complete it by appointing another member in place of the one removed. If that operation was not completed no substitution was effected and matters accordingly remained in *statu quo*. The right to remove and the right to appoint "another or others" were interlocked. If one right was exercised the other must also be exercised and if both were not exercised, if, for instance, the act of removal alone was performed, that act was nugatory. That was precisely the result of the proceedings on 28th and 30th May. The members of the Council elected in May were given an opportunity of considering the appointments previously made. They set to work to effect a substitution by removing existing members, then an effort was made to elect new members but that attempt failed, some gentlemen declining to become candidates. No new substitutes were appointed so no substitution was effected. Finally the old members were again

appointed and in the final result the appointment of the old members was confirmed. The word "substitute" meant "to put in place of another." Here, no new member was put in the place of an old member so the act of substitution which the local authority was required to perform was never consummated and the original appointments therefore stood. Viewing the whole of the proceedings of the Council on 28th and 30th May from beginning to end, His Honour came to the conclusion that the proceedings of the Council were incomplete and ineffective. One resolution neutralised the other. An attempt was made to effect a substitution but it failed, so the original appointments stood. His Honour referred to the principle stated by Lord Shaw in **Shannon Realties v. St. Michel,** (1924) A.C. 185, 192, that where alternative constructions were equally open, that alternative was to be chosen which would be consistent with the smooth working of the system which the statute purported to be regulating, and added that the construction he had put upon the statute seemed consonant with the intention of the Legislature. His Honour was disposed to think that the language of the subsection denoted that the identity of the members must be changed if any change at all be attempted under the statute.

Mr. Northcroft also claimed that the notice calling the special meeting to consider the removal of members of the Board should have informed members that new appointments were to be made. It seemed to His Honour, that in view of his decision upon the other question raised, it was unnecessary to consider whether what was done at the meeting on 30th May was or was not irregular. In **Major v. Tauranga County,** 7 N.Z.L.R. 121, and in **Thomson v. Stevenson,** (1916) N.Z.L.R. 963, the validity of special orders was in issue and in each case the validity of the special order plainly depended upon the efficiency of a notice calling a special meeting.

It remained for His Honour still to consider two submissions made on behalf of the defendants: first, that in a proceeding of the present kind the Attorney-General should have been joined, and, second, that the Supreme Court had no jurisdiction to entertain the application. His Honour had no doubt that if the Court had jurisdiction to hear the case the Attorney-General should have been a party in the action. The plaintiffs were electors within the meaning of the Auckland Transport Board Act, 1928. The basis of their claim was that the defendants having been removed from office on 28th May, 1929, had since then continued to act as members of the Board. It was claimed that the general body of electors as defined by the statute had a right to elect members of the Board as successors to the defendants, and that that right had been and was being infringed. Inasmuch, therefore, as the matter in issue was whether there had been an interference with a public right, His Honour thought that the Attorney-General should have been joined in the proceedings. His Honour knew of two instances in which in respect of an interference with a public right a plaintiff could sue without joining the Attorney-General. They were stated by Buckley, J., in **Boyce v. Paddington Borough Council,** (1903) 1 Ch. 109, 114, as, first, where the interference with the public right was such as that some private right of his was at the same time interfered with, and, secondly, where the plaintiff in respect of his public right suffered special damage peculiar to himself from the interference with the public right. In the present case no private right of the plaintiffs had been interfered with and no special damage peculiar to themselves had been suffered by any one of them. If there had been any unlawful interference at all it was an interference with statutory rights which electors in a large district had had conferred upon them. It was claimed that certain gentlemen were perpetrating a public wrong in that they were taking part in the management of a large public undertaking without lawful authority. The non-joinder of the Attorney-General could, however, be got over. If there were any need for it His Honour would make such an order as would bring him in either as plaintiff or defendant in the present proceedings. But, as His Honour was prepared to decide that the defendants were holding office in accordance with law, it was unnecessary to take any step to bring the Attorney-General into the litigation.

His Honour next proceeded to consider whether the old remedy of *quo warranto* had been taken away by Section 14 of the Auckland Transport Board Act, 1928, which provided that a Magistrate's Court might issue a summons calling upon a member of the Board to show cause why he should not be adjudged to be ousted from office upon proof that he was or had become incapable under the Act of holding his office. His Honour referred to Subsection (5) of that Section, and said that the Section assumed that a person had been elected or appointed to an office and that some form of incapacity existed which disabled him from acting as a member of the Board. He might have ceased to be an elector or he might be of unsound mind or he might have become bankrupt or he might be disqualified for other reasons. Section 10 provided a list of instances in which a person should be incapable of being elected to be a member of the Board, but except in the case of a person who was not an elector the Section did not provide that a person should be incapable of being a member of a Board. Nevertheless the logical consequence of disqualification for election seemed to be incapacity for holding office. In the present case the ground relied upon against the defendants was that, under paragraph (d) of Section 6 of the Act, they had become incapable of holding office because, having been removed therefrom, the members of the City Council, for the purpose of replacing them, were obliged to select "another or other" electors. Notwithstanding that they continued to be electors and could submit themselves for election if an extraordinary vacancy occurred, it was said that when the Council came to make appointments under the special provisions contained in paragraph (d) the door was shut against the defendants; they were incapable of being appointed under paragraph (d) and were incapable under the Act of holding office. Reluctant as His Honour was to decide that the jurisdiction of the Court in a matter of that kind had been taken away, His Honour had been unable to discover any sound reason for deciding that the remedy against a person who was or had become incapable of holding an office was restricted to the cases enumerated in Section 10. The words of the Section were "is or has become incapable under this Act." If the Auckland City Council was bound to elect another or other electors not being the electors removed from office, then there appeared to be no doubt but that the question to be decided was whether the defendants had become incapable under that Act of holding office, and Section 14 stated that such a question should not be tried in the Supreme Court. Although His Honour had been unable to discover that in England there existed a provision precisely identical with Section 14 of the Auckland Transport Board Act, 1928, the Municipal Corporations Act, 1882 (Eng.) in principle bore some kind of resemblance to it and was reviewed in **Rex v. Beer,** (1903), 2 K.B. 693. There the Court had to determine to what extent the remedy by *quo warranto* had been taken away by Section 87 of that statute, but it did not assist to a decision in the present case. After giving all the facts and the legislation due consideration His Honour found it impossible to avoid the conclusion that the one and only question for determination in the present action was whether each of the defendants was or had become incapable of holding his office under the statute, and as the language of the Section was plain His Honour had no other alternative but to decide that the Magistrate's Court was the tribunal in which the matter should be determined.

Judgment for defendants.

Solicitors for plaintiff: **Earl, Kent, Massey and Northcroft,** Auckland.

Solicitors for defendant: **Stanton, Johnstone and Spence,** Auckland.

MacGregor, J. October 16; 25, 1929. Wellington.

ROXBURGH v. ROXBURGH.

Divorce—Maintenance—Petition for Divorce on Ground of Separation for More Than Three Years Under Agreement—Failure by Petitioner to Pay Maintenance Under Agreement—Failure Not "Wilful and Persistent" but Due to Poverty—Decree Nisi Granted and Not Withheld Until Agreement Reached Between Parties as to Payment of Arrears of Maintenance and Future Maintenance—Decree Not to be Made Absolute Until Order Made for Permanent Maintenance of Respondent and Child—Divorce and Matrimonial Causes Act, 1928, S. 33.

Petition by husband for divorce on the ground of separation for more than three years under an agreement in writing. The petitioner's case was proved at the hearing, but it was also proved that the petitioner had for some time past, owing to poverty, failed to pay to the respondent the maintenance to which she was entitled under the separation agreement.

Ongley for petitioner.

O. C. Mazengarb for respondent.

MacGREGOR, J., said that from the evidence it did not appear that the petitioner had failed to pay the maintenance "wilfully and persistently"—see **Mason v. Mason,** (1921) N.Z.L.R. 955, 963—but rather that his failure to pay was caused

by his poverty. In those circumstances counsel for the respondent while admitting that the petitioner was entitled to a decree for divorce, contended that the decree *nisi* should not be actually pronounced until the petitioner had come to an agreement with the respondent regarding the arrears of past maintenance and the payment of future maintenance. In support of that contention he cited the cases of **Lodder v. Lodder,** (1921) N.Z.L.R. 876, 881, and **Irvine v. Irvine,** (1922) G.L.R. 194, 196. His Honour had considered those cases carefully, but he doubted whether they should be followed as suggested in the circumstances of the present case. Neither of the cases cited dealt with arrears of maintenance. In both of them the husband was a man of some means. In the present case he was a poor man, earning a precarious livelihood as a waterside worker. From the evidence as elicited at the hearing, His Honour doubted whether the parties could, owing to their irreconcilable attitude, come to any mutual agreement on the vexed question of maintenance. That question should, His Honour thought, be left to the Court to determine under Section 33 (2) of the Divorce Act. The appropriate time to apply for permanent maintenance was on the application to make the decree absolute, and His Honour thought that course should be adopted in the present case. If the parties could agree on the amount to be paid, a separate petition need not be filed, and the order for maintenance might be included in the decree absolute: **Robertson v. Robertson,** (1922) G.L.R. 62. If not, the Court itself would have to fix the amount. As to the maintenance due under the deed, see **Reid v. Reid,** (1926) P.1.

His Honour thought, however, that the decree *nisi* should not be made absolute unless and until an order had been made providing for the permanent maintenance of the respondent and her child under Section 33 (2): see **Jardine v. Jardine,** 6 P.D. 213; **Edwards v. Edwards,** (1894) P. 33; and **Parry v. Parry,** (1896) P. 37. The amount of the weekly or monthly payment so to be ordered could not now be fixed, as it must depend to some extent upon the financial position of the parties respectively at the time of the motion for a decree absolute. Decree *nisi* granted, to be moved absolute after the expiration of three calendar months. *Interim* custody of the infant child of the marriage given to the respondent. This decree *nisi* not to be made absolute unless and until an order for the permanent maintenance of the respondent and her child made by the Court.

Solicitors for petitioner: **Ongley and O'Donovan,** Wellington.

Solicitors for respondent: **Mazengarb, Hay and Macalister,** Wellington.

Blair, J. October 10, 18, 1929.
Wellington.

HINDMARSH v. GUTHRIE.

Negligence—Collision—Motor-vehicle—Respondent's Car Rounding "Blind" Corner on Approach to Bridge on Wrong Side of Road—Appellant's Car Approaching Corner from Opposite Direction on Correct Side of Bridge—Sudden Emergency—Appellant Swerving to Wrong Side of Road to Avoid Collision—Respondent Swerving to Correct Side—Collision—Respondent Negligent—Act of Appellant in Sudden Emergency Created by Respondent Not Amounting to Negligence.

Two appeals, one by Hindmarsh, the driver of a motor car, and the other by the Shell Co. of New Zealand Ltd., the owner of such car, against the decision of a Stipendiary Magistrate at Wellington, holding that a collision near the new Hutt Bridge with a motor car driven by the respondent was due to the negligence of Hindmarsh and that Hindmarsh and the Company were liable in damages to the respondent in respect of such collision. The appeals were by consent heard together. It appeared that the appellant, Hindmarsh, was at about 1 a.m. on the night of 2nd May, 1929, driving across the new Hutt Bridge. He was proceeding at a speed of about 15 miles per hour on his correct side of the bridge, his near wheel being about six feet from the near side curb, and was about 45 feet from the Hutt end of the Bridge when the lights of the respondent's car suddenly appeared at the Hutt end of the bridge. The respondent had driven along the main Hutt Road which meets the bridge at virtually a right angle, and instead of approaching the bridge on a wide sweep so as to enter it on his proper side, the Magistrate found that the respondent cut the corner. The bridge had concrete sides which would obscure the view of the respondent, and the lights on the bridge itself had the effect of negativing the shine of approaching lights. Respondent's speed was 15 miles per hour. The appellant's marks on the bridge showed that he proceeded for possibly 5 feet on his original course and then swerved to his right, thus bringing himself on to the wrong side. It was estimated that he made his decision to get out of the way of the respondent's approaching car within a quarter of a second. The respondent himself simultaneously veered over to his proper side and his car struck and broke the wooden edging of the footpath, actually coming to a stop on the footpath on his proper side of the bridge. A collision took place and both cars were damaged—neither of them very severely. The Magistrate found that the respondent approached the bridge on the wrong side, but further found that appellant should, instead of swerving over to his wrong side, have remained on his proper side and applied his brakes. The Magistrate considered also that the appellant had the last opportunity of avoiding the accident, and that the appellant was not justified in assuming that respondent might not go to his proper side. The appellant in evidence said that his first indication of respondent's approach was the lights of a car badly cutting the corner, and that he thought that to avoid a head-on collision his only course was to get out of the way and so he drove to the other side of the road.

Keesing for appellants.

Leicester for respondent.

BLAIR, J., after observing that a motor car travels in feet per second one and a-half times the figure for its speed in miles per hour and that the two cars approaching each other at the rate of 15 miles per hour would each be travelling at the rate of 22½ feet per second and would, therefore, use up the 45 feet separating them in one second, said that the Magistrate, on the facts as he had found them, had misconceived their legal effect. The corner of the bridge was what was known to drivers as a "blind corner" inasmuch as one could not see round it. Any driver of a car who drove round such a corner on his wrong side was taking a most grave risk. He would not dream of taking such a risk if he knew that a vehicle were approaching round the corner on its correct side, and it followed that if he did not know whether there was a vehicle there or not, he should assume that there was a vehicle there, and be most careful to approach a blind corner well on his proper side. A driver disregarding such a natural precaution was a danger to traffic. The Lord President in **Barty v. Harper and Sons,** (1922) S.C. 67, 69, when dealing with a submission that traffic in the absence of other traffic had the right of occupying any part of the roadway said: "But it is going too far to appeal to that general principle in support of the pursuer's conduct while rounding a blind and dangerous corner, especially in view of the conditions of modern rapid traffic." The respondent, on the Magistrate's finding, deliberately disregarded that very obvious and proper driving rule. He cut the corner, and from the point of view of the appellant the position as it appeared to him must have been that he suddenly found himself with two headlights bearing down on him some three lengths away. Appellant could not escape by going further to his left as there was no room. He had to make up his mind what to do in a space of not more than a quarter of a second and he decided, wrongly as it eventuated, to swerve sharply to his wrong side to avoid what he thought was a certain collision. At such moments as those a driver must act instinctively, although as events turned out it did not happen to be the correct instinct, for the simple reason that respondent's instincts led him to the same spot. The crisis was created by the respondent's gross neglect of a rudimentary driving rule. It was the right and in fact the duty of a driver on his proper side of the road to go to his wrong side if by so doing he could avoid an accident. There was, therefore, nothing improper in the appellant, in the stress of the moment caused by the respondent's improper action, electing to go to his wrong side. In His Honour's opinion the fact that the appellant did so was under the circumstances no evidence of negligence against him. The collision must have taken place within one and a-half seconds from the moment when the two vehicles first sighted each other, and appellant having made one decision it was not possible to alter it. It was clear, therefore, that on the Magistrate's finding of the facts respondent was wholly to blame. The rule was well established that a wrong manœuvre made under stress of danger created by another could not be availed of by the other as evidence of negligence. Where a person was suddenly put in a position of imminent personal danger by the wrongful act of another, it was sufficient if he showed as much judgment and self-control in attempting to avoid that danger as might reasonably be expected of him in the circumstances. **The Bywell Castle,** 4 P.D. 219; **U.S. Shipping Board v. Baird Line,** (1924) A.C. 286; **Wallace v. Bergius,** (1915) S.C. 205. His Honour distinguished **Barty v. Harper and Sons,** (1922) S.C. 67, which was strongly relied upon by the respondent,

on the ground that the circumstances of that case clearly brought it outside the rule in **The Bywell Castle** (*cit. sup.*) as the defendant had there attempted a highly dangerous manoeuvre quite unnecessarily and without the slightest suggestion of stress of peril.

Appeal allowed in both cases.

Solicitors for appellants: **Barnett and Keesing**, Wellington.
Solicitors for respondent: **Leicester, Jowett, and Rainey**, Wellington.

Smith, J. September 27; October 4, 1929. Auckland.

IN RE ALLAN.

Bankruptcy—Creditor's Petition for Adjudication—Arrangement by Debtor with Creditors—Petitioning Creditor Not Party to Arrangement—Evidence Insufficient to Justify Court in Dismissing Petition on Ground of Debtor Having No Assets—Conduct of Petitioning Creditor Not Amounting to Abuse of Procedure of Court in Bankruptcy—Arrangement with Creditors Not *per se* "Sufficient Cause" for Dismissing Petition—Bankruptcy Act, 1908, Section 37 (3).

Petition by Commercial Loan and Finance Co. Ltd. to have one Allan adjudged bankrupt for failure to comply with the terms of a bankruptcy notice. In October, 1928, the petitioning creditor which had a security over all the debtor's chattels to secure its debt, seized and sold the chattels, realising about £14. On 2nd December, 1928, the debtor made a proposal to his creditors to pay the sum of £2 per week out of his wages for distribution among them *pro rata*. This proposal was apparently not communicated to the petitioning creditor. The arrangement was carried out by the debtor and a dividend of 4/6 in the £ was paid to all the creditors, save the petitioning creditor. It was said that a dividend of 4/6 in the £ was being held in suspense for the petitioning creditor, pending the result of these proceedings. On 13th December, 1928, the petitioning creditor obtained judgment for £35 10s. 6d., the balance due to it under its security. The solicitors for the petitioning creditor were apparently aware by 4th July, 1929, that some arrangement existed between the debtor and his other creditors, for on that day they telephoned the solicitor for the debtor, and insisted on payment to them, on behalf of the petitioning creditor, of a dividend, and threatened bankruptcy proceedings if the payment was not forthcoming. At that time, no dividend had been paid to the other creditors. The debtor's solicitor replied that the funds in hand did not warrant a dividend of 4/- in the £, and that owing to the number of small creditors, it was unfair to expect cheques to be sent out for a smaller dividend, but he said that he expected to be able to pay a dividend within two or three months. The petitioner's solicitors then asked for a dividend in advance of the other creditors, on the ground that the petitioning creditor's debt was the largest. The debtor's solicitor refused this, as it would have been in conflict with the arrangement with the general body of creditors. The manager of the petitioner company was dissatisfied with his solicitors and consulted another solicitor who, without further communication with the debtor or his solicitor, issued a bankruptcy notice to the debtor on 16th July, and served it on 17th July. The creditor's petition was filed on 9th September. Ten days' notice of a meeting of creditors to be held on 24th September was sent by the debtor's solicitor to all the creditors, including the petitioning creditor. That meeting was held, and was attended by certain small creditors, but was not attended by the petitioning creditor. The creditors present at that meeting passed a resolution expressing entire satisfaction with the arrangements made by the debtor for payment of his liabilities and unanimously concurring that it was not in the interests of the debtor or of his creditors that he should be adjudicated a bankrupt. Many of the small creditors also signed a certificate to that effect. It was on affidavit that the creditors at the meeting were satisfied that there were no assets available for distribution among the creditors, if an order of adjudication should be made against the debtor.

McLiver for petitioning creditor.
Newberry for debtor to oppose.
Lennard for other creditors to oppose.

SMITH, J., said that the granting of the petition was opposed on two grounds: (1) that the debtor had no assets, and (2) that the petitioning creditor had been guilty of an abuse of the procedure of the Court in Bankruptcy. As to the first ground, the law was stated by Lord Esher, in **In re Betts**, (1897) 1 Q.B. 50, 52, as follows: "If the Court is clearly convinced, not merely by the statement of the debtor, but from all the circumstances of the case, that there cannot be any assets, or any prospect of any coming into existence, and that if a receiving order is made, the only effect will be a mere waste of money in costs, then in such a case the Court has a discretion in the matter, and will be justified in exercising that discretion by refusing to make the order." The evidence in the present case showed that all of the debtor's available chattels in October of last year were sold by the petitioning creditor, but that since then the debtor had bought a motor car. An explanation was made at the Bar that such car did not belong to the debtor, but there was nothing in evidence to show the circumstances. As to landed property, the only evidence was the general statement on affidavit that the creditors present at the meeting were satisfied that there were no assets of any description available for distribution. In His Honour's opinion, the case made against the petitioning creditor on that ground was not sufficiently strong to justify the refusal of an order. In **In re Betts** (*cit. sup.*) where an order was refused, the debtor had not obtained his discharge from a previous bankruptcy, and so the Court was convinced from all the circumstances of the case that there were no assets which would be available in a second bankruptcy. The present case fell far short of that.

As to the second ground, it was shown that on 4th July, 1929, the petitioner's then solicitors asked Mr. Newberry for payment of a dividend, and in default threatened bankruptcy proceedings. The manager of the petitioner company denied positively that he authorised his solicitors' action in threatening bankruptcy proceedings. Even if the solicitors' action were binding upon the petitioning creditor, His Honour was of opinion that such a threat did not constitute sufficient cause against the making of an order of adjudication. All that was asked was the payment of a dividend from the debtor's fund, a fund which did not appear to have been actively brought to the knowledge of the petitioning creditor. The debtor's solicitor declined to pay, upon the ground that there was not sufficient in hand to pay a dividend of 4/- in the £, and that owing to the number of small creditors it was unfair to expect cheques to be sent for dividends of a smaller amount. The next request of the solicitors for a dividend was for payment of a dividend in advance of the other creditors, on the ground that the petitioning company was the largest creditor. That was refused because such a payment would have been in breach of the arrangement with the general body of creditors. That reason seemed to have been accepted by the petitioner's solicitors and the request was not pressed, and no threat of bankruptcy proceedings as an alternative to such preferential payment was made. It was not shown, moreover, that the request for preferential payment was made with the authority of the petitioning creditor. The petitioning creditor, having changed its solicitor, caused the bankruptcy notice to be served on 17th July without further communication with the debtor or his solicitor. The suggestion made to the Court on behalf of the debtor was that the former solicitors must have told the petitioning creditor that the attitude of the debtor's solicitor was reasonable, that they declined to issue a bankruptcy notice in an endeavour to extort a preferential payment from the other creditors, and that the petitioning creditor employed another solicitor to effect its purpose. There was no evidence to support that suggestion. Upon a consideration of the evidence His Honour's view was that the petitioning creditor was not properly advised, from the beginning, of the position between the debtor and the other creditors. The petitioning creditor did not appear, on the evidence, to have been invited to enter into the debtor's arrangement with the small creditors. It was significant that it was not until after the creditor's petition had been filed that the petitioning creditor was invited to attend a meeting of creditors. The petitioning creditor was entitled, if he thought fit, to disregard that notice and to proceed with its legal remedies. The *bona fides* of the petitioning creditor was also to be judged by the fact that the manager had heard that the debtor had bought a motor car. He would naturally wish that position investigated. On the evidence, His Honour was not justified in assuming more than that the petitioning creditor's manager disagreed with his former solicitors either as to their past conduct of his case, or as to their advice as to future action, or both. After a consideration of all the circumstances, His Honour held that it had not been proved that the petitioning creditor used threats of bankruptcy for the purposes of extortion, or that the petitioning creditor pretended to come in to any arrangement between the debtor and his creditors and then seek some secret advantage—**In re Sunderland**, (1911) 2 K.B. 658, 663—or that the petitioning creditor demanded a preferential payment as the price of consenting to the arrangement between the debtor and his creditors, as in **Re Shaw**, 83 L.T. 754, and **Re a Debtor**, 91 L.T. 664. The

mere fact that the debtor had entered into an arrangement with his creditors (to which the petitioning creditor had not assented) was not, however beneficial to the creditors, "sufficient cause" for dismissing the petition—**Ex parte Oram, in re Watson,** 15 Q.B.D. 399. The present case was to be distinguished from a petition founded on an assignment of property to a trustee for the benefit of the creditors in respect of which the provisions of Section 37 (3) of the Bankruptcy Act, 1908, would apply.

Order for adjudication made.

Solicitor for petitioning creditor: **F. D. McLiver,** Auckland.
Solicitor for various other creditors: **C. G. Lennard,** Auckland.
Solicitor for debtor: **F. J. Newberry,** Auckland.

Smith, J. October 11: 15, 1929.
Auckland.

WILSON v. MORRIS.

Divorce—Permanent Maintenance—Destitute Persons—Registration in Magistrates' Court of Supreme Court's Order for Permanent Maintenance—No Jurisdiction in Magistrates' Court to Vary Order or Cancel Arrears Due Under Order—Destitute Persons Act, 1910, Ss. 39, 61; Amendment Act, 1926, S. 8—Divorce and Matrimonial Causes Act, 1928, S. 41.

Motion for a writ of mandamus against the Stipendiary Magistrate at Whangarei, to compel him to hear and determine a complaint made by the plaintiff. The facts were that on 3rd April, 1928, the Supreme Court at Wellington made an order, in divorce proceedings between the plaintiff and his former wife, for the payment by the plaintiff to her of £1 per week for her maintenance. The order was pursuant to Section 8 of the Destitute Persons Amendment Act, 1926, registered in the Magistrates' Court at Wellington on 5th April, 1928. On 11th September, 1929, the plaintiff filed his complaint in the Magistrates' Court at Whangarei, praying for a cancellation of the arrears payable under the maintenance order, and for a variation of the order. Mrs. Wilson objected to the jurisdiction of the Magistrates' Court to vary the order, or to remit arrears; the Magistrate upheld the objection.

Crimp for plaintiff.
Hubble for Mrs. Wilson.

SMITH, J., said that it appeared that some Magistrates had held that they had jurisdiction to vary Supreme Court orders registered in the Magistrates' Court pursuant to Section 8 of the Amendment Act of 1926, while others had held that they had not. His Honour read the provisions of the Section and said that, as he himself had pointed out in **Maxwell v. Maxwell,** (1929) N.Z.L.R. 44, the authority of the Magistrate to proceed and exercise his penal jurisdiction depended upon the registered copy of the order under the seal of the Supreme Court. His jurisdiction continued "so long as such order continues in force." On principle, then, a Magistrate could not entertain any application to cancel or vary that order; for any cancellation or variation of the order would *ipso facto* oust his jurisdiction. Counsel for the plaintiff relied on the words "and all proceedings may be taken thereon," as constituting an authority to the Magistrate to cancel or vary the order. But, in the first place, those proceedings, whatever they might be, could only be taken so long as the order continued in force. In the second place, the word "thereon" showed that the proceedings (whatever they might be) were to be taken on the registered order. They were proceedings "on" the order, and not against it. The proceedings, therefore, would include all proceedings up to fine and imprisonment for wrongful default in payment. The object of Section 8 was clearly, in His Honour's opinion, to provide a summary remedy for the enforcement of the order. There was only one Court for the variation, modification, or suspension of an order for maintenance made by the Supreme Court in divorce proceedings, and that was the Supreme Court itself. Section 41 of the Divorce and Matrimonial Causes Act, 1928, conferred upon the Supreme Court ample power in that respect. It could not be suggested that Section 8 of the Destitute Persons Amendment Act, 1926, ousted the jurisdiction of the Supreme Court to vary its own order. If there were two jurisdictions, obvious difficulties would arise. No hardship was imposed upon any party by holding that the Magistrates' Court could not cancel or vary or remit arrears due under an order for maintenance registered under Section 8. The defendant could always apply to the Supreme Court for a variation of the order for maintenance; and in any event, the defendant was guilty of no offence before the Magistrate by reason of default in payment, unless his failure to pay was "without reasonable cause": Section 61 of the Destitute Persons Act, 1910.

Motion dismissed.

Solicitors for plaintiff: **Ball and Wilkin,** Auckland, agents for **N. E. Crimp,** Whangarei.
Solicitors for Mrs. Wilson: **Meredith, Hubble and Ward,** Auckland.

Kennedy, J. October 16; 17, 1929.
Dunedin.

CLUTHA DEVELOPMENT LTD. v. BYRNES.

Mining—Application for Special Claim—Claim Opposed—Preliminary Inquiry Before Warden to Ascertain Whether Expenses of Survey Should Be Incurred—Application Adjourned for Survey and Costs Awarded Applicant—Warden's Decision Not Appealable—Not a "Final Order, Judgment or other decision" of Warden—Mining Act, 1926, SSs. 172 (b), 366.

Appeal from the decision of a Warden in respect of an application by the respondent for a special dredging claim which was opposed by the appellant. The application came before the Court on 10th April, 1929, when the Warden held the preliminary inquiry referred to in Section 172 (b) of the Mining Act, 1926, for the purpose of enabling it to be ascertained, as far as practicable, whether the expense of survey should be incurred. The objector was heard and the Warden then, being of opinion that no valid objection appeared to the granting of the application, adjourned the application for survey. The notice of appeal stated that the objector was dissatisfied with the decision of the Warden which was stated in the notice to be as follows: "Application adjourned for survey. Costs £3 3s. 0d. and Court fees allowed to applicant."

Hay for appellant.
F. B. Adams for respondent.

KENNEDY, J., said that on the appeal to the Supreme Court the preliminary objection was taken that the decision appealed against was not a final judgment, order or other decision of the Warden and that no appeal would, therefore, lie from the decision to adjourn for survey and from the incidental award of costs: Mining Act, 1926, Section 366. His Honour was of opinion that such objection was sound. The exact point raised was decided by Sim, J., in **Halliday v. Gibson,** (1922) N.Z.L.R. 879, where it was held that a decision of a Warden, almost identical with the decision appealed from, was not a final decision and, therefore, not appealable. His Honour respectfully agreed with that judgment and with the reasons therefor. If on the holding of the preliminary inquiry under Section 172 (b) of the Mining Act, 1926, the Warden was of opinion that the application should not be granted he might dismiss it. If, however, no valid objection appeared to exist to the granting of the application the survey was to be proceeded with and in the meantime the hearing of the original application was postponed. The application was not dismissed but it was, at that stage, certainly not granted. When, after the survey was completed, the hearing was resumed it would still be open to the objector to urge other grounds why the application should not be granted and the application might then be refused. Until a decision was given, the application was neither granted nor refused. All that the Warden had done prior thereto, was to reject certain reasons urged why the application should be dismissed at the preliminary inquiry. The fact was that the appeal lay not from the reasons given by the Warden when adjourning the further hearing for survey, as the notice of appeal appeared to suggest, but only from the Warden's final order, judgment or other decision. The rejection by the Warden of the grounds urged by the objector for refusing the application at the preliminary inquiry did not finally dispose of the application one way or the other. The decision, therefore, to adjourn till after survey, was not a final decision from which an appeal would lie.

Appeal dismissed.

Solicitors for appellant: **Brodrick and Parcell,** Cromwell.
Solicitors for respondent: **Bodkin and Sunderland,** Alexandra.

"The Profession of the Law."

A Paper Read at the English Law Society's Provincial Meeting.

An admirable little essay on "The Profession of the Law" was read by Mr. F. A. Graham (London) at the Provincial Meeting of the English Law Society, held at Bournemouth at the beginning of last month. As to a few of Mr. Graham's observations it has, of course, to be remembered that in England separation of the two branches of the profession is the invariable rule and not, as in this country, the exception, but nevertheless the whole paper, which we reprint below, is of considerable interest to the New Zealand practitioner.

"As members of a profession, engrossed in its daily tasks and engagements, we seldom turn aside to ask ourselves whether, apart from the fulfilment of the pressing duties of our calling, we have any place in the body politic, or whether in this changing age we carry any weight or influence in shaping it for the common weal. Our annual autumnal gathering, however, may prove to be an opportunity, not otherwise to be found, for such reflection; and if so, it should not be impossible to recognise the unique position which the profession, as a whole, in close touch as it is with men and women of every class, should hold, in guiding and stabilising the streams of thought and action, which have been and are flowing strongly through our country, into channels which may, at least, avoid disappointed hopes and harmful upheavals.

"The mere realisation of the fact that we are members of a profession which has to play its part in steadying and guiding our country in days of change and crisis will, without doubt, tend to influence both our judgment and our advice. Class warfare, from either side, will be deprecated; disputes and difficulties will be viewed and advised on from more than one angle; while imperceptibly a spirit of goodwill and conciliation will both infuse our arguments and qualify our actions. With these opening observations as to our place and usefulness in the nation's life may we go on to consider some aspects of a profession which entails such opportunities and responsibilities.

Its Entrance.

"One of the most striking features of our profession is that it is carried on by persons of varying degrees of qualification. Indeed, in a period like the present, when knowledge is extending on every hand, and the habits and thoughts of men are perceptibly changing under the influence of a post-war outlook, the suitable equipment for the practice of the profession of the law (apart from the revolutionary character of recent legislation in regard to the laws of property and descent) becomes increasingly complicated and involved. No longer can the tendering of advice, based only on observation and experience, suffice; for he who would be wise to-day in the ways of the law will find himself, like unto the searcher after mineral wealth, faced with a succession of strata, in the form of Statutes, ancient and modern, and judicial decisions of varying lucidity, through which he must of necessity drive the shaft of his intelligence before he can obtain the desired result.

"To meet this situation there is the well planned and expanding curriculum of the Society's Law School, the guide and counsellor of the budding lawyer as he passes through the entrance gate of general knowledge into articles of clerkship, before descending, duly qualified, into the arena of his chosen profession. In this purpose of leading our articled clerks by the best and surest road to that intellectual well-being which will constitute their principal capital in professional life, the Society is undoubtedly undertaking the most important of its many tasks; and no profession, perhaps, more amply repays the acquisition of a thorough and at the same time practical, education and training. In proportion to the development of his knowledge will the future practitioner become valuable to himself, and therefore capable of being valuable to others.

"In this connection it may not be out of place to suggest that a power worthy of cultivation, but somewhat neglected in our legal curriculum, is that of *utterance*. Our power over others lies not so much in the amount of knowledge and thought within us as in the ability to utilise and express it. A lack of facility, either to express or adapt ourselves to the various degrees of intellect met with from time to time in the practice of the law is not unknown amongst us; and both in negotiation and in argument many a case has failed to secure a satisfactory presentation through want of suitable words. The addition to the present course of studies of a class for discussion (apart from the well-known and approved debating societies) would probably meet a real need.

Its Continuance.

"Here, it may be noted, that confidence is the soil out of which employment grows, and that good repute has been likened to fire—once kindled it is easily kept alive, but when extinguished not easily lighted again. Our work must largely partake of the character of those who do it; and the tone of our professional character will depend on the estimate which we form of the duties we undertake, and of the spirit which ought to actuate us in carrying them out. For instance, service rendered gives a feeling of satisfaction; but if the service is fulfilled solely in the expectation of reward, the consequent satisfaction is no little dimmed. In the profession of the law there is, it may be said, little or no room for the diffident or retiring nature—distrustful of his own abilities he is unlikely to do justice to his client's cause. At the same time success in the profession is seldom given to him whose chief asset is self-confidence and assurance, and who, while active in the protection of his client's interest, is not careful as to the means used to attain the sought-for end.

"To say that scrupulous exactitude in money matters and the strictest integrity in handling the property of others is required in the profession of the law is to state that which is the basis of the confidence we seek to win; while the neglect of suitable care and attention will undoubtedly lead, sooner or later, to difficulties and confusion. The periodical visit of the auditor, if not essential, is certainly most expedient in the practice of the law

"In the profession of the law an intelligent thrift of time is of the utmost importance to the busy man; and order and proportion in our work will be found to be the true secret of the smooth working of the office machine. A certain degree of latitude in regard to working hours may be necessary from time to time;

but to seek to stretch such latitude beyond reasonable limits will be found to be harmful and unwise. While intelligence and energy may be stimulated by pressure from without, yet any beneficial effect may quickly be lost if the pressure becomes too great.

"Let the younger practitioner have no fear as to the future. The high places of the profession, few though they be, may be reached with the exercise of quite ordinary qualifications, and in the profession of the law application and attention are seldom left without reward.

Its Drawbacks.

"Not for us that self-determination, which to-day is claimed not only by the younger nations of the world, but also by the younger professions. At will they may fix and adopt a scale of remuneration, adequate or otherwise, for their services; while the legal profession remains tied and bound by Statutes and Rules, with resultant fees that at times look strangely meagre in the light of those which have to be paid elsewhere. Not for us (with few exceptions) government appointments to official positions. That the *solicitor* to be appointed must needs be a *barrister* is, alas, one of the paradoxes of the legal world. Not for us the addition of alphabetical lettering to our names, for the purpose of illuminating our professional standing, as the manner of some is. Not for us the creation of legal literature on the varied branches of the law—for, after the daily demands of our professional life have been met, there is neither time nor strength for authorship. Whilst *originality*, a valued element in most human affairs, finds little or no scope in the practice of the law.

Its Guardian.

"It is of moment that members of the profession should not only properly estimate the immense value of the Law Society to our collective and individual well-being, but also take an active interest in its welfare and extension—joint counsels and efforts are ever needful wherewith to meet common dangers and difficulties. The advantages secured to the profession by the united action of our Society have been many; and it is surely true wisdom to rely, for the preservation and extension of those advantages, on the body by which they have been secured. The Law Society, therefore, has a just claim on our whole-hearted confidence and support; but to its continued maintenance and efficiency the loyalty and help of *all* members of the profession becomes more and more indispensable.

"It is certainly probable that the two branches of our profession in this country will continue to remain apart; but the spirit underlying both must be one and the same; ever seeking to exert its influence in upholding that freedom and justice, amongst all classes of the community, for which as a nation we are justly proud. To this end a joint school of law in the days to come would surely not be unwelcome to all concerned.

Conclusion.

"A profession which has proved so useful cannot escape occasional misunderstandings and abuse; but if we are in earnest in seeking to promote a growing spirit of fellowship and co-operation in the service of our profession, we shall be able, in the future, as in the past, safely to weather any storms that blow. That in a sense we belong not so much to our selves as to our profession is, perhaps, hardly as yet fully realised; else surely the obligation, under which poor persons may now command our service to enforce their rights and redress their wrongs, would be more definitely acknowledged by the profession as a whole, and not left to a minority to undertake and fulfil. The day, however, must assuredly come when the whole profession will be genuinely proud of its Poor Persons Procedure.

"To recapitulate, while the services of our profession are indispensable to the well-being of the nation, a responsibility, which cannot be evaded, rests upon us, both individually and collectively, as to the manner in which those services are discharged. In days, therefore, when movements leading to agitation and upheaval may, from time to time, menace our Constitution, there should surely come to the profession of the law a quickened sense of corporate responsibility, a stronger emphasis on right ideals and practical reforms, as well as a close adherence to those indispensable high standards of conduct and practice which are our conscious heritage from the past—thus, and thereby, taking a definite part in rightly directing the forces of this changing age, as well as fulfilling the responsibilities which rest upon the profession as an integral part of the national life."

Tendencies in Legislation.

Views of Mr. Justice Eve.

At the banquet held in connection with the Law Society's recent Provincial Meeting at Bournemouth, Mr. Justice Eve voiced some more strictures upon modern legislation. "Another tendency in your legislation," he said, "due it may be to the aftermath of the war, is the tendency on the part of the executive to restrict the personal freedom of the individual, to intermeddle with, and at times to compete with, the individual comfort, and occasionally, not infrequently, to transgress the line which should clearly, and which does clearly, demark the functions of the executive and those of the magistracy. And is there no doubt that these tendencies to restrict the individual freedom, to discourage individual effort, self-denial and thrift, to assume responsibility on the part of the State which ought to be discharged by individuals, and to restrict the rights of the citizen to have his disputes adjusted and his position ascertained by the ordinary courts of law, good intentioned as they may be but hopelessly illusive as they are, are destructive of the moral fibre and the national characteristics of those who would set up a new state wherein the legitimate rewards and emoluments of those who have toiled and saved should be the first fund available for the support, the maintenance, the fecundity and the indolence of those who have never done anything?"

The Firm's Letterheads.

In the Westminster County Court a barrister was strenuously contending that a firm was liable because all the correspondence conducted by a member of the firm was written on the letter-paper of the firm.

Judge Turner: "A man might write love letters on his firm's notepaper, but that would not make the firm liable for breach of promise of marriage."

London Letter.

Temple, London,
12th September, 1929.

My dear N.Z.,

The death of Lord Mersey is, apart from the grief it involves for his personal friends and companions, an appreciable loss from our stock of strong personality, which is less ample in these than in past days. The gentle art of compromise tends, in our generation, to eliminate the less accommodating gift of strength; and, without for a moment suggesting that there was any lack of humanity or sweet reasonableness in Lord Mersey, since those who knew him more nearly and had occasion to observe him, when these qualities were called for, speak no less highly of him than do others, it is upon a Judge of strength and at times positively terrifying strength that the memory lingers, so far as concerns practising barristers of the day. There is no denying that, as fledglings at the Bar, we trembled upon learning that he was going the circuit; and, when it came to the ordeal itself, we wished to goodness we might change places with our client so that we might enjoy the security of the dock and he be left to do the arguing. It was said, and I do not know with what truth, that he deliberately emulated Hawkins, J., of terrific memory; and I know that many a man of my year resented the observations of the older hands that we lived in easy times now that there was no Hawkins, J., to confront. This, when there was Bigham, J., to deal with. I should add, if I wrote according to precedent, that his severity was always accompanied by unswerving justice, his ferocity tempered by an underlying geniality. They may have been: I was never sufficiently in possession of my faculties to judge: I felt like the unfortunate running for his life, with no other idea than to arrive at the gate of the field ahead of the bull behind. A splendid bull? A perfect bull? A bull animated only by the kindest of natures and the most congenial of motives, when you stopped running and got to know it? May be: all I ever knew was the fervour of my own inward prayer that heaven, or my own address, would get me over the gate and out of harm's way before I had any opportunity whatever of estimating, by experience, its characteristics and disposition. Our great soldier, Field Marshal Allenby was also, and perhaps still is, known among his intimates as "the Bull," and I think I am not detracting but adding to a great memory, when I extend the title to Lord Mersey, as he was at any rate in the days when he and I used, in the course of our several professions, to "have words."

One other personal memory of that past, a quarter of a century ago and more, is appropriate. Bigham, J., was also distinguished, as amongst us smaller and less reverent fry, by the overwhelming distinction of his famous clerk. It used to be a recognised initiation to the lighter side of the law, for the new recruit, bent upon learning either as solicitor or as barrister the workings of the Courts, to be taken round and introduced to Mr. D . . . ., by far the best dressed man within the precincts of Justice and by no means the least interesting. He is the father of those two renowned and charming actresses, often known as the Misses Dare, a fact which used to add a further thrill to the almost surreptitious visits of the law student to the chambers of Mr. Bigham.

The Lord Chief's book, on the beastliness of bureaucracy, is now appearing in the *Daily Telegraph*, and we need have no fears that there will be any lack of ferocity, and deadly ferocity at that. But yet, somehow, if I was a bureaucrat I should not be terribly afraid. Either these bulls are not what they were, or else I have got thick-skinned and hard-seated, and am no longer a judge of the species. No, I stick to what I have always said, and what every generation has said before mine, and what every generation will say after it: we are a softer race of men than we used to be.

We are still on Vacation, and little is doing or being discussed, except, perhaps, the never-ending and no-nearer-a-conclusion-than-ever discussion as to motorists and the law. You no doubt know that we still suffer under a universal speed limit of twenty miles an hour, maximum, here, the exact nature of our suffering being that there is, in actual administration, no speed limit at all and, what is worse, no rule of law enforcing reduction of speed where progress should be particularly cautious. I mean this, that the anachronism of the 20 m.p.h. not only achieves no good but it achieves much harm in that it excludes speed rules which could be practical and would be enforced. We have had an interesting case, locally, on motor matters, which deserves and is about, I hope, to get a wider publicity than the merely local. There has come into existence, and you may have it too, a system of dividing roads into halves (one half for each direction of traffic) at blind corners and danger spots, generally. It has never been anywhere announced, so far as I am aware, what the white line, painted on the surface of the road, indicates or intends, nor has it ever been authoritatively laid down what is the nature of the line: is it a rule of law, an estoppel, or just a suggestion? At such a blind corner, a "road-hog" overtook a law-abiding car, driven by a lady of principle and determination. The passing began at the beginning of the white line, and ended at the end of it, so that throughout the length of dangerous bend, which was plainly marked as blind and as requiring careful clearance of the off-side of the road, there was being created, by the "road-hog," a definite trap, possibly death-trap, for any car or vehicle approaching on its correct side from the opposite direction. No collision happened only because there was nothing so approaching: but the lady took the view that criminals should not only be pursued upon their achieving injury, but they should be pursued upon their committing the crime: she was up and after the offender forthwith and, upon catching him up, not only roundly rated him for his offence, but also saw to it that he was prosecuted.

It is, as I have previously reminded you, a troublous business, promoting a prosecution in which you yourself have to give evidence; it takes up a lot of time and means much abandoning of your own convenience; and it involves the never too pleasant experience of going into the witness-box and being cross-examined. In this case, the lady manfully saw the business through; and the surprised "road-hog," who presumably supposed he could do what he pleased so long as he avoided killing people and then it would not matter because he would probably be one of his killed himself, found himself fetched miles back from home on a charge of "driving to the danger," and then fined £10, and then having his license suspended for six months, to boot. There is the further pleasant thought that it probably cost him some fifty pounds moreover, in his own and his lawyers' and his witnesses' expenses; and it must

have been a bitterness to him, and no encouragement for other hogs, to hear the lady being warmly praised by the Bench for her good work.

This, I should say, is the beginning of better things. Otherwise matters are so bad, that something must be done about them, by the Law, soon. I suppose it is the same all the world over, though I am beginning to suspect that our high reputation for being law-abiding and the esteem in which we hold ourselves in this regard have their disadvantages and produce a laxity, in this class of criminality, peculiar to our admirable and much-admired selves. The lawless American seemed to me to treat his motor fiends, when I was there, with a much more effective restraint, *a propos* of all which, you will observe in the current (London) *Law Journal*, notes upon civil and criminal liability, as applied to motors and lethal roads, and upon the case, in the current number of the Law Reports, *Grinham v. Davies*, (1929) 2 K.B. 249, which deals with that vague rule forbidding mention of the fact that a defendant in a running-down case is insured. I am not so sure that old ideas are not the best, in this regard; all refinement of argument will never convince me that there is not an inevitable tendency with juries to let themselves go and have a good smack at it, just as soon as they discover an insurance company has to foot the bill. "They can afford to pay . . . ." is a thought too long familiar as a popular thought with juries in one context or another to be thus suddenly exploded. It used to be railway companies, I remember; and when the insurance companies get poor again, as I doubt if they ever will, it will be someone else. Nobody can say it is right, though it is undoubtedly convenient!

Yours ever,

INNER TEMPLAR.

Correspondence.

The Editor,
N.Z. Law Journal.

Sir,

Fees on Affidavits.

Recently a client brought in some papers the purport of which was that he and two co-executors were applying, in Australia, for exemplification of a probate granted to them in this Dominion. Having carefully perused the papers I got the deponent to swear the affidavits, three in number, and I marked the accompanying exhibits. I charged 9/-, being 2/- on each affidavit and 1/- on each exhibit. A few days later my client told me that he had written his sister, his co-executor, to take money with her when she went to go through the same performance and that she had answered that her solicitor had charged nothing.

Now, who is right? Should I have made the charge or not? Is such a charge defensible? If so the charges should be made uniformly or not at, all and for myself I am not prepared to give up my time to these things for nothing.

I am, etc.,

"AFFIDAVIT."

11th November, 1929.

Third Party Insurance.

Compulsory Scheme Desired in England.

We in New Zealand are just beginning to feel the benefits of last year's Act providing for the compulsory insurance by owners of motor-vehicles against third party risks. In England, however, no similar enactment has yet been passed though there has been a good deal of discussion on the subject, especially in legal circles. The following extract from the editorial comment of the *Law Journal* is of considerable interest:—

"The necessity for a system of compulsory insurance by motorists against third party risks has been preached in these columns in season and out of season. We are very glad to find that our views on the subject are increasingly widely shared. The London and Home Counties Traffic Advisory Committee consider it necessary, and so does the Royal Commission on Transport, whose first Report was issued at the beginning of August. *Truth*, which has always emphasised the need for such a system, refers again to the matter in Wednesday's issue, and several of the daily papers have been inspired by some recent remarks of the Registrar of the Bristol Bankruptcy Court as to the injustice of the present position. In the case before him a motor mechanic, against whom an injured pedestrian had recovered 1,626*l.* damages, returned no assets, and the victim of the accident was therefore without any remedy. This sort of thing constantly happens, and we think there is no doubt but that it will not be long before public opinion insists on reform. It is suggested that compulsory insurance would cause premiums to be largely increased, but there seems to be no reason why this should be so; the reckless driver who became a substantial liability to insurers would find himself unable to obtain a driving licence, a result which would be all to the good. And in this connection it is significant that the leading British Companies have all undertaken to carry on business under the recent New Zealand Act under which the premium for insuring a private motor car against third party risks is only 1*l.* as compared with 6*l.* or so for a 12 h.p. car here, under the voluntary system. And we confess to some astonishment at the fact that there has been no public outcry at the scandalous fact that under the law as it stands, even where the motorist is insured against third party risks, an injured person can only recover the damages awarded if the motorist is fully solvent, since if he becomes bankrupt the policy moneys form part of his general assets."

Court of Appeal.

Sittings for 1930.

The following dates have been fixed for the sittings of the Court of Appeal at Wellington, for 1930:—

Monday, 10th March ..	.. First Division.
Tuesday, 24th June	.. Second Division.
Wednesday, 24th September	.. First Division.

Australian Notes.

(By Wilfred Blacket, K.C.)

Since I last wrote there have been some interesting and unusual happenings in our Law Courts. In Brisbane Mr. Justice Douglas has granted an injunction restraining Dr. Ferguson from keeping roosters at his home in a Brisbane suburb so as to cause a nuisance to his neighbours, the Misses Edith, Valerie, and Wanda Ruthning. His Honour held that, although the Misses Edith and Valerie were not sound sleepers and would suffer more discomfort from this cause than most people, there was nothing to be said against Miss Wanda in respect of her sleeping qualities and that the noise complained of seriously interfered with the "comfort physically of the plaintiffs, according to ordinary notions prevalent among people of this country." There was no offer by the doctor to give his birds a sleeping draught before they retired for the night, nor did he make any request that he should be allowed to keep them till Christmas. In New Zealand there are, I think, restrictions as to the places where fowls may be kept. In New South Wales there are none. A man may keep fowls in a yard three feet away from his neighbour's bedroom without breaking any law or regulation, and so the Brisbane decision should be of salutary effect. Under the New South Wales Local Government Act power is given to local authorities to control and regulate the use of premises so as to prevent "objectionable noises thereon, or noises thereon at unreasonable hours." Under this power ordinances or by-laws have been made dealing with internal combustion engines, but the greatest of all suburban nuisances, the noisy motor-cycle, hoots and shrieks from dewy eve till early morn.

Another very interesting action was that brought by Mrs. Wright, of Melbourne, against Mrs. Cedzick, the plaintiffs complaint being that the affections of her husband had been alienated by the defendant. The Full Court of Victoria thought that the claim disclosed no cause of action. From this decision Mrs. Wright has appealed to the High Court: reserved judgment has not yet been delivered. Curiously enough there is now pending in the Supreme Court of New South Wales a case, *Ashton v. Grant*, where a claim for damages is made on similar grounds. The declaration was demurred to and the case stands over pending delivery of the judgment of the High Court.

In *Harris v. Harris*, a divorce appeal to the New South Wales Full Court, the question was whether the lady had complied with an order for restitution of conjugal rights. She had returned upon being served with the order, but had told her husband that she would not stay with him if she found that her affection for him was insufficient. She found that she had only enough affection for him to last three months and at the end of that time she left him. The trial Judge dismissed the husband's petition on the ground that she had complied with the order, but the Full Court held that a conditional return was not a compliance, and that the husband was entitled to a decree.

The Workers' Compensation Commission has had to consider the case of James Burns, known professionally as "Jim Smith," who, while engaged by Leichhurdt Stadiums Ltd. to fight four rounds for £2, was struck heavily and killed. His mother claimed compensation, but the Commission decided that he was not a "worker" within the meaning of the Workers' Compensation Act.

A feature of the recent General Election has been the enthusiasm with which a number of persons issued writs claiming £10,000 damages for libel. About a quarter of a million was claimed in this way, but all the actions were abandoned after the declaration of the results. Then the journalists of New South Wales had a conference and took serious notice of the matter, and passed a resolution which looks as if it had been drafted by a space writer, and shrieks for a judicious blue pencil. It begins with the statement: "That this Conference is of opinion," and concludes with the pious hope "that action be taken that will provide a wholesale (*sic*) deterrent to those who abuse the processes of the Court and penalise the newspapers by the issue of writs without genuine intention" (*siccer*). The resolution was presented to the Attorney-General, Mr. Boyce, next day and he made a very definite promise that the Cabinet would consider the matter.

"Slattery's" Act provides (*inter alia*) as follows: "Whosoever having received or collected any money under any authority, upon terms requiring him to pay, apply, deliver, or account to any person for the same and fraudulently appropriates or fraudulently omits to account in violation of the terms upon which he received such moneys shall be liable to prosecution." There have, unfortunately, been many prosecutions under this section. In a recent case, *R. v. McDonald*, the accused, a solicitor, had received moneys from a client to be invested for him upon short-dated loans. The accused was convicted under the section cited but the Court of Criminal Appeal quashed the conviction on the ground that the section applies only to cases where money has been received from a third person on behalf of the client and has no application to a case where the money has been received from the client himself.

T. M. Slattery, after whom the Statute is familiarly called, made a great deal of history of various kinds in his day. He was for a time the Prothonotary, but resigned and acquired an enormous practice as a solicitor; in politics he became Minister of Justice. Also he was £30,000 short in his trust funds. Being fond of racing he owned a horse called "T.M.S.," the initials being generally interpreted as "Too Many Seconds." Slattery had backed a double to win him £36,000—Famous for the Epsom and T.M.S. for the Metropolitan. Famous won, and one hundred yards from home T.M.S. was five lengths ahead of everything. Then Mooltan came out of the ruck and beat T.M.S. in the last stride. Then there was heard throughout the grandstand a ringing laugh and a merry voice saying: "Did anyone ever see the likes of that?" And the merry voice and the laugh belonged to T. M. Slattery.

In *Sawdon v. Dale*, breach of promise of marriage, tried in Sydney before Mr. Acting-Justice Hammond and a jury, the learned Judge ruled that the statement of a witness that he had seen the defendant kissing the plaintiff was no corroboration of her statement that they were then engaged. The Full Court has unanimously affirmed the decision. The case may be useful upon the point of law involved, but it is also of interest as showing that four at least of our Supreme Court Judges have some knowledge of the habits and customs of members of our community

Looking through old fee books to-day one entry in particular interested me. In '91 at Bourke (N.S.W.) I defended Cyrus Huxley on a charge of riot. Some lewd fellows of the baser sort had pulled down a sly-grog shop—which quite possibly on general principles ought to have been pulled down—and did other acts *vi et armis*. The evidence that Cyrus Huxley was one of the rioters was contemptible. I asked the Judge to take the case from the jury. He said that he would not do that but that he would tell them to acquit. Upon that I addressed for five minutes only. The Judge told them to acquit, but they came back with a verdict of "guilty." In the town that evening one of the jurors told the reason for the verdict: "Well p'raps he didn't do it, but if he didn't do that he did a lot of things that were a sight worse and he was better in gaol than out of it anyhow, so we sent him up." This was before the passing of the Criminal Appeal Act so the conviction stood. The Judge, greatly astonished at the verdict, imposed a sentence of nine months imprisonment. The night after Cyrus Huxley was released he garotted two men in the main street of Bourke and was sent up for ten years. I have always been afraid that Cyrus was forced into a career of crime by the careless verdict.

I have written of your Solicitors Guarantee Fund Act and of the public spirit of its promoters in very eulogistic terms in Sydney papers, but there is no organisation and not sufficient *esprit de corps* in the profession here to make such a magnificient piece of legislation a possibility with us.

Rules and Regulations.

Animals Protection and Game Act, 1921-22. Open season for deer-shooting in Hawke's Bay, Waitaki, and Otago Acclimatization Districts.—Gazette No. 77, 14th November, 1929.

Defence Act, 1909. Financial instructions and allowance regulations for N.Z. Military Forces.—Gazette No. 77, 14th November, 1929.

Fisheries Act, 1908. Regulations for trout and perch fishing in Hawke's Bay Acclimatization District.—Gazette No. 77, 14th November, 1929.

Judicature Act, 1908; Judicature Amendment Act, 1913: Sittings of Court of Appeal and Supreme Court for 1930.—Gazette No. 77, 14th November, 1929.

Land and Income Tax Act, 1923; Land and Income Tax (Annual) Act, 1929. Dates for payment of ordinary Land-Tax, special Land-Tax and Income-Tax.—Gazette No. 74, 7th November, 1929.

Orchard and Garden Diseases Act, 1928. Downy mildew on hops declared disease under Act. Introduction into New Zealand of hop-sets of any hop plant prohibited.—Gazette No. 74, 7th November, 1929.

Surveyors' Institute Act, 1908; Surveyors' Registration Act, 1928. Examination Rules for certificates of competency as Surveyors.—Gazette No. 74, 7th November, 1929.

Education Act, 1914. Amended regulations relating to the organisation, examination and inspection of public schools. Amendments to the regulations relating to attendance registers, returns and average attendances; payments of grants in aid of free kindergarten schools; probationary assistants; educational bursaries; district high school fees; secondary schools-staffing, salaries, etc.; manual and technical instruction; public schools—salaries, grading, staffing, etc.; intermediate examination. Amended regulations relating to Free Places.—Gazette No. 69, 17th October, 1929. Amended regulations relating to Training Colleges and Probationers.—Gazette No. 73, 31st October, 1929.

Post and Telegraph Act, 1928. Electric Lines Regulations: Telephone Exchange Service.—Gazette No. 73, 31st October, 1929.

Consolidation of Statutes.

Victorian and New Zealand Systems.

We have recently drawn attention to the meritorious performance of Victoria in its latest consolidation of its statute law, and have stated that New Zealand could learn a great deal from that State in such matters. The Victorian Attorney-General and the Law Institute of Victoria seem, however, to regard the reverse as being the case. The Attorney-General (Hon. Mr. Macfarlan), on the occasion of the passing of a resolution of thanks to His Honour Sir Leo Cussen for his eminent services in connection with the consolidation, is reported as having said:

> "We look forward to introducing a new scheme of consolidating—the Statute Law Revision Committee will shortly be considering that—and we hope that this will be the last consolidation in this form. The intention is to adopt the New Zealand or the Federal plan and to have practically a continuous system of consolidation, and there is no doubt that Sir Leo will give us considerable assistance in that connection."

And the *Law Institute Journal*, in its record of proceedings of the Council of the Institute, says:

> "The Council has under its consideration the desirability, or otherwise, of a continuous consolidation of statutes, instead of a complete consolidation on occasions separated by long intervals. The New Zealand Parliament and the Commonwealth Parliament adopt the practice of a partially continuous consolidation of the Statutes. There is much to be said for each side of the matter."

The practice of the Commonwealth Legislative as to consolidation may be such as to warrant the application to it of the description "partially continuous"; but there is no justification at all for the application of this description to our so-called "system" of the annual consolidation, apparently at random, of a few enactments. Only fourteen years have elapsed since the last general consolidation in Victoria as against twenty-one years here. The New Zealand practitioner has some twenty-six volumes of extant statute law while his Victorian colleague has to consult five or six volumes at the most. What attractions our spasmodic practice has for Victoria it is difficult to imagine.

Bench and Bar.

The Hon. Mr. T. M. Wilford, K.C., Minister of Justice and Defence, has been appointed to the High Commissionership. Apart altogether from any question of party politics it is a matter of considerable gratification that this responsible office has once again come the way of a member of the Profession.

Mr. H. F. Johnston of the firm of Johnston, Beere & Co., Wellington, has been nominated as the Reform Party's candidate for the Hutt electorate at the by-election necessitated by the resignation of the Hon. Mr. T. M. Wilford, K.C.

"It may be said that claims for damages for personal injuries in connection with driving form the staple litigation of to-day."

—Mr. Justice Salter.

The Rise of Bureaucracy.

Or the Growing Interference of the Government Official with the Liberty of the Subject.

The continuous growth of bureaucratic government has during the last few years agitated to no small extent the minds of the members of the legal profession both in England and in New Zealand. The question was raised at the recent Provincial Meeting of the English Law Society, held at Bournemouth at the beginning of last month, in a paper read by Mr. H. G. Wedd. The illustrations chosen by the author are drawn, of course, from English statutes and regulations and some of the examples given were apparently not altogether happy, for his paper received, in matters of detail, a fair measure of criticism. Many examples can be found in New Zealand and the whole question is one of such importance that it is thought that New Zealand practitioners will find food for reflection in Mr. Wedd's paper, and we accordingly print it below.

"In approaching such a subject as I have chosen for this paper, the first thing that occurs to the mind is the difficulty of dealing with a subject of such size and importance within limits sufficient to prevent my becoming tedious or exceeding the time allotted to the reading of a single paper, so it shall be my endeavour to be as concise as possible.

"Looking back for an instant at recent history, we may date the rise of the evil from the sudden craze for creating new ministries (each with its attendant principal and under-secretaries, clerks, typists, office boys, book-keepers, and inspectors) which broke out about 1912 and raged till after the war. These new ministers and officials sought at once for some means of earning their salaries and justifying their existence, and their efforts in almost every case led them into interfering in some branch of the life of the nation, regardless in many cases whether such interference was justifiable or not. For example, the Ministry of Transport decreed that every owner of a motor-car should have a document called a registration book. It would be interesting to find out what expense was caused to the country by the printing, distribution and checking of these books, and whether in any single case they have proved of the slightest use.

"The Ministry of Health has now ordained that every man who milks a cow shall first wash his hands, and presumably inspectors are appointed to enforce the ordinance, but I have not heard of any sanitary inspector who has caught a milker transgressing this stringent regulation, or of a summons being issued against the offender before the magistrates. We may have a test case one day as to what the word 'washing' means; perhaps the Ministry will provide a regulation Mark 1 type of soap and towel for use by milkers. I was told recently, however, by a practical farmer that if the 'Milk and Dairies Order' of 1926 was strictly carried out it would be impossible for any farmer to produce a single gallon of milk, and I believe the Order is treated as more or less of a dead letter. It is possible, it seems, for even a Ministry to go too far.

"The earliest and perhaps the most striking example of the power of the official can be found in the administration of the Housing Act, 1919. Under that Act the need of houses was mentioned, and the Ministry of Health was given power to see that the local authorities built them, or themselves to step in and build them, no limit of any kind being placed on the expenditure to be incurred, but (as my hearers no doubt remember) not more than a penny rate could be levied on the locality concerned. The cost of building went up to somewhere about one thousand pounds per house, and 208,000 houses were built all over the country which have cost, are costing, and will apparently forever cost, the taxpayer 40*l.* a year per house, a total of nearly 8½ millions a year. In one case I know of a local authority which pointed out again and again that to build a house for a labourer at a cost of 1,000*l.* was absurd, but the Ministry would hear no excuse: the houses must be built. All these structures, mostly hideous and badly (because hurriedly) built, remain scattered all over the country as a monument to official ineptitude.

"A further instance. In 1925 it occurred to some official that no Church of England clergyman was capable of appointing an efficient collector of tithes; so what happened? The Tithe Act of 1925 was pushed through Parliament, which took away a whole class of property from the clergy and transferred it to the officials representing Queen Anne's Bounty, but created fresh officials to supersede the existing collectors, and various committees. The tithe is now, after being collected locally, sent first to an 'area' headquarters; from those headquarters it is sent to London, to Queen Anne's Bounty: there a fresh staff of officials sorts it all out again and sends it back (less some 10 per cent.) to the parishes it originally came from.

"More officials have now been created under the Rating Act, 1925, and in some counties one of their first proceedings is to rate the public elementary schools, which are, of course, maintained by the rates. Thus the County Rating Office levies rates on the County Education Office property, the County Treasury Office takes the money and pays it out again to the County Education Office to make up for the increased cost of maintaining the schools. There is even a worse case under the same Act. The gentlemen who voluntarily undertake the management of our village halls and parish rooms are being assessed and bullied to pay rates on their structures. Now I do not believe for one moment that the ratepayers as a whole wish those buildings rated: they are run practically entirely *pro bono publico*, and often have a hard struggle to 'make ends meet.' If they were released, as they mostly have been, from payment, the other ratepayers might be a penny or twopence worse off in the year—a very modest contribution to the upkeep of the hall—but the ratepayers are not consulted: the official body is stronger than the public whose servants they are supposed to be.

"Nothing can show the extent of the evil more clearly than a comparison between the figures of the present Budget and those of 1914. In both years the cost of the Army and Navy is very much the same, round about a paltry 80,000,000*l.*, whereas the Civil Service estimates for this year are 227,000,000*l.*, practically three times as much as the Army and Navy. What benefits, I ask, does the nation receive for these 227,000,000*l.*?

"Besides the setting up of these Ministries, more and more Acts of Parliament have been passed, giving Ministers all sorts of powers to make regulations and ordinances affecting the liberties of the subject. Thus, by the Railway and Canal Traffic Act, 1887, secs. 24

and 31, the whole of the railway companies in the kingdom can only make such charges as a Government Departments (i.e., the Board of Trade) thinks fit. To such an extent has the custom of legislation by Departments grown that in 1920 eighty-two Acts of Parliament were passed and 2,473 Statutory Rules and Orders. The Safeguarding of Industries Act, the Advertisements Regulation Act, 1925, the London Traffic Act, 1924, the Rating and Valuation Act, 1925, afford similar instances of Government Departments being given what are practically legislative powers. By the Patents, Designs and Trade Marks Act, 1883, rules to be made by the Board of Trade 'shall be of the same effect as if they were contained in this Act.' Under the National Insurance Act, 1911, a statutory officer, known as an insurance officer, decides what unemployment benefit an injured employee may draw, and the employee may appeal to a Board of Referees. If the Court of Referees upholds the insurance officer, no further appeal is possible, but if the Court sides with the injured man the officer can appeal to yet another official, the umpire appointed by the Crown, whose 'decision shall be final and conclusive on matters of both fact and law'—(sec. 88 (1) (*a*). In the Rating and Valuation Act, 1925, the Minister is even given power to 'modify the provisions of this Act so far as may appear necessary or expedient'—a most extraordinary provision.

"Enough has surely been said to establish the existence of evil, and to prove that the executive branch of the State is gradually usurping both the legislative and judicial functions. What, then, is the remedy? Parliament is responsible for this horde of officialdom. It is Parliament who, like the fisherman in the Arabian Nights, has opened the bottle and released the Genie who, grown to enormous proportions and with its head in the clouds is overshadowing the world we live in. It is the House of Commons who is responsible and who must be called on to grapple with its own creation: and the question of economy should have been brought to the forefront in the recent election. If only Mussolini could be invited to go through the Civil Service estimates when the next Budget is in course of preparation we should no doubt see a change. In default of this we must wait till the next election; but when it comes all parties must join hands to ensure that no member shall go to Westminster who has not given a solemn pledge that the expense of the Civil Service shall be thoroughly and drastically reduced. When once the Genie is subdued, the sun of national prosperity will surely shine more brightly upon the fair country so dear to all our hearts."

"No one can doubt but that a great deal of legislation must be of an experimental and tentative nature, and the more it savours of these attributes the more necessary it is to approach its formation and its passage with caution and with discrimination."

—Mr. Justice Eve.

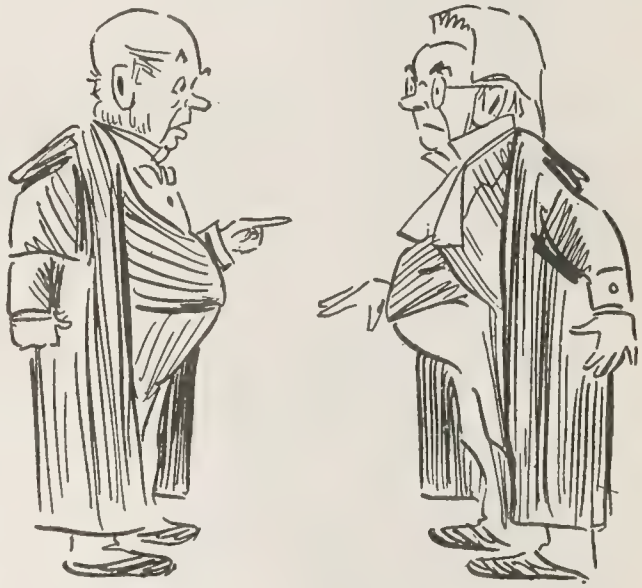
"Legislation framed for a particular emergency ought to be put an end to or suspended as soon as the emergency ceases."

—Mr. Justice Eve.

Forensic Fables.

THE PRUDENT JUDGE AND THE STOUT USHER.

A Great Many Years Ago there Lived a Prudent Judge who Gave Universal Satisfaction. He was a Magnificent Lawyer. Legal Problems, however Complicated and Obscure, Never Caused him the Least Alarm. When the Doctrine of Equitable Subrogation was Mentioned, the Prudent Judge Brightened Up; and Such Topics as Anticipatory Breach of the Contract, the Provisions of the Harter Act, and Covenants Running with the Land Filled him with Joy. And, Wonderful to Relate, the Prudent Judge was Just as Good when it Came to a Question of Fact. As the Prudent Judge was a Bachelor and a Recluse, whose Practice at the Bar had been of the Stuffiest Description, there Appeared to be no Reason for this Phenomenon.



But there was. Quite Early in his Judicial Career the Prudent Judge Detected that the Stout Usher in his Court was a Person of Great Good Sense. He therefore Summoned the Stout Usher to his Room, Pressed a Substantial Offering into his Hand, and Begged him to Abandon his Habit of Sleeping throughout the Proceedings, and to Pay Close Attention to the Evidence in Each Case. The Stout Usher Orally Agreed so to Do. Thereafter, when the Court Adjourned, the Prudent Judge would Ask the Stout Usher what he Thought about the Various Witnesses. The Stout Usher was Never in Doubt. Sometimes he would Say that the Plaintiff was a Bit of a Liar; on other Occasions he would Pick Out the Defendant as the Ananias of the Piece. Under the Able Guidance of the Stout Usher the Prudent Judge Never went Wrong. And when At Last the Prudent Judge Retired, the Attorney-General, in a Valedictory Address, Dwelt upon his Uncanny Knowledge of Human Nature and his Marvellous Capacity for Distinguishing Truth from Fiction.

MORAL: *Ask the Usher.*

Supreme Court.

Sittings for 1930.

The dates for the commencement of the sittings of the Supreme Court in the various centres have now been fixed and are as follows :—

NORTHERN JUDICIAL DISTRICT.

Auckland: 4th February; 6th May; 29th July; 28th October.

HAMILTON JUDICIAL DISTRICT.

Hamilton: 24th February; 9th June; 25th August; 17th November.

TARANAKI JUDICIAL DISTRICT.

New Plymouth: 24th February; 26th May; 18th August; 17th November.

GISBORNE JUDICIAL DISTRICT.

Gisborne: 25th February; 4th June; 19th August; 11th November.

WANGANUI JUDICIAL DISTRICT.

Wanganui: 17th February; 19th May; 11th August; 10th November.

WELLINGTON JUDICIAL DISTRICT.

Wellington: 3rd February; 5th May; 28th July; 28th October.

Palmerston North: 4th February; 6th May; 29th July; 28th October.

Napier: 17th February; 26th May; 11th August; 3rd November.

Masterton: 4th March; 2nd September.

NELSON JUDICIAL DISTRICT.

Nelson: 18th March; 15th July; 2nd September.

Blenheim: 11th March; 8th July; 25th November.

CANTERBURY JUDICIAL DISTRICT.

Christchurch: 11th February; 6th May; 19th August; 28th October.

Timaru: 4th February; 29th April; 29th July; 21st October.

WESTLAND JUDICIAL DISTRICT.

Hokitika: 26th February; 11th June; 10th September.

Greymouth: 26th February; 11th June; 10th September.

OTAGO AND SOUTHLAND JUDICIAL DISTRICT.

Dunedin: 3rd February; 28th April; 28th July; 28th October.

Invercargill: 17th February; 12th May; 18th August; 10th November.

Oamaru: 4th March; 2nd September.

"Cynical remarks are sometimes heard to the effect that there are too many lawyers in the legislative halls of the Empire. So far as Canada is concerned I believe that to lawyers is largely due the continuous betterment evidenced in the legislation of the country, both Dominion and Provincial."

—Rt. Hon. Ernest Lapointe.

Legal Literature.

Paterson's Licensing Acts with Forms.

Thirty-ninth Edition: 1929: By H. B. HEMMING and S. E. MAJOR.
(pp. cxv: 1292: clxi: Butterworth & Co. (Publishers) Ltd. and Shaw & Sons, Ltd.)

As in the case of the *Annual* and *Yearly Practices*, *Stone's Justices Manual*, and *Willis's Workmen's Compensation*, the very fact of an annual appearance, coupled with frequent use by the profession, ensures the complete accuracy of this work, for if any error appears it is quickly discovered and just as quickly can be remedied. To those familiar with past editions of *Paterson* this, the thirty-ninth, by the same editors as its predecessor will require no commendation from a reviewer. Nor is it proposed to deal at length with the work for the benefit of the very few who do not know it; but it may, however, be advisable to point out that its scope is much wider than generally imagined and that it deals among other matters with the law relating to clubs, theatres, cinematograph exhibitions, music and dancing, racecourses, billiards, compensation, covenants, contracts of sale of licensed premises, and rates and taxes on licensed property.

New Books and Publications.

Companion to the Companies Act, 1929. By the Hon. Fletcher Moulton. (Eyre & Spottiswoode). Price 18/-.

Dart's Law and Practice of Vendors and Purchasers. Eighth Edition. Two Volumes. By E. P. Hewitt and M. R. C. Overton, M.A. (Stevens & Sons, Ltd.). Price £5 10s.

Wilshere's Analysis of Taswell Langmead's Constitutional History. Fifth Edition. (Sweet & Maxwell Ltd.). Price 8/-.

The Great Seal.

The Great Seal must not be taken outside the realm, and when, in 1913, Lord Haldane, the Lord Chancellor, was invited to visit Canada and the United States provision had to be made for its custody during his absence, and accordingly Viscount Morley, Earl Beauchamp, and Sir Herbert Cozens-Hardy, the then Master of the Rolls, were appointed Commissioners for this purpose. Recently a Commission has been appointed for the like purpose during any absence of Lord Sankey from the United Kingdom. There are four Commissioners on this occasion—Lord Muir Mackenzie, Mr. Justice Hawke, Mr. Justice Macnaghten, and Mr. Justice Luxmoore: the omission of the Master of the Rolls, who is usually included, was no doubt due to his then himself being abroad.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"The administration of the law depends upon the complete co-operation of the Bench and Bar."—Lord Finlay.

Vol. V. Tuesday, December 17, 1929 Nos. 21 & 22.

The Closing Year.

The year now drawing to a close has been not uneventful so far as the profession and matters affecting it are concerned. Much has been achieved though a great deal remains still to be accomplished. The event of paramount importance as regards the welfare of the whole profession has been the placing upon the Statute Book, at the instigation of the profession itself and with the entire approval of nearly every individual practitioner, of the Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Act. The profession owes a great debt to the President and the members of the Council of the New Zealand Law Society and to its other representatives who so unremittingly exerted themselves to secure the enactment of the measure, and much is also owing to a sympathetic Attorney-General anxious to safeguard the profession of which he is the head. Already the scheme is under way—a Committee of Management of the Fund has been constituted and the amount of each practitioner's subscription has been fixed—and no doubt confidence in the profession, impaired temporarily by the conduct of one or two unworthy members of its ranks, will, when the public appreciates the protection afforded to it by the scheme, soon be restored. While traditionally the profession shrinks from advertisement it may be, however, a matter worthy of earnest consideration as to whether it would not be advisable, until the position is fully understood by the public, for some form of corporate announcement to be made, either by the Law Society itself or by the Committee of Management of the Fund, of the exact security and advantages ensured by the Act. Any such announcement would be as much in the interest of the public as of the profession, and, if effected in a proper manner, would be quite consistent with professional dignity.

During the year we have seen several changes in the personnel of the Supreme Court Bench. There have been the tragic death of the late Sir Charles Skerrett, the appointment of Mr. M. Myers, K.C., as his successor in the office of Chief Justice, and the elevation to the Bench, to fill the vacancy caused towards the end of last year by the death of Sir William Sim, of Mr. Justice Kennedy. These appointments bring the Bench once again up to its full numerical strength and the wheels of justice, in a year in which the volume of litigation has exceeded that of its immediate predecessors, have indeed run smoothly; the year has seen a perceptible increase in what is of paramount importance in the administration of justice, that confidence in the Court which ought to prevail among members of the Bar.

In the Magistracy there have also been changes: Mr. J. H. Luxford, S.M., was promoted to the office of Chief Judge of the High Court of Samoa, and Mr. P. H. Harper and Mr. G. N. Morris were the new appointees during the year. Certain small improvements, technical rather than substantial, have been made by last session's Finance Act as regards the superannuation allowances granted to Magistrates, though it would have been extremely fitting had the Government availed itself of that apparent opportunity and placed not only the superannuation but the salaries of the Stipendiary Magistrates on a proper and adequate footing. As we have observed in effect on several previous occasions no effort should be spared to attract to judicial office, whether in superior or inferior Courts, only the best of those available.

An interesting and not unimportant event, so far at any rate as the Bar is concerned, was the appointment, for the first time in over three years, of a new King's Counsel, and the occasion was distinguished by some outspoken comment by the Chief Justice as to the true purpose of the letters patent. It was in order to secure the dignity of the office that the Law Practitioners Amendment Act of 1915 was passed requiring any King's Counsel subsequently appointed not to practise as a solicitor. Since that date we have seen only one appointment made which has been followed by the appointee practising on his own account as a barrister. The patent has, it is true, now been granted on four other occasions under the altered law, but of those appointed not one has since his swearing in engaged in private practice. To remove the condition at present annexed because of the paucity of applicants in recent years would be at once to place in jeopardy the prestige and the honour of the office. The Bar will wholeheartedly agree with His Honour's forceful observation: "The patent is not intended to be given to a practitioner merely to carry with him into retirement."

There still remains, as we observed earlier, a great deal to be accomplished by the profession. So far as it increased the sense of corporate interest engendered at the first Conference the Wellington Conference held last Easter was invaluable, but not a few of its discussions and remits show little sign yet of any prospect of achievement. The Annual Conference, now twice tried, is, we hope, established as a permanent institution; but it is one thing for Conferences to pass resolutions, another to carry them into effect. Resolutions advocating changes in the general law depend, of course, for their realisation on the Legislature, and the New Zealand Law Society can do little more than endeavour to satisfy Ministers of the Crown; but resolutions affecting solely affairs relating to the profession stand on a somewhat different footing. The Conference endorsed the principle, for instance, of the extension of the Society's functions and of its disciplinary powers over its members. Again, two papers dealing with legal education were read and a committee was set up to consider the questions raised by the papers. These questions are undoubtedly important to the profession and it is to be hoped that the ensuing year will see considerable progress made as regards them. Another matter important in the interests of the profession is the appointment of a lawyer of executive ability and standing in the profession as an executive officer to assist in the administration of the Society's affairs. The last Conference unanimously passed a resolution advocating such an appointment, and this, in the opinion of many, is one of the most urgent matters requiring attention in 1930.

Court of Appeal.

Herdman, J.
Adams, J.
MacGregor, J.
Ostler, J.

October 7, 8; November 6, 1929.
Wellington.

SCALES v. YOUNG.

Licensing—Alteration of Boundaries of Electoral Districts—Part of No-License District Merged in New District in Which Granting of Licenses Not Prohibited Throughout Area Containing More Than Half of the Population—Application to Licensing Committee of New District for Publican's License in Respect of Premises in Part of No-License District So Merged Which Were Licensed Before No-License Carried in that District—Applicant Not Entitled to License—Licensing Act, 1908, Sections 27, 52, 128—Licensing Amendment Act, 1910, Sections 4, 5, 6, 11, 12, 30.

Motion for certiorari and alternatively for mandamus removed into the Court of Appeal for argument. The plaintiff who was the lessee of the Somerset Hotel in Ashburton, was the applicant for a publican's license for those premises, and the defendants were the Licensing Committee of the Mid-Canterbury Licensing District which included Ashburton. This district was constituted a new district in 1928 by the South Island Representation Commission in pursuance of Sections 7 to 12 of the Electoral Act, 1928, and comprised portions of the former electoral districts of Ellesmere and Ashburton. Before the Representation Commission changed the boundaries of electoral districts in 1928, the Ashburton electoral district had been a "no-license" district for some twenty-five years. It became a no-license district in 1903, and the Somerset Hotel, which had been one of the licensed houses in the town, lost its license. Triennially, since 1903, a poll had been taken in the district on the issue whether licenses should be restored in the district, but the district remained and was still a "no-license" district when the district was merged in the Mid-Canterbury District. The electorate of Ellesmere was a district in which continuance was in operation, and one of the consequences of the union of Ashburton with Ellesmere was that the granting of licenses was not prohibited throughout an area within the new district which contained more than half the population of the new electoral district. Ashburton as a "no-license" district ceased to exist. The electors were no longer entitled to vote on the subject of "Restoration," but under the legislation in force were obliged to vote and did vote upon the national issues of "Continuance," "State Control" and "Prohibition," and at the last poll in 1928 continuance was carried. The plaintiff claimed that, notwithstanding the impossibility of getting a verdict by the electors in favour of "Restoration," he was entitled to apply for a license and that the licensing committee to whom he had applied had jurisdiction to consider and give a decision upon his application.

Wright, Sim and Wilding for plaintiff.

Spratt and Charles for defendant.

HERDMAN, J., said that the plaintiff relied substantially upon Section 128 of the Licensing Act, 1908, and Section 30 of the Licensing Amendment Act, 1910. His Honour after referring to these sections, said that stress was laid upon the words "or has otherwise ceased to exist," appearing in Section 30 above referred to. The contention was that, notwithstanding repeated declarations made by electors at the poll during the last twenty-five years, that licenses should not be granted in the abolished district of Ashburton, they possessed to-day some legal right to have their applications considered and granted. His Honour thought that a consideration of the legislation from the year 1881 up to the present date proved irresistibly that the effect of carrying "no-license" in a district when the provisions for local option were in force was to abolish existing licenses and that a declaration by the electors in favour of "Restoration" was a condition precedent to again granting licenses in place of those that had ceased to exist in consequence of the vote of the people. His Honour referred to Sections 27 and 52 of the Licensing Act, 1908, and to Sections 3, 4, and 5 (since repealed) and Sections 6, 11, and 12 of the Licensing Amendment Act, 1910, for the purpose of ascertaining the intention of the Legislature when the latter Act was passed and the meaning, at that time, of Section 30. In the present case a no-license poll had been succeeded not by a restoration poll but by a continuance poll. But assuming that Section 30 could have the meaning ascribed to it by the plaintiff it would seem that it was too late to apply, for subsection (2) of Section 30 of the Act of 1910, fixed a limit within which an application must be made and that limit of time had long since expired. It was admitted by both parties that the sole cause of the present difficulty was the change of electoral boundaries—that and nothing more. But because electoral boundaries had been changed that did not give authority to grant licenses without a restoration poll. His Honour interpreted Section 30 of the Act of 1910 as being intended to preserve the life of a license which came into existence under the authority of a licensing poll. For instance "continuance" might be carried in a district in which 50 licenses existed. One of those licenses might be forfeited if a licensee were sentenced to imprisonment upon an indictment; or a license might be cancelled if a licensee conducted his house in an improper manner; or a licensee might die and his representatives might neglect to apply for a renewal; or it might happen, too, that a licensee might neglect to pay a renewal fee. In such cases a licensing committee might grant a license to an applicant in lieu of one that had ceased to exist, but when it came to making a grant of a new license over and above the number which the electors had in contemplation when they recorded their votes at a licensing poll, that was a very different matter. To justify a decision that Section 30 gave jurisdiction to increase the number of licenses beyond the limit authorised by continuance, strong authority was needed.

The phrase "otherwise cease to exist" was pointed to as the authority for re-creating licenses which had been destroyed by the popular vote. But a poll in favour of continuance was not the same kind of thing as a poll requiring "Restoration," and an argument, founded on Section 30, that after a continuance vote was carried a licensing committee might grant not only licenses in existence, but licenses which might have been granted had a restoration vote been carried was, His Honour thought, obviously unsound. Subsection (3) of Section 73 of the Act of 1908, seemed to assume that a license was issued only after a poll.—See also Subsection (1) of Section 106 of the same statute.

To determine the meaning of Section 30 one must assume that it dealt with situations that arose after a poll had been taken. In the district the last poll resulted in a verdict for continuance which must mean a continuance of licenses existing when a poll was taken and no more. Except under a special provision dealing with a sudden increase of population, and except by the process of restoration His Honour knew of no means by which new licenses could be created. In His Honour's opinion, then, Section 30 did not authorise a licensing committee to entertain such an application as had been made in the present case, and what His Honour had said in respect of that section applied with equal force to Section 128. Rightly or wrongly the established principle upon which licenses to sell liquor might be granted in New Zealand was that it should be done under the *aegis* of an electoral poll. In any event Section 30 was not retrospective. For the purpose of deciding the present case it was not necessary to trace the vicissitudes of New Zealand licensing legislation over many years in elaborate detail. It was sufficient by a reference to some of the important statutory provisions to indicate how the policy at present in operation had been evolved and the nature of that policy. His Honour reviewed the provisions of the Acts of 1881, 1893, 1895, 1904, 1908, 1910, and 1918, and said that throughout that long procession of enactment after enactment commencing in 1881 and ending in 1920, the principle of control of the sale of liquor by the electors had been established and the limitation of the number of licenses had been definitely provided for. Not only that, but when territory became affected by no-license, the prohibition against the granting of licenses remained fixed until a poll was taken which sanctioned restoration, and even when restoration was carried, as His Honour had already pointed out, it might not be the original licensee who would benefit but the owner of the premises who might never have held a license. A license had no permanent existence. It was not a thing that lived for ever. If it were destroyed by a poll the rights of the licensee disappeared. Unless he were the owner of premises his right to get a license if "restoration" were carried was no better than that of any other man. An examin-

ation of the section relied upon and a consideration of the legislation convinced His Honour that the claim for relief made by the plaintiff was untenable.

ADAMS, J., MACGREGOR, J., and OSTLER, J., delivered separate judgments agreeing in the result.

Judgment for defendant.

Solicitors for plaintiff: **Duncan, Cotterill and Co.**, Christchurch.
Solicitors for defendant: **Orbell and Charles**, Christchurch.

Full Court.

Myers, C.J.
Herdman, J.
Adams, J.
MacGregor, J.
Ostler, J.

October 1; 10, 1929.
Wellington.

SMITH v. HICKSON.

Licensing—Offences—Licensee Convicted of Selling Liquor on Licensed Premises During Closing Hours—Pleas of *autrefois convict* to Two Further Informations Alleging Exposure of Liquor for Sale and Opening of Licensed Premises for Sale of Liquor—Offences Separate and Independent—Conviction on First Information Not a Bar to Conviction in Others.

Appeals from the dismissal by the Stipendary Magistrate at Nelson of two informations. On 10th June, 1929, the Magistrate had before him three informations against the respondent, the licensee of a hotel: the first charged him with selling liquor on his licensed premises during the time at which such premises were directed to be closed, the second with exposing liquor for sale, and the third with opening his licensed premises for the sale of liquor during the time at which such premises were directed to be closed. To the first information Hickson pleaded "guilty," and he was convicted and fined £2 and costs. The second and third informations were dismissed by the learned Magistrate, who held that a plea of "*autrefois convict*" which had been entered by the respondent barred the informant from proceeding upon those informations.

Fell for appellant.
Perry and Moynagh for respondent.

MYERS, C.J., said that the practice had always been in cases of the kind to lay informations for all the acts complained of if they were thought to constitute separate offences, but only to ask for one conviction in respect of what might be called the culminating or final act, and to abandon the informations for the other acts or offences. Experience had shown that the ends of justice had been sufficiently and satisfactorily met by the adoption of that practice. For that reason His Honour had approached the consideration of the appeal with the frank desire of upholding the Magistrate's decision if possible; after careful consideration, however, he found himself unable to do so. The respondent relied mainly upon the decision in **Dorrian v. McHugh**, (1907) 2 Ir. R. 564. In **Paterson's Licensing Acts**, 39th Edn., 692, the learned editors referred to **Rex v. South Shields Licensing Justices**, (1911) 2 K.B. 1, where Lord Alverstone, C.J., expressly left open the point raised by the present appeal, but **Dorrian v. McHugh** was not referred to; nor could His Honour find it cited anywhere at all except as a reporter's note in **Rex v. South Shields Licensing Justices** (*cit. sup.*). His Honour was unable to follow **Dorrian v. McHugh** on this point. His Honour had had the opportunity of reading the judgments prepared by Herdman, J., and Ostler, J., and he agreed with the conclusions at which they had arrived and the reasoning on which those conclusions were based. Since the argument, counsel for the respondent had forwarded a memorandum drawing attention to **Shaw v. Pardy**, 18 N.Z.L.R. 782, but that case was distinguishable.

It would be improper to attempt to fetter the discretion of the Police in the present or any other case; but His Honour thought it both proper and advisable to point out that a variation in any particular case or cases of the existing practice to which His Honour had already referred, unless in any such variation discretion was wisely and cautiously exercised, might injure rather than benefit the best interests of justice. His Honour apprehended, however, from what was said at the Bar that the present appeal was brought simply to determine the question of law. It was said by counsel for the appellant that the present was not what he called a bad case and it was competent for the Police if they thought proper, now that they had established their point of law, to abandon the proceedings on the remaining informations.

HERDMAN, J., said that to decide whether the Magistrate was right in dismissing the two informations upon the special plea put forward it was necessary to determine whether, if the informations had been proceeded with the defendant would have been in peril of being convicted twice of the same offence. If the conviction for selling liquor at a time when licensed premises should have been closed involved a conviction for the offences charged in the two informations which were dismissed, then a plea of *autrefois convict* could be made successfully. The test was not whether facts proved upon the hearing of the three cases were identical or whether the three informations had their origin in the same transaction. The matter to be decided was whether, when Hickson had been convicted of selling liquor, he had also been convicted of opening his premises for the sale of liquor and of exposing liquor for sale. Proof must be given that the offences charged in the two informations were the same offence or substantially the same offence of which the accused was convicted. It seemed to His Honour that the three informations necessitated the proof of three distinct acts. To sell liquor a licensee need not open his premises for the sale of liquor nor need he expose liquor for sale and he might open his premises for the sale of liquor or expose liquor for sale without actually effecting a sale. It might be that in prosecuting a man for selling liquor after hours proof might be given that he unlawfully opened his premises and that he unlawfully exposed liquor for sale; but that might not always occur, and if it should happen that such evidence were given incidentally, that circumstance in itself could not secure for the offender immunity from prosecution. After referring to **Welton v. Taneborne**, 21 Cox C.C. 702, **R. v. Young**, 33 N.Z.L.R. 1191, **Wemyss v. Hopkins**, L.R. 10 Q.B. 378, His Honour said that to succeed in the present case the defendant had to prove as a fact that a conviction for selling liquor necessarily involved a conviction for the other offences. A plea of "not guilty" had not yet been entered in respect of the two informations under consideration. Up to the present point the Magistrate had considered only the special plea and had not acquitted the defendant upon the facts. Proceeding upon the special facts and circumstances of the particular case he might no doubt find, were the defendant to plead "not guilty," that unlawful acts had been committed. But such unlawful acts were not an unlawful sale; they were separate independent offences, as much unlike an unlawful sale as gross indecency was unlike sodomy, the two crimes which were considered in **R. v. Barron**, (1914) 2 K.B. 570. His Honour referred also to **Bollard v. Spring**, 51 J.P. 501. In the present case, could it be said that the defendant, when he was charged with unlawfully selling liquor, was in danger of being convicted of unlawfully opening his premises or of unlawfully exposing liquor for sale? His Honour did not think so. It was possible that the Magistrate, if he had considered that the evidence did not support a sale but was sufficient to support another charge, could have amended the information by substituting the other charge, but that was not done and at the present stage one could not predict what he would have done if a general plea of "not guilty" had been entered and the two informations had been proceeded with. The Court had to decide the appeal keeping in mind the fact that the Magistrate had before him three separate informations charging three separate offences and that each offence differed in essence from the others. If a conviction upon a charge of selling was, in certain circumstances, to bar a charge of unlawfully opening premises, then was a charge of opening premises to stand in the way of the prosecution for unlawful selling, and if a licensee were convicted of unlawfully exposing liquor for sale, was he to escape prosecution for opening his premises or for selling liquor after hours? His Honour was not prepared to follow **Dorrian v. McHugh**, (1907) 2 I.R. 564, which was relied upon by the respondent; it appeared to be in conflict with **Wemyss v. Hopkins** (*cit. sup.*), and with the principle stated in such cases as **R. v. Barron** (*cit. sup.*) and **Bannister v. Clarke**, (1920) 3 K.B. 598, 605.

ADAMS, J., concurred in the judgment of Ostler, J.

MACGREGOR, J., concurred.

OSTLER, J., delivered a separate judgment agreeing that the appeals should be allowed.

Appeal allowed.

Solicitor for appellant: **C. R. Fell**, Nelson.
Solicitors for respondent: **Perry and Perry**, Wellington.

Supreme Court

Myers, C.J. June 7; October 9, 1929.
Napier.

LEYLAND MOTORS LTD. v. NAPIER HARBOUR BOARD.

Wages Protection and Contractors' Liens—Wages—Contract to Build Pier for Harbour Board—Assignments by Contractor of Moneys Payable Under Contract—Notices of Attachment for Wages Served on Board—Bankruptcy of Contractor—Claims of Workers for Wages Not Affected by Bankruptcy and Entitled to Priority Over Assignments—Moneys Payable to Contractor by Board Dehors the Contract and Deposit Accompanying Contractor's Tender Not Affected by Assignments or Charged in Favour of Workers—Working Foreman of Quarry, Working Foreman and Acting Engineer, and Driver of Motor-lorry Held to be "Workers"—Worker Giving Certificate that Wages Paid to Certain Date Entitled to Claim Under Act Only for Wages Accruing Subsequently—Order Directing Payment Out of Moneys Payable "On Completion of Contract" Held to Include Moneys Payable on Termination of Contract by Agreement—Wages Protection and Contractors' Liens Act, 1908, Sections 4, 5, 9, 10, 20.

Action to determine the validity and priority of certain claims under Part I of the Wages Protection and Contractors' Liens Act, 1908. On 17th June, 1927, the Napier Harbour Board accepted the tender of one, McGaffin, for certain work described in the specification as the Eastern Pier Reconstruction Contract. On 17th September, 1927, McGaffin and two sureties executed a bond in the sum of £1,000 to secure the due performance of the contract. The contract was not a lump sum contract but one for work to be done at schedule prices; the work was to be completed, subject to a maintenance period of one month, before 17th September, 1928. The contract authorised (clause 56) monthly progress payments to be made on the engineer's certificate in the proportion of 75 per cent. of the value of the work executed and the remaining 25 per cent. to be paid upon the expiration of 31 days after completion and maintenance of the work to the satisfaction of the engineer. It was provided (clause 59) that the contract should be read subject to the Wages Protection and Contractors' Liens Act, 1908, but that it should be lawful but not obligatory for the engineer, in any case where the contract price exceeded £3,000, upon being satisfied by the contractor that there were no claims under the Act enforceable by a sub-contractor or workman, to release any part of the 25 per cent. retention moneys, but so that at least 10 per cent. of the value of the work executed should remain unreleased. McGaffin who on 21st March, 1928, owed the plaintiff company certain moneys in respect of motor-lorries and equipment purchased from the company under hire-purchase agreements, on that date signed an order in favour of the plaintiff addressed to the Secretary of the defendant Board, authorising such Secretary to pay to the plaintiff on his behalf 10 per cent. on the amounts payable to him from time to time, such 10 per cent. to be deducted from the 15 per cent. payable to him after the progress payment of 75 per cent. had been made. The order further authorised the Secretary on the completion of the contract to pay to the plaintiff on his behalf out of the final 10 per cent. due to him, such sums as might be owing by him to the plaintiff at the date when the final payment became due. Notice of that order was given on the same date to the defendant Board. On 29th June, 1928, there was served on the Board an order given by McGaffin to one Dibble, a surveyor, on 26th June, 1928, directing the Board to pay Dibble £46 17s. 6d. "out of the 75 per cent. on my Eastern Pier Reconstruction Contract with your Board." On 3rd July, 1928, the District Inspector of Factories at Napier forwarded to the Board two notices of Attachment issued pursuant to Part I of the Wages Protection and Contractors' Liens Act, 1908, for wages amounting to £3 9s. 0d. and £3 5s. 0d. respectively, these notices being signed by J. Ryan and F. Snell respectively. These notices required the Board to retain in its hands all moneys due or accruing due from the Board to McGaffin. On 3rd September, 1928, one L. A. Denton served upon the Board notice of an order given to him on the same date by McGaffin, authorising the Board to pay to him out of the final payment due for the Eastern Pier Reconstruction Contract, the sum of £67. It was expressly provided that the order was to be paid in precedence to any others except the plaintiff's and Dibble's. On 7th September, 1928, Denton served upon the Board notice of assignment of a further sum of £15 15s. 0d. out of the moneys payable to McGaffin by the Board in respect of the said contract. On 5th September, 1928, McGaffin gave one Stanford, an order, notice of which was duly served upon the Board for the sum of £135 14s. 2d. out of moneys held by the Board on his contract. On 6th September, 1928, one Riddell, served upon the Board a notice pursuant to Part I of the Wages Protection and Contractors' Liens Act notifying the Board that McGaffin was indebted to him in the sum of £312 for wages and requiring the Board to retain in its hands all moneys due or accruing due to McGaffin. Similar notices under Part I of the Act in respect of claims for wages were also served upon the Board by the following persons: McMillan for £182 on 8th September, 1928; Orr for £28 on 10th September; Brownrigg for £140 on 11th September; Dale for £6 on 13th September. On 11th September McMillan wrote to the Board giving information of the amounts due to Orr and Dale and also four other workers, Phair, Bailey, Brierly and T. McMullan, in respect of wages. On 13th September McGaffin was adjudged bankrupt on his own petition. No work seemed to have been done on the contract after 26th June, 1928. On 5th September, 1928, McGaffin wrote to the Board asking it to agree to a termination of the contract, and on 13th September the Board agreed to a cancellation on terms (*inter alia*) that the contractor was to be paid schedule rates for all work done up to the termination of the contract, that he was to pay all outstanding wages up to the same date, thereby relieving the Board of all liability in the present action; and that his bondsmen were to be released from any further responsibility under their guarantee. On 17th October, 1928, Bailey wrote to the Board in reference to his claim for £11 3s. 5d. for wages; and on 20th October McMullan with regard to his claim for £4 6s. 0d. No payments had been made by the Board after 26th June, 1928. The amount held available by the Board in respect of work done under the contract was £785 0s. 11d., and the amount affected by the assignment to the plaintiff company was £727 19s. 0d. Apart from the above-mentioned sum of £785 0s. 11d., the Board held the sum of £99 18s. 9d., being the deposit (less exchange) which accompanied the contractor's tender, and there were two further sums of £69 and £20 due to the contractor under agreements or arrangements separate and distinct from the Eastern Pier Reconstruction Contract.

Fitzherbert for plaintiff.

Grant for Napier Harbour Board.

Scannell for Riddell and Denton.

Gleeson for McMillan, Brownrigg, Phair, Bailey, Brierly and Orr.

Lusk for Official Assignee.

MYERS, C.J., said that the Board could not, in his opinion, appropriate the deposit of £99 18s. 9d. to the detriment of the Official Assignee or any of the other claimants, and that sum was not caught by the terms of the plaintiff's assignment, or of any of the other assignments. Nor, in His Honour's view, was it charged in favour of the workers under Section 4 of the Wages Protection and Contractors' Liens Act, 1908, as it was not "moneys due to the contractor by the employer under or in respect of the contract or work." And, in His Honour's opinion, the same observations applied to the two items of £69 and £20. Those three items of £99 18s. 9d., £69 and £20, therefore, His Honour thought, passed to the Official Assignee as property of the bankrupt.

It was contended on behalf of those who purported to claim as workers that their claims took priority to the plaintiff's assignment by reason of the provisions contained in Part I of the Wages Protection and Contractors' Liens Act, 1908. On the other hand, it was contended for the plaintiff that the rights of the workers were lost by reason of McGaffin's bankruptcy. If the latter contention were correct the result would certainly be most extraordinary.

It was necessary first of all to consider the question whether the defendants with the larger wages claims, namely, Riddell, McMillan, and Brownrigg, were entitled at all to the benefits of Part I of the Act. Riddell was McGaffin's foreman at the quarry during the whole period of the contract, his wages being £6 a week. He was what might be called a working foreman. It appeared that during the whole period of twelve months during which he was working for McGaffin, he received no payment on account of wages. McMillan was also a working foreman and acting-engineer at a salary of £7 per week. There was owing to him the sum of £182 on account of wages in regard to the particular contract under consideration. The work done by Brownrigg was apparently that of driving a motor lorry. He claimed the sum of £140, but assuming that he

was entitled at all to the benefits of Part I, his claim must in His Honour's opinion be limited to £30, being the equivalent of his wages after 5th May, because, firstly, he admitted having been paid £40 on account; and secondly, on 20th June he certified in writing to the Secretary of the Harbour Board that his wages had been paid up to 5th May, 1928; and thirdly, he said that when he gave the certificate he obtained from McGaffin a cheque (post-dated) for £70. That cheque was payable on 20th July and was dishonoured on presentment. Whether or not the position of any other person or persons was altered by reason of that certificate of Brownrigg's (now alleged by him to have been untrue) was not clear; but manifestly his certificate was calculated to have such an effect. Brownrigg took no further step till 11th September, just on the eve of McGaffin's bankruptcy, when he gave the notice already referred to. His Honour thought that to some extent the decision in **Inhabitants of Fitzherbert Road District v. Robert,** 17 N.Z.L.R. 538, supported his view as to the limitation of Brownrigg's claim. At the trial Mr. Fitzherbert admitted that some amount must be paid to each of the three men—Riddell, McMillan, and Brownrigg—because, he said, their charges or notices of attachment had been served and they were entitled to payment under the statute. But he said that the claims were excessive and that the *quantum* of the claims must be carefully scrutinised. After the conclusion of the hearing His Honour had called counsel together and raised certain questions, one of them being the question as to whether those three men were "workers" within the meaning of the Act. In his subsequent written argument Mr. Fitzherbert contended that Riddell at least was a foreman in charge of a camp and was not a manual worker or engaged in work of any kind as defined in Part I of the Act, and was consequently not entitled to the rights conferred by that part of the Act, although he might have been entitled to protection under Part III if he had taken the appropriate action. The same argument applied to McMillan, though not to Brownrigg. The terms "wages" and "worker" were defined in Section 2 of the Act. In His Honour's opinion Riddell and McMillan were workers within the meaning of the Act. The definition of "worker" was not confined to a person engaged or employed in manual labour or even in manual work. The words were: "In any manner engaged or employed in manual labour or in work of any kind." In **Cook v. North Metropolitan Tramways Co. Ltd.,** 18 Q.B.D. 683, A. L. Smith, J., considering a statute in which the words "engaged in manual labour" appeared, said: "The expression used, it should be noted, is not manual work but manual labour, for many occupations involve the former but not the latter—such as telegraph clerks and all persons engaged in writing." In the present case, as His Honour had pointed out, the words used were not even "manual work," but "work of any kind." His Honour referred in support of his view to **Leech v. Gartside,** 1 T.L.R. 391, and also, by way of illustration, to **Phillips on Mechanics' Liens,** 3rd Edn., 274-279, and **Stryker v. Cassidy,** 32 Am. R. 262, and notes thereto. It was stated in the memoranda submitted by Mr. Scannell and Mr. Gleeson that both Riddell and McMillan, while engaged in their duties as foremen, worked with the other men employed and did their full share of manual labour. His Honour did not think that it was necessary for them to show that they actually did any manual labour. In His Honour's view the work which one associated with the duties of a working foreman was sufficient to bring such a person within the definition of "worker" for the purposes of Part I of the Act. If, however, it were necessary to ascertain with more precision the nature of the duties of Riddell and McMillan, His Honour would be prepared to direct that they be further examined under Section 20 of the Act. His Honour held then that all three, namely Riddell, McMillan, and Brownrigg, were entitled to the benefits of Part I of the Act.

His Honour referred to **Dallas v. Smart,** 18 N.Z.L.R. 479, and said that the effect of the decision was that there was nothing in Part I (as there was in Part III in respect of a claim under that part of the Act) which limited the time within which the notice to the employer was to be given or the time within which proceedings were to be taken. Nor did there appear to be any limit to the amount that might be claimed by a worker, or to the period of his work in respect of which he was entitled to claim. It would seem, therefore, that a worker might take steps to secure his rights under Part I whatever the amount of his claim might be, so long as there was in the hands of the employer any money due to the contractor. The truth probably was that the Legislature did not contemplate the case of workers allowing wages to become in arrear to such large amounts, but that could not affect the validity of the claims.

But for the bankruptcy of the contractor, the position in the present case would be for all practical purposes precisely the same as in **Harwoods Ltd. v. Gardiner,** (1927) N.Z.L.R. 127, where MacGregor, J., held, following **In re Barber,** 3 N.Z.L.R. 370, that by virtue of Section 5 of the Act the assignment was defeated by the prior claims of the workmen. In **Harwoods Ltd. v. Gardiner** (*cit. sup.*) none of the workers employed by the contractor had taken steps to enforce their claims for wages by notice of attachment under Part I, but it was held that the provisions of the statute effectively made the wages due to workers on the contract "a first and paramount charge" upon the contract moneys in terms of Section 4. Mr. Fitzherbert, however, contended that all that was altered by the bankruptcy of the contractor and that such bankruptcy defeated the claims of the workers. His Honour did not think that that was so. If it were so, Section 4 of the Act, which provided that the wages due to workers should be a first and paramount charge upon the moneys due to the contractor by the employer, would be nugatory in the event of bankruptcy. Similarly, an assignment by the contractor of the moneys due to him under the contract, though it might be worthless and ineffective prior to the bankruptcy of the contractor, would immediately upon his bankruptcy be valid and effective for all purposes and would take priority over the very claims to which the Act said it should be subject. Furthermore, instead of being entitled to the priority which the statute gave, the workers would be relegated to a lesser right under Section 120 of the Bankruptcy Act, 1908, (as amended by the Bankruptcy Act, 1927) which right indeed might well be worthless. That section did not attach to any special assets, such as the moneys due under a contract like the contract of McGaffin with the defendant Board, but dealt with the moneys received by the assignee by the realisation of the bankrupt's property. Consequently, if, in a case like the present, an assignment took priority, there might be no assets in the contractor's bankrupt estate, and the workers would be left without anything at all. In **In re B. E. Williams,** (1916) N.Z. L.R. 650, Chapman, J., held that a lien on land under Part III of the Wages Protection and Contractors' Liens Act, 1908, was a security within the meaning of the Bankruptcy Act, 1908. It was true that Section 20 of that Act provided that where a creditor had attached any debt due to him he should not be entitled to retain the benefit of the attachment as against the Assignee on the debtor becoming bankrupt, unless he had completed the attachment before the date of the adjudication; and subsection (2) of the same section enacted that for the purposes of the Act an attachment of the debt was completed by the receipt of the debt. His Honour did not think, however, that that section applied to an attachment created by or under Part I of the Wages Protection and Contractors' Liens Act, 1908. A secured creditor was defined in Section 2 as meaning a person holding a mortgage, charge, lien, or security on the property of the debtor, or any part thereof, as a security for the debt due to him from the debtor. There were other words in the definition, but such words were held by Chapman, J., in **In re B. E. Williams** (*cit. sup.*) as not being intended to be restrictive of the words which preceded them. The learned Judge, in holding that a lien under Part III of the Act was a security within the meaning of the Bankruptcy Act, 1908, followed the decision of the Court of Appeal in **In re Williams, ex parte Official Assignee,** 17 N.Z.L.R. 712. In that case it was held that a charge to which a sub-contractor was entitled under Part III upon moneys due to the contractor was not defeated by the bankruptcy of the contractor before a notice claiming the charge has been given by the sub-contractor, or when the bankruptcy related back to an act of bankruptcy before the giving of the notice. The reasons given for that view by Edwards, J., (who delivered the leading judgment) at pages 719-725 of the report, in His Honour's opinion applied equally to a claim under Part I. As in the one case, so in the other, a statutory relation, quite independent of contract, was created between the employer and the worker. In the one case as in the other it seemed to His Honour that justice and reason required that rights so given should not be defeated by bankruptcy unless the intention of the Legislature that they should be so defeated was made clear. Indeed, if anything, the position seemed to be stronger under Part I than under Part III. The provisions of Part I seemed to His Honour to constitute a species of trust in respect of the contract moneys in favour of the workers and His Honour could not see that, so far as these moneys were concerned, the Official Assignee was in any different position from the contractor. Section 4 made wages a first and paramount charge upon the moneys due to the contractor by the employer. Section 9 (1) enacted that upon service of notice of attachment as therein provided all moneys due and thereafter to accrue due and payable to the contractor should be attached and should be retained by the employer until the Court in which the claim was heard directed to whom and in what manner the sum should be paid. His Honour did not think that the Official Assignee, any more than the contractor, was entitled to payment from the Board to the prejudice of the statutory rights of the workers. So far as the assigned moneys were con

cerned, the contest was between the workers and the plaintiff as the holder of an assignment. They were not claimed by the Official Assignee; and it was not necessary for the plaintiff, as the holder of the assignment, to join the Official Assignee in an action to recover them. It was necessary to sue the Board only, and if that had been done it seemed to His Honour that the plaintiff could not have recovered by reason of Section 5. The Official Assignee was joined only for the purpose of having all parties before the Court in order to obtain one comprehensive decree, just as if the Board itself had taken proceedings by way of interpleader.

His Honour was invited at the trial to deal with the whole case really as being in the nature of an interpleader with a view to one comprehensive decree being worked out settling the rights of the parties. That being so, His Honour assumed that the smaller wages claimants—Dale, Phair, Bailey, Brierly, and McMullan, whether their notices of attachment were or were not strictly in order, had given proper notices because, if the view that His Honour had taken was right, they were still not too late to give proper notices if they had not already done so.

His Honour therefore held as follows: (1) That the Official Assignee was entitled to the three sums of £99 18s. 9d., £69 and £20 as being property of the bankrupt; (2) That the notices of attachment by the workers were valid under Part I of the Wages Protection and Contractors' Liens Act, 1908, to the extent indicated by His Honour in the judgment, and those workers were entitled to judgment against the Official Assignee and to orders under Section 10 of the Wages Protection and Contractors' Liens Act, 1908; (3) The plaintiff was entitled under its assignment to £169 18s. 3d. being the difference between the amount payable to the workers and the sum available under the contract.

It followed that there was nothing to which the assignments of Dibble, Denton, and Stanford could attach. That was clear, His Honour thought, so far as Dibble and Stanford were concerned. Dibble's order was for payment "out of the 75 per cent." and it seemed to His Honour that there was nothing left to satisfy that order after the workers were paid. Stanford's order was subsequent to both the plaintiff's, Dibble's and Denton's. As to Denton's order, it was urged by Mr. Scannell that there was included in the moneys held by the Board a sum of £177 15s. 11d., as to which no progress payment had been made and that consequently a 75 per cent. of that amount was not caught by the plaintiff's assignment and should be applied *pro tanto* to the satisfaction of Denton's order. His Honour did not think that that contention was sound. Firstly, His Honour saw no reason why, in the circumstances of the case, the claims of the workers should be so provided for as to exonerate the £177 15s. 11d. His Honour knew of no principle that would justify such an appropriation. If Mr. Scannell's view were right Dibble's order would take precedence over Denton's. Secondly, Denton's order was expressly, or by necessary implication, subject to the plaintiff's order; and His Honour thought that a fair and reasonable interpretation should be given to the words in the plaintiff's order "out of the final 10 per cent. due to me." His Honour thought those words must be construed as meaning the final 10 per cent., or so much thereof as was finally payable to the contractor. Mr. Scannell also urged that McGaffin's contract never was "completed," and that, therefore, nothing could become due to him, and, therefore, to the plaintiff, under the second part of the order, as that part of the order directed payment "on the completion of the contract." His Honour was not prepared so to construe the order. The contract was one based on schedule rates and was in fact terminated by mutual agreement before the whole of the contract work was done. His Honour thought that on a reasonable and proper construction the words in the order "on completion of the contract" included the case of completion by means of a termination of the contract agreed upon by the parties thereto. His Honour could not help thinking that that was the intention of the parties. The language of the order was that of commercial men, and should not, His Honour thought, be technically construed. In his view what the parties had in mind so far as the second part of the order was concerned was not so much the completion of the contract as the completion or termination of the contract work.

Solicitors for plaintiff: **Johnston, Beere and Co.**, Wellington.

Solicitors for Napier Harbour Board: **Sainsbury, Logan and Williams**, Napier.

Solicitors for Riddell and Denton: **Carlile, McLean, Scannell and Wood**, Hastings.

Solicitors for McMillan, Brownigg, Phair, Bailey, Brierly, and Orr: **Cresswell and Gleeson**, Napier.

Myers, C.J. September 19; October 3, 1929. Wellington.

TASKER v. ALGAR.

Practice—Costs—Abortive Trial—Death of Judge After Trial and Before Judgment—Second Trial Resulting in Favour of Plaintiff—Defendant Unsuccessfully Appealing to Court of Appeal—Plaintiff Not Entitled to Recover from Defendant Costs of First Trial.

Application on behalf of the plaintiff for the costs of the first trial of an action. The action was originally heard before the late Mr. Justice Sim, who reserved his decision and died very shortly afterwards without having delivered judgment. Subsequently, the action was re-tried before Smith, J., who gave judgment in the plaintiff's favour. The question whether the plaintiff was entitled to the costs of the first trial was not prior to the delivery of his judgment brought under the notice of Smith, J., but a formal judgment was sealed which contained the words "the costs of and incidental to the hearing of this action before His Honour Mr. Justice Sim being by consent of the parties reserved." Counsel for both parties then made application to the Justice Department for their solicitor and client's costs of the first trial. The Department made an *ex gratia* payment of £50 to the plaintiff and £45 to the defendants. The defendants then appealed to the Court of Appeal which affirmed the judgment of the Court below.

Wiren for plaintiff.

Cornish and James for defendants.

MYERS, C.J., said that counsel for both parties agreed that the matter was one for the exercise of the discretion of the Court. Each of them urged that that discretion should be exercised in his favour. The brief contention by Mr. Cornish on behalf of the defendants was that the death of a Judge after hearing a case and before giving judgment was an act of God which should not give rise to an order for payment of costs by one party to the other. Mr. Wiren contended that the same principle should apply as to the case of an abortive trial before a jury, in which case, speaking generally, the successful party on the second trial was awarded costs of the first trial as well as of the second. His Honour did not think that that or any other class of case referred to by Mr. Wiren presented a true analogy. The death of a Judge in circumstances like the present seemed to His Honour to stand on a different footing and to require special consideration. That view was emphasised by the course taken by the Justice Department which, as His Honour would show later, made a payment to each of the parties in the present case; but it would obviously not adopt the same course in any of the cases upon which Mr. Wiren relied as analogous cases. In His Honour's opinion the loss should lie where it primarily fell. It seemed to His Honour to fall primarily on both parties and there, in His Honour's view, it must lie, that was to say, each party should bear his own costs of the first trial. As the point was one of practice His Honour, with the consent of counsel had conferred with the Judges of the Division of the Court of Appeal then sitting in Wellington, all of whom concurred in the opinion that His Honour had expressed.

There was, however, another reason in the present case why the plaintiff should not be allowed the costs of the first trial. After judgment was delivered by Smith, J., and before the hearing of the appeal in the Court of Appeal, counsel for the parties made a joint application to the Justice Department for payment of their costs of the first trial upon the ground that in the circumstances the case was one which might reasonably be met by such a payment on the part of the Government. After consideration the Justice Department agreed to make, and did make, an *ex gratia* payment of £50 to the plaintiff and £45 to the defendants—which payments were accepted by the parties. His Honour was informed by counsel during the argument that the total amount of costs of the first trial as between party and party if allowed by the Court would amount to £54—a sum just slightly in excess of that which the plaintiff accepted from the Justice Department. What the plaintiff was seeking, therefore, after accepting the payment from the Justice Department, was to obtain from the defendants the amount which they received from the Justice Department and a little more. When the parties first made their application to the Justice Department they asked for payment of their full costs as between solicitor and client. That application was not acceded to; but, as His Honour had said, the plaintiff accepted the sum of £50. It was more than probable that if the defendants had anticipated for a moment that after accepting payment from the Justice

Department the plaintiff would make his present application they would not have joined in the application to the Justice Department, at all events at that stage. They would in all probability have preferred to await the decision on the present application to the Court and then, if an order had been made against them, apply to the Justice Department for payment of the amount which they had to pay to the plaintiff in respect of the first trial, plus a further sum on account of their own costs. The defendants might, therefore, well be said to have been prejudiced by the conduct of the plaintiff. If the plaintiff had recovered costs of the first action from the defendants as between party and party His Honour was satisfied that the Justice Department, whatever it might have done for the defendants, would have made no further payment to the plaintiff. The plaintiff received from the Justice Department what amounted substantially to the party and party costs, while the defendants were paid a slightly lesser sum, the Department evidently taking the view that the loss of both sides should be met to a reasonable extent. If an order were made in the plaintiff's favour on the present application, it would be equivalent in the circumstances to charging the defendants with the payment of costs of the first trial as between solicitor and client.

Solicitors for plaintiff: **Wylie and Wiren,** Wellington.
Solicitors for defendants: **Webb, Richmond, Cornish and Swan,** Wellington.

Myers, C.J. September 13; November 7, 1929. Wellington.

IN RE LYNDON.

Will—Construction—Gift of Residue Upon Trust to Pay Income to Wife for Life and After Her Death to "Such of My Children as Shall Survive Me and Be Alive at the Death of My Wife"—Interests of Children Contingent upon Surviving Widow—No Intestacy as to Capital—Gift of Income Without Limit of Time Operating as Disposition of Capital.

Originating Summons for the interpretation of the will of Godfrey Lyndon deceased. The testator gave all his estate to his trustees upon trust to allow his wife to carry on his farming business and to take the net profits thereof for her own benefit as provided by the will, and, subject thereto, to sell and convert, and to stand possessed of the residuary estate upon trust to pay the income thereof to his wife during her life, and after her death to pay such income equally "between such of my children as shall survive me and be alive at the death of my said wife." The will then proceeded as follows: 'But if any child of mine be then dead leaving issue living at the death of my said wife who being male shall attain the age of twenty-one years or being female shall attain that age or marry under that age then the capital of the share of my residuary estate to the income of which such dead child would have been entitled if living at the death of my said wife shall be held in trust for such issue if more than one in equal shares as tenants in common *per stirpes* on their attaining the age of twenty-one years or being female marrying under that age." The testator left him surviving his widow and two daughters all of whom were still living. The daughters were over 21 and were unmarried. The questions submitted to the Court were (1) whether there was an intestacy as regards the capital of the testator's estate remaining after payment of the debts, funeral and testamentary expenses. (2) Whether the capital of the testator's estate so remaining belonged to the testator's children, and if so whether the shares of such children were vested in them and merely postponed in enjoyment until the death of the widow.

Maclean for plaintiffs.
Hay and Jones for defendant.

MYERS, C.J., said that there could be no doubt as to the answer to the first question. There was a gift, after the widow's death, of the income of the residuary estate without limit as to time; and such a gift where no other disposition of capital was made was a gift of the capital: **Theobald on Wills,** 6th Edn., p. 542; **Hawkins on Wills,** 3rd Edn., p. 159; **Clough v. Wynne,** 2 Mad. 188; **In re L'Herminier,** (1894) 1 Ch. 675. The first question was therefore answered in the negative.

As to the second question, it was contended by Mr. Maclean that the provision in the will giving the estate to the children who should survive the widow was not intended to be conditional upon their surviving her but purely a postponement in enjoyment to protect the widow's life interest. Though the words were in the form of a condition his contention was that they merely denoted that the gift was to come into possession at the determination of the widow's life interest. Mr. Hay on the other hand contended that it was a clear case of a contingent gift. His Honour distinguished **Sturgess v. Pearson,** 4 Mad. 411, and stated that the estate was not given to an particular children by name, or even to all the children or such of them as should survive the testator, or to all the children or such of them as should survive the widow, but to "such children as shall survive" the testator "and be living at the death of" the widow. The words of condition "and be living at the death of my said wife" were in His Honour's opinion part of the description of the children who were to take. That being so, until the widow's death no child completely answered the description which the testator had given of those who were to take under the will: until then the legatees could not be ascertained. In His Honour's opinion, therefore, the gift to each of the children was contingent upon such child surviving the widow: **Underhill and Strahan on Wills,** 3rd Edn., 205, citing **Bull v. Pritchard,** 1 Russ. 213; **In re Astor,** (1922) 1 Ch. 364, at pp. 370, 378, 379, 386-388; **Bull v. Pritchard,** 5 Hare 567; **Hawkins on Wills,** 3rd Edn., 287. His Honour could find nothing in the context of the will which qualified the words of contingency. On the contrary the words in the substitutionary clause "would have been entitled if living at the death of my said wife" seemed to support the conclusion at which His Honour had arrived. The answer to the second and third questions was, therefore, that the capital of the estate belonged to the daughters contingent only upon their surviving the widow, subject to the effect of the substitutionary clause in the event of the daughters or a daughter predeceasing the widow and leaving issue living at the widow's death. If both daughters should die during the lifetime of the widow without leaving issue then an intestacy would result on the widow's death.

Solicitors for plaintiffs: **Maclean and Kincaid,** Taihape.
Solicitors for defendant: **E. A. R. Jones,** Wellington.

Myers, C.J. August 29; October 45, 1929. New Plymouth.

IN RE DOMBROSKI.

Workers' Compensation—Certiorari—Agreement Between Employer as to Compensation—Jurisdiction of Magistrate to Approve—Jockey in Employment of Trainer Injured While Racing Horse Owned by Third Party—Agreement by Jockey Accepting *ex gratia* Payment by Trustees of Racing Conference in Full Satisfaction of Claims Against Trustees, Trainer, and Owner—Magistrate Assumed to Have Ascertained Facts Giving Jurisdiction—Jockey's Solicitor Certifying Agreement in Order—"Trade or Business" Including Operations of Trainer of Horses and in Some Circumstances Racing of Horses by Horse-Owner—Quaere as to Effect of Delay on Motion for Writ of Certiorari—Writ of Certiorari Refused—Workers' Compensation Act, 1922, Sections 3, 18.

Motion by one, J. A. Dombroski, an apprentice jockey under 21 years of age, for Certiorari to quash an order made by Mr. J. S. Barton, S.M., on 23rd March, 1927, in purported pursuance of Section 18 of the Workers' Compensation Act, 1922. Dombroski was an apprentice jockey in the employment of a trainer named Jackson, under an apprenticeship agreement. He was engaged at a certain weekly wage and the agreement contained a provision that his fees for winning and losing mounts were to be paid to the Secretary of the New Zealand Racing Conference who was to retain one half for the employer, i.e., Jackson, and the remainder, after certain possible deductions, was to be invested by the Secretary and paid to Dombroski on his attaining 21 and completing his apprenticeship, or on the determination of his employment. The Rules of Racing provided that no apprentice should ride in any race without the consent of his employer. The horse "Mountain Ore" which Dombroski was riding at the time of the accident belonged to one Robert Fairweather. By the Rules of Racing certain trust funds were established which were administered by trustees appointed by the Racing Conference. The funds were applied by the trustees in their uncontrolled discretion for or towards certain purposes one of which was the indemnifying of owners of horses against liability for accidents causing death or injury to (*inter alia*) jockeys, whether such owners were or were not legally liable

in respect of such accidents. Another of such purposes was the making of such provision as the trustees thought fit for the benefit of any employee of an owner of racehorses who might be injured by accident whether or not the owner was liable to such employee for damages or compensation by reason of such accident. The Rules provided that any such provision should be in substitution for and not in addition to any sum which the employee might claim or recover as compensation or damages against the owner by reason of or in consequence of such accident. It was expressly declared that the fund was not to be deemed an insurance fund for horse-owners, or to confer on any person any right of indemnity or other right whatever. After the accident Dombroski made a claim in the form prescribed by the Rules of Racing, in which he stated that the accident occurred in relation to a horse "Mountain Ore" owned by Fairweather and that he was at the time of the accident employed as an apprentice in the stable of C. Jackson. After some correspondence between the Secretary of the Racing Conference and the Egmont Racing Club, Dombroski wrote on 8th March, 1927, to the Secretary a letter in which he agreed to accept the offer of the General Trustees of £151 13s. 6d. in full settlement of all claims which he might have arising out of the accident. Subsequently an agreement, between Dombroski of the first part, Jackson and Fairweather of the second part, and the Trustees of the Racing Conference Accident Fund of the third part, was prepared and completed. By that agreement it was witnessed that the trustees, whilst not acknowledging any legal liability in the matter, as an act of grace agreed to the payment to Dombroski out of the accident fund of the sum already fixed and assented to, and Dombroski acknowledged that the payment made to him was "Accepted by him in full satisfaction and discharge of any claims that he might have against the Trustees, or the said Charles Jackson or the said Robert Fairweather, or any other person or persons, on account or by reason of the said accident or injury"; and he accordingly for the considerations set out in the agreement released the Trustees, Jackson, Fairweather, and all other persons whomsoever, from any claims or demands in respect of the accident or injury, or anything arising therefrom, or from any expenses or loss he might have incurred or suffered through or on account of the accident or injury sustained. The agreement, Dombroski's signature to which was attested by the Magistrate, came before the Magistrate on 23rd March, 1927; the Record Book of the Court showed that Mr. B. Malone appeared for Dombroski and certified that the agreement was in order. The Magistrate's approval of the agreement was entered in the following terms: "Agreement approved: the money to be paid to the Public Trustee to be held by him with all accumulations of interest in trust for the injured worker until he is 21 years of age, with discretion on the part of the Trustee to supplement the earnings of the worker therefrom while a minor."

L. A. Taylor for Dombroski in support of motion.

C. H. Weston for Trustees of N.Z. Racing Conference to oppose.

MYERS, C.J., said that Mr. Weston had raised the preliminary point that the Court should refuse to hear the application after so great a lapse of time. In some cases no doubt (though there was no rule in New Zealand as to the time within which such an application must be made) delay might be fatal to the application; but the only person affected was Dombroski himself, and it would be very unfortunate and unsatisfactory if the matter were disposed of on that ground. His Honour did not intend so to dispose of the case.

Mr. Taylor on behalf of Dombroski contended that the Racing Conference was not an employer within the meaning of the Workers' Compensation Act, nor was it an employer in any sense. That was perfectly correct. He contended further that Dombroski's employment was with Jackson and that such employment did not come within the Act. Alternatively he contended that Dombroski would have been entitled to compensation from Jackson under the Workers' Compensation Act but that the payment was one made not by Jackson, but by the Trustees of the Racing Conference and was purely an *ex gratia* payment to which the provisions of the Act did not apply. While it was quite true that so far as the Racing Conference or the Trustees of the Fund were concerned the payment was an *ex gratia* payment, His Honour could see no difference in principle, so far as the worker was concerned, between a payment of that kind and a payment made to a worker by an insurance company which indemnified the employer. The payment in each case was made for the purpose, or with the object, of settling a claim to compensation, and of obtaining the release of the employer from such claim. It was made in each case for the employer's benefit: and, so far as the worker was concerned, it must be deemed to be made on the employer's behalf. His Honour assumed for the moment that Dombroski had a claim to compensation against either Jackson or Fairweather. Certainly the money which was paid to him by the Racing Conference or the Trustees was paid to and accepted by him in full satisfaction of claims which were in fact, or which at least included, a claim that he was assumed to have against Jackson and Fairweather, or one of them under the Workers' Compensation Act. His Honour referred to Section 3 of the Workers' Compensation Act, 1922, to the definition in that section of the words: "trade or business" as including "any trade business or work carried on either temporarily or permanently by or on behalf of an employer." The words "trade or business" were also used in various sections of the English Act, but there was no statutory definition of the expression. The definition in New Zealand was first introduced in the Workers' Compensation Act, 1908, and it appeared probable that the words "or work" were added to overcome the effect of some of the English decisions. They certainly seemed to widen the meaning of "trade or business" as previously judicially interpreted. His Honour did not stop to inquire what was the precise relationship between Fairweather, Jackson and Dombroski in regard to the riding of the horse "Mountain Ore" because in the view that His Honour took of the matter that point was not material, and in any case His Honour doubted whether there was sufficient evidence before the Court to enable the point to be determined. If Jackson was the employer, his operations seemed to His Honour to be covered by the statutory definition of "trade or business," and as Dombroski was injured by an accident arising out of and in the course of his employment with Jackson he would be entitled to compensation. If Fairweather was the employer then, though it may be that the racing by a horse-owner of a horse or horses did not under all circumstances come within the definition of "trade or business"—a question which His Honour was not called upon to decide in the present case—it was sufficient to say that the racing of horses by any particuar horse-owner might at least amount to a "trade or business." In the present case Dombroski was represented by his solicitors on the application for the Magistrate's approval of the agreement. Whether or not the application was actually made by Dombroski, or by the trustees, did not appear, but Dombroski's solicitor appeared and certified that the agreement was in order. The application for approval purported to be made in pursuance of Section 18 of the Workers' Compensation Act. Once it appeared that Dombroski was employed by either Jackson or Fairweather and that such employment was for the purposes of the trade or business of the employer the Magistrate had jurisdiction under Section 18. It was his duty to ascertain those facts for the purpose of the jurisdiction which he was asked to exercise. His Honour assumed that he did ascertain them, and indeed they were admitted by Dombroski's solicitor when he appeared before the Magistrate, if not expressly, at least by necessary implication. His Honour thought that the principle stated in **In re Roche**, 7 N.Z.L.R. 206, 220 applied.

Motion dismissed.

Solicitor for applicant: **L. A. Taylor**, Hawera.
Solicitors for trustees: **Weston and Billing**, New Plymouth.

Ostler, J. September 16: October 7, 1929.
Hamilton.

WILLCOCKS v. HAMILTON BOROUGH COUNCIL.

By-law—Motor-traffic—Reasonableness—By-law Relating to Licensing of Motor-omnibuses—Definition of "Motor-omnibus" Sufficiently Wide to Include Service Cars—Provisions as to Construction of Motor-omnibuses Obviously Inapplicable to Service Cars—By-law Not Enforced by Borough Officers—Definition Too Wide and By-law Unreasonable—By-law Quashed in Part.

Motion under Section 12 of the By-laws Act, 1910, to quash a by-law made by the Hamilton Borough Council in 1922. The only part of the by-law objected to was the definition of "motor-omnibus" contained in Clause 2, and Clause 253. The definition of motor-omnibus was as follows: "'Motor-omnibus' means a motor for the carriage of passengers for hire, in which the passengers or any of them are charged to pay separate or distinct fares for their respective seats therein." Clause 253 was as follows: "A motor shall be deemed to ply for hire as a motor-omnibus whenever in any street or public place within the Borough such motor carries, or the person in charge of such motor engages, offers, or solicits to carry any passenger or passengers on or in such motor from or to any

place in the Borough for separate or distinct, or at the rate of separate and distinct fares." "Motor" was defined as "any vehicle propelled by mechanical power." "Motor-cycle" was defined as a "motor with only two road wheels, and including any side-car attached thereto." "Motor-car" was defined as a motor with more than two road wheels." "Motor-cab" was defined as a motor plying for hire or standing in a public street for hire for the conveyance of passengers, not being a motor-omnibus."

Tompkins in support of motion.

Swarbrick to oppose.

OSTLER, J., said that it would be noticed that only two types of motors plying for hire were recognised,—viz.: motor-omnibuses and motor-cabs. The only criterion adopted for distinguishing those two classes was whether or not the passengers were charged separate or distinct fares for their seats. Thus if the owner of a motor-cycle with a side-car attached made a business of taking two passengers for hire at separate fares, one on the pillion-seat and one in the side-car, his vehicle would come within the definition of a motor-omnibus. There was no separate definition of service cars, and no provision for the licensing of such vehicles except either as motor-omnibuses or as motor-cabs. There were some thirty such vehicles engaged in regular runs, one of the terminal points of which was Hamilton. These were nearly all large motor-cars designed for fast travelling with bodies known as the tourer or sedan type. The vehicles mostly used for those services were not what were popularly known as motor-omnibuses. When the by-law complained of was made in 1922 the system of service cars had not been as fully developed as it had since become. It was then in its infancy. It was during the last five or seven years only that the service cars had become so general in New Zealand. The stringent conditions contained in the by-law as to the construction of a motor-omnibus before it could ply for hire in the Borough, were obviously not made for the class of vehicles used as service cars. The draftsman had in mind the large bodied motor-omnibus mounted on motor-truck chassis which had recently become so familiar an object in the streets of our cities and towns. In His Honour's opinion it would be utterly unreasonable to apply those provisions to the class of motor generally used as service cars, such as a Cadillac or Hudson Sedan.

The Borough had itself recognised that difficulty, because in most cases it had not endeavoured to enforce its own by-law against the owners of most of the service cars running on routes with terminal points in the Borough. It had licensed some thirty of these vehicles as motor-cabs, although its executive officers must have known that they were used purely as service cars, and not as taxi-cabs plying for hire in and immediately round the Borough. The Borough officials must know that daily a large number of breaches of the Borough by-laws were committed by the drivers of these service cars, inasmuch as daily they left and returned to the Borough unlicensed as motor-omnibuses, and without complying with the requirements of the by-laws as to construction before they could be so licensed. Thousands of such breaches occurred every year to the knowledge of the Borough, for which nobody was prosecuted. Why was that? The only reasonable answer was that the Borough officials must themselves recognise that it would be unreasonable to prosecute because it would be unreasonable to enforce the stringent provisions as to construction in the case of service cars. If so, then it seemed to His Honour that there was no escape from the conclusion that the by-law itself was unreasonable. If a by-law was considered by the enacting power to be too unreasonable to enforce, it must follow that that by-law was too unreasonable to be valid: see **Blythe v. Wheeler,** (1925) N.Z.L.R. 560. In only three instances had the Borough issued motor-omnibus licenses under its by-laws, and those were for vehicles containing in one case 12, in one 14, and in the other 15 passengers.

The Motor-omnibus Traffic Act, 1926, did not touch service cars which had a regular run of 20 miles or more from their terminal points. There was a gap in the legislation. The Hamilton Borough had recognised the difficulty, and had been asking for legislation to deal with service cars. But meanwhile it seemed to His Honour unreasonable to push them into the category of motor-omnibuses, to which they did not naturally belong, by adopting the artificial criterion of whether a separate charge was made for each seat irrespective of how many or how few seats there were. Meanwhile the public would, His Honour thought, be sufficiently protected if such vehicles were licensed as motor-cabs. Before a motor-cab license was granted the vehicle must be tested to see that it was in good order in every respect; the maximum speed was regulated by the Motor-lorry Regulations of 1925; and insurance of the passengers was compulsory by the Motor-vehicles Insurance Act, 1928.

It was claimed by counsel for the Borough that the by-laws attacked were not the by-laws which were complained of as unreasonable. It was urged that what was complained of was the unreasonableness of the provisions as to the construction of motor-omnibuses, but that those provisions were not attacked. But those provisions were not claimed to be unreasonable as applying to the vehicles popularly called motor-omnibuses. All that was complained of was their application to service cars. It was only the definition of motor-omnibus so as to include service cars which was claimed to be unreasonable. His Honour distinguished **Retter v. Hogan,** (1927) N.Z.L.R. 871, which was relied on in support of the validity of the by-laws attacked. It was urged that His Honour should amend the by-law by limiting the definition to vehicles designed for carrying ten or more persons. His Honour was not disposed to adopt that suggestion. The statutory definition of motor-omnibus in the Motor-omnibus Traffic Act, 1926, applied to vehicles designed for carrying eight or more persons. If the Borough adopted that definition it would be difficult for any Court to say that it was unreasonable. The large modern American motor-cars which were mostly used as service cars were designed to carry seven persons including the driver. But they were so roomy that there was no difficulty, without overcrowding, in providing room for two passengers on the front seat, three on what were known as the dicky seats, and three on the back seat. That makes a total with the driver of nine persons. His Honour suggested that it would be reasonable to define motor-omnibus as any motor designed to carry more than nine persons including the driver, in which separate fares were charged for each seat; but preferred to leave the matter of amendment to the Council itself, which His Honour felt sure would not be unreasonable.

Order quashing the portions of the by-law set out in the motion.

Solicitors for party moving: **Tompkins and Wake,** Hamilton.
Solicitors for Borough: **Swarbrick and Swarbrick,** Hamilton.

MacGregor, J. October 14; 25, 1929. Wellington.

IN RE WINTER: PUBLIC TRUSTEE v. WINTER.

Will—Construction—Incidence of Debts—Devise of "Real Property Including Interests in Land"—Testatrix Purchaser of Land Under Agreement for Sale and Purchase—Incidence of Unpaid Purchase Money—Residuary Estate Not Primarily Liable—Devisee Taking Only Testatrix's Interest in Land—Land "Charged with Payment of Sum of Money By Way of Mortgage"—Statutory Abolition of Vendor's Equitable Lien Not Affecting Equitable Charge Created by Agreement—Property Law Act, 1908, Sections 9, 109.

Originating summons for the interpretation of the will of M. W. Winter deceased. The will was dated 3rd October, 1928, and the testatrix died on 10th October, 1928. The testatrix at her death left three separate landed properties. Two of these properties were completely paid for by the testatrix and the titles were in her name as owner of the fee simple. The third property, valued at £735, was held by the testatrix merely as purchaser under an agreement for sale and purchase, under which there remained owing £304 10s. 8d. as unpaid purchase money. The free residuary personal estate amounted only to some £250 or thereabouts. By her will the testatrix devised all her "real property (including interests in land)" to her trustee upon certain trusts and gave and bequeathed all the residue of her estate to her husband. Several questions were submitted to the Court but the case is reported as to the first question only, viz.: whether the land contracted to be purchased by the deceased under the agreement for sale and purchase was primarily liable for the payment of the balance of the purchase money owing by the deceased in terms of the agreement or whether such purchase money was payable primarily out of the residuary personal estate of the deceased.

Kelly for plaintiff.
Hay for defendant J. Winter.
Cornish for defendant M. H. J. Winter, and his infant children.

MacGREGOR, J., said that the question to be determined was whether the sum of £304 10s. 8d. was primarily payable out of the land held under agreement for sale and purchase, or whether it was payable primarily out of the free residuary personal estate of the testatrix. In other words, did the burden of the payment fall upon the issue of the testatrix, who were the devisees of that equitable interest in land, or did it in substance fall upon her husband as residuary legatee? The true answer to that question must depend in the first instance on the language of the will itself. The words of the actual devise were: "I give and devise all my real property (including interests in land) unto my trustee upon trust as follows," &c. As was said by Denman, C.J., in **Doe d. Gallini v. Gallini,** 5 B. & Ad. 621, 641, "every part of that which the testator meant by the words which he has used should be carried into effect as far as the law will permit, but no further, and that no part should be rejected, except what the law makes it necessary to reject." Applying that rule of construction to the present will, what was the result? The testatrix spoke of "all my real property." Then she went on to add "including interests in land." It was His Honour's duty to give effect if possible to both of those expressions, and not to reject either of them, in construing the will. The words "all my real property" seemed to be wide enough to include both legal estates and equitable interests in land. But the testatrix in and by her will did not appear to have employed them in that broad sense. She had obviously used the expression "interests in land" as extending the meaning of "all my real property," as including some interest or interests in land not actually answering the description of "real property." In order to give effect, if practicable, to that apparent intention of the testatrix, His Honour was clearly entitled to ascertain the position of the several parcels of real property passing under the devise in order to discover what really was intended by the testatrix when making that distinction. In the result His Honour found that the testatrix died possessed of three separate parcels of land. In the case of two of those parcels she held the entire legal estate and interest, having paid the whole purchase money therefor. In respect of the third parcel of land, her whole "interest" in it was represented by the portion of purchase money paid by her in respect thereof at the time of her death. His Honour did not think that he was doing violence to the language of that badly drafted will if he construed the words in question accordingly. It was only by adopting that construction that he could give effect to every part of the clause in question, and that His Honour could avoid rejecting the words "including interests in land." The result would be that with respect to all three pieces of land the devisees would take the precise "interests in land" owned and enjoyed by the testatrix herself at her death. In the two former cases they would be entitled to the whole legal and equitable estate—the entire purchase price having been paid in each case. In the third case they would be entitled to the equitable interest in land previously owned by the testatrix, which remained subject to payment of the balance of purchase money left unpaid by her.

Counsel for the residuary legatee also contended that the same result must necessarily follow from the express provisions of Section 109 of the Property Law Consolidation Act, 1908. The question that arose was whether the parcel of land held by the testatrix under agreement for sale and purchase was at the time of her death "charged with the payment of any sum or sums of money by way of mortgage," within the meaning of that section. That really involved two subsidiary questions: (a) Whether that land at the death of the testatrix was "charged" with the payment of any sum of money and (b) whether, if so, that charge was "by way of mortgage." The first sub-question must, His Honour thought, clearly be answered in the affirmative. The unpaid purchase money in His Honour's opinion remained a charge on the land until it was paid off. Until that time arrived the land was always in fact "charged" with its payment. By clause 7 of the agreement the vendor agreed to execute a transfer only "on payment of the whole of the purchase money and "interest moneys as hereinbefore provided." By clause 10 if the purchaser should make default for one month in payment of the "interest purchase and other moneys" due all moneys already paid were forfeited to the vendor, who might resell the land and recover any deficiency or loss from the purchaser. Had the purchaser become bankrupt, her Official Assignee could have procured a title to the land only on payment of the balance of purchase money and interest due. It thus appeared to His Honour obvious that that land was by the contract of sale at the death of the testatrix "charged" in equity with the payment of the sum or sums of money remaining on the purchase: see **Payne v. Esdaile,** 13 A.C. 613, 623, 628. It was true that by Section 9 of the Property Law Act, 1908, it was provided that no vendor of any land should have an equitable lien thereon by reason of the nonpayment of the purchase money or any part of the purchase money for the same. But it appeared to His Honour that the "equitable lien" spoken of in Section 9 was quite a different thing from the equitable charge existing in the present case. A vendor's lien for unpaid purchase money was a charge upon the property sold, created by construction of equity, independently of any supposed agreement of the parties to the contract. The equitable charge in the present case was a charge upon the property created by the act of the parties, and arising out of the terms of the written agreement between them: see **19 Halsbury's Laws of England,** 14, 15, and cases there cited. The two "charges" were thus essentially distinct in their origin and nature, and in His Honour's opinion the statutory abolition of the vendor's equitable lien in New Zealand could not and did not in any way defeat the operation of an "equitable charge" created by the contract of the parties themselves. The second sub-question should also, in His Honour's opinion, be answered in favour of the residuary legatee. In other words His Honour thought the land was charged with the payment of a sum of money "by way of mortgage," within the meaning of Section 109 (1) of the Property Law Act, 1908. By Section 2 of that Act it was provided that "mortgage" included "a charge on any property for securing money or money's worth." Effect must of course be given to that extended definition of "mortgage": cf. **In re Beirnstein,** (1925) 1 Ch. 12. His Honour had already determined that the land was charged with the payment of a sum of money, i.e., the unpaid purchase money. From the circumstances of the present case it would seem of necessity to follow that that charge was "for securing money." To secure the payment of the unpaid purchase money appeared to His Honour to be the sole object and effect of the charge in question. That being the case, His Honour thought the land was at the time of the death of the testatrix charged with the payment of a sum of money "by way of mortgage" within the meaning of the Property Law Act, 1908. By Section 109 (1) of that Act, accordingly, the devisees of the land were not entitled to have that debt discharged out of the residuary estate of the testatrix. In deciding that question His Honour had not deemed it necessary to discuss the English and Australian cases cited during the argument, as those cases were conflicting and in His Honour's judgment the matter must finally depend on the precise language of the Property Law Act, 1908, which was wider in its terms than Locke King's Act (17 and 18 Vict. c. 113), on which **Hood v. Hood,** 26 L.J. Ch. 616, was decided. His Honour accordingly held that the land contracted to be purchased by the testatrix under the agreement for sale and purchase was primarily liable for the payment of the balance of the purchase money owing by the testatrix in terms of the said agreement.

Solicitor for plaintiff: **Solicitor to Public Trust Office,** Wellington.

Solicitors for defendant J. Winter: **Mazengarb, Hay and Macalister,** Wellington.

Solicitors for defendants M. H. J. Winter and his infant children: **Webb, Richmond, Cornish and Swan,** Wellington.

Blair, J. May 27, 28, 29, 30, June 6, July 5, 8, 9; October 24, 1929. Wellington.

ANDREWS v. GREEN.

Contract—Vendor and Purchaser—Specific Performance—Damages—Contract by Defendant to Purchase Hotel from Vendors—Contract Providing that Vendors Should Purchase a Certain Property Subject to Existing Mortgages from a Named Company and Credit the Equity Towards the Purchase Price of Hotel—Company Not a Party to Contract and Refusing to Sell Property on Terms Stated in Contract—No Implied Term That Vendors' Obligation to Buy Property from Company Conditional on Consent of Company—Contract Unenforceable—Vendors Not Entitled Either to Specific Performance or Damages.

Action by the plaintiffs, the owners of a hotel at Dannevirke, against the defendant for specific performance of a contract by the defendant to buy such hotel with an alternative claim for damages. The contract was constituted by the acceptance by the defendant of an option given by the plaintiffs to him. The price of the hotel was fixed at £45,500, less mortgage, £14,700, and the option provided for payment of £1,000 on the exercise of the option and £4,300 cash at any time within 3 months on completion, and then provided as follows: "The Dannevirke Hotel vendors are to buy from Messrs. Mark Green Limited

the Cuba Street property known as Goodwin's Buildings, 126-128 Cuba Street for the sum of £28,000, and to take over the mortgages on same of £12,000 at 6% and £1,000 at 8% as part payment of the said purchase money, the equity of £15,000 to be paid to the credit of the Dannevirke Hotel vendors." Provision was then made as to the balance of purchase money, £10,500, and the taking over at a valuation of the furniture and stock. Mark Green Ltd. was a private company with a capital of 10,000 shares, of which Green held 8,000 shares and his family the remaining 2,000 shares. Green was managing director of the company. The company was not, however, a party to the above contract and subsequently refused to sell the Cuba Street property in question on the terms stated in such contract. The plaintiffs thereupon commenced the present proceedings against the defendant Green. Mark Green Ltd. was not a party to the proceedings

H. F. Johnston and Cornish for plaintiff.
Macassey and Rothenberg for defendant.

BLAIR, J., after pointing out that the company, Mark Green Limited, was a distinct entity from the purchaser Mark Green—**Salomon v. Salomon and Co.,** (1897) A.C. 22, 28—said that the contract provided for the sale and purchase of Andrews Hotel, but with equal clearness provided that the hotel vendors were to buy from Mark Green Ltd. that company's Cuba Street property, and the £15,000 arising from that sale was to be credited away from the company and go to reduce the purchase money. The difficulty arose because although the plaintiffs were prepared to buy the Cuba Street property and for the company to hand over the £15,000 as mentioned in the contract, the company itself was not prepared to do so. Strictly speaking the company had never considered the matter in any way. But no proof had been offered of the company's willingness to carry out the transaction. The plaintiffs were, therefore, unable to fulfil the obligation of carrying out the Cuba Street part of the transaction, although they were ready and willing to do so. The plaintiffs had no binding contract with the company and could not compel the company to complete. They rested their case on readiness and willingness to complete, and said it was Green's business to get the company to complete. Mr. Johnston contended that the words "if the company agrees to sell on the terms named" must be implied, and he relied on **Hamblyn v. Wood,** (1891) 2 Q.B. 488, and "**The Moorcock,**" 14 P.D. 64, as justifying the reading in of those words to give the contract business efficacy. That suggestion postulated that without adding something to the contract as written, it was not sufficient for the plaintiff's purpose. But the contract had a clear and distinct meaning, and although its provisions might be unwise in a certain respect, that did not detract from the clarity of the words. If it had not been for the fact that Mark Green Limited was not prepared to sell—and that fact came into being after the contract was signed—no one could have suggested that there was any difficulty in ascertaining the meaning of the document. The doubt—if there were a doubt—which required resolving by resort to implication, was a doubt which was not in the contract itself, but arose by reason of the happening of a subsequent event. There was a well known rule that a written contract could not be varied or contradicted by parol evidence. The evidence which it was usually sought to use for that purpose related to facts prior to signing. In the present case the document was sought to be varied by parol evidence of facts which came into existence subsequently to the signing. Each of the parties to the contract knew that Mark Green Ltd. was a stranger to it, and each of them must have known that a stranger had a mind of his own. They had chosen to contract without first ascertaining the mind of that stranger. After it had been ascertained that this stranger was not prepared to fulfil the part allotted to him by the contract one of the parties to the contract sought to read into the contract an implication that, as far as the stranger was concerned, the contract meant that plaintiffs were to buy the Cuba Street property only if the company were willing to sell and were willing also that its whole interest in the property priced at £15,000 should be paid away to a third party. The plaintiffs also said that the contract meant that the sale of the hotel was a complete cash and mortgage transaction at £45,500 with the right in Green, if he could get the company to agree to the terms, to require the plaintiffs to accept the equity in Cuba Street property as the equivalent of £15,000 towards the purchase price. His Honour could not spell that meaning out of the contract. The £15,000 represented by the Cuba Street property was a third of the purchase money for the hotel, and were His Honour to construe the contract as a cash contract as to that £15,000 His Honour would be imposing on the purchaser a liability to find, otherwise than as stated in the contract, that very large sum of money. That would be making a new contract. His Honour arrived at the above conclusion without the necessity of considering the point whether the contract was or was not an exchange. There was a good deal to be said for the submission that the transaction was really in the nature of an exchange, but if it were a contract of exchange it was one whereby A and B contracted to exchange A's property for one belonging to C, the equality of exchange being provided by B, and C not having been made a party. If the transaction were one of exchange it was obvious that an essential party to it was absent. His Honour distinguished **Croome v. Ledlard,** 2 My. & K. 251, and said that in the present case one-third of the purchase money for one property was expressed by the agreement to come from the sale of another property and it was not possible to sever one transaction from the other. It was clear in His Honour's opinion that specific performance must be refused.

The plaintiffs claimed damages in the alternative. In cases where there was a binding contract but specific performance was not possible, the Court could award damages in lieu of specific performance. The plaintiff in such cases had done all that he could be called upon to do under the contract and the default was the defendant's. In the present case the position was that the inability to perform the contract was due to a third party. The plaintiff was in this position that he could not establish that the part of the contract relating to the Cuba Street property had been or could be fulfilled, and without that the contract was unenforceable. If it were unenforceable it was enforceable neither specifically nor by way of damages. The case was not like **Fleming v. Munro,** 27 N.Z.L.R. 796, where the rule in **Bain v. Fothergill,** L.R. 7 H.L. 158, applied. In that case defendant agreed to include in an exchange as his own a property belonging to his wife. She refused to complete and the contract could not be enforced by specific performance, but damages were awarded because defendant knew he had no title to his wife's property and had nevertheless contracted to exchange it. In the present case the documents made it clear that the Cuba Street property was not the defendant's. It belonged to a stranger to the contract, and it was because this stranger had not been proved willing to complete that the contract was unenforceable. No default on the part of the defendant having been proved the plaintiff could not recover damages against him.

Judgment for defendant.

Solicitors for plaintiff: **Johnstone, Beere & Co.,** Wellington.
Solicitor for defendant: **W. L. Rothenberg,** Wellington.

Smith. J. October 4; 22, 1929.
Auckland.

AMBURYS LTD. v. BODDIE.

Injunction—Defendant Converting to His Own Use in Connection with Milk Round Glass Bottles Owned by Plaintiff—Defendant Claiming a Right to Use Bottles—Plaintiff Entitled to Injunction Without Proof of Actual Pecuniary Damage—Form of Injunction.

Motion for injunction pursuant to Rule 466 and motion to discharge interim injunction. The statement of claim alleged that the defendants, without the consent of the plaintiff, had, for some time past, been acquiring, handling and converting to their own use, for the sale and delivery of milk to their own customers for the purposes of their own trade as milk vendors bottles which were the property of the plaintiff, and embossed with the words "Amburys Limited Milk Vendors Auckland" within a circle and with the words "Loaned Return When Empty"; the plaintiff claimed an injunction restraining the defendants their servants or agents from handling acquiring and converting to their own use such bottles the property of the plaintiff. An interim injunction was granted restraining the defendants from handling acquiring or converting such bottles to their own use, and the defendant filed a motion to dissolve this interim injunction. This motion and the plaintiff's motion under Rule 466 were heard together. The claim against H. Boddie was by consent of the plaintiff dismissed. His Honour found on the facts that R. C. Boddie had wilfully and wrongly asserted a right to convert the plaintiff's bottles to his own use in connection with a milk round which he was by a contract with two persons, Watson and Walker, under an obligation to establish for Watson and Walker. It was not proved that the plaintiff had sustained any damage. In these circumstances it was contended by the counsel for the defendants

that the plaintiff was not entitled to the remedy by way of injunction and the case is reported upon this point only.

McVeagh for plaintiff.
Simpson for defendants.

SMITH, J., said that the situation which arose was analagous in principle to a trespass which was not trivial and which was threatened to be repeated. In such cases, the Court would always interfere by injunction without proof of actual pecuniary damage: **King v. Brown Durant and Co.,** (1913) 2 Ch. 416. "It is as old as the hills," said Cozens-Hardy, M.R., in **Attorney-General v. Long Eaton Urban Council,** (1915) 1 Ch. 124, at 127, "that if a man threatens that he intends to do something which is unlawful and asserts a right to do it, the Court will grant an injunction to restrain him. It is wholly irrelevant to say whether he has done it or has not." In His Honour's opinion the position of the parties, and the nature of the right asserted by the defendant against the plaintiff, entitled the plaintiff to be protected by injunction to the extent warranted by the defendant's attitude. The extent of that protection required consideration. The prayer of the statement of claim was, His Honour thought, too wide. In **Phillips v. Thomas,** 62 L.T. 793, where a defendant contended that he had a right to do the thing complained of—viz. to permit public sports which amounted to a nuisance—and had refused to give an undertaking, the proper inference was that there would be a repetition of the nuisance, i.e. of the particular kind of nuisance. In **Dunlop Pneumatic Tyre Co. v. Neal,** (1899) 1 Ch. 807, North, J., said generally: "But when a man employed in the way of his trade accepts an order and points out to the purchaser the way in which he intends to execute it, and then comes here and asserts that he had a right to do what he did, this shows that he is doing it in the ordinary course of his trade, and that he would do the same thing again if any one else should come to him on a future occasion and give a similar order." In all the circumstances of the present case, including the statement that Boddie was going to run Amburys off the road, His Honour thought that Boddie's assertion of right showed that he would take up the same attitude as to the use of the plaintiff's bottles in relation to the supply and distribution of milk, (whether by means of milk rounds other than Watson and Walker's or by any other means not usually called a "milk round") as he had taken up in respect of the use of plaintiff's bottles on Watson and Walker's milk round. But His Honour did not think that Boddie's assertion of right could be justifiably extended beyond that. The plaintiff was, accordingly, entitled to the issue of a writ of injunction against the defendant R. C. Boddie restraining him from handling, acquiring and converting to his own use in connection with or in relation to the milk round of Watson and Walker, or in connection with or in relation to any other milk round, or otherwise in connection with or in relation to the supply and distribution of milk, bottles the property of the plaintiff, embossed with the words "Amburys Limited Milk Vendors Auckland" within a circle, and with the words "Loaned Return When Empty."

Solicitors for plaintiff: **Thorne, Thorne, White and Clark-Walker,** Auckland.
Solicitors for defendants: **Hosking and Simpson,** Auckland.

Smith, J. November 8; 14, 1929.
Auckland.

BROWN v. A. & B.

Practice—Money-lender—Argument of Question of Law Before Trial—Action Against Solicitor Claiming Damages for Negligence in Connection with Money-lending Transactions Entered Into by Plaintiff—Defence That Plaintiff Unregistered Money-lender—No Agreement Between Parties as to Facts—Plaintiff's Answers to Interrogatories and Entries in Diary Relied on as Establishing Facts on Which Defence Founded—Possibility that Solicitor Estopped from Raising Defence or that Defence Waived—Insufficient Indisputable Facts to Enable Questions to be Answered—Questions Capable Only of Conditional Determination—Argument of Questions of Law Before Trial Refused—Code of Civil Procedure, Rules 154, 160.

Motion to review a decision of Smith, J., in Chambers to make no order upon a summons for an order for the argument of certain questions of law before trial, either by means of a special case or under Rule 154, or in such other manner as the Judge might deem expedient. The action was one claiming damages in respect of the alleged negligence of the defendant A. while allegedly acting as the plaintiff's solicitor. The allegations related to two transactions entered into in 1921 and 1922 by which the plaintiff, allegedly acting under the advice of A., advanced money to certain third persons; the plaintiff through the alleged negligence of A. in the course of such transactions had lost a substantial part of the moneys so advanced. The statement of claim was filed on 14th July, 1927. The defendant A. filed his first statement of defence on 30th August, 1927, denying the plaintiff's allegations of negligence; this defence did not raise the plea that the plaintiff was an unregistered money-lender. On 4th October, 1927, defendant's partner B. was added as a co-defendant on the defendant's application. On 6th December, 1927, the co-defendant filed a statement of defence denying that he acted as plaintiff's solicitor, alleging that the plaintiff acted on his own responsibility, and setting up in respect of one of the two transactions referred to that it was compromised by an agreement of 4th July, 1922, whereby the defendant agreed to pay the plaintiff a certain sum in full settlement of all liability in respect thereof and alleging payment to the plaintiff of certain sums in pursuance of such agreement. On 13th May, 1929, the plaintiff filed an amended answer to interrogatories delivered by the defendant A. This amended answer disclosed that the plaintiff had come to New Zealand in 1921 and disclosed the money-lending transactions entered into by the plaintiff during the years 1921 and 1922; it also disclosed that the plaintiff had never been in New Zealand or elsewhere a registered money-lender. On 24th October, 1929, the defendant A. filed an amended statement of defence alleging (*inter alia*) that the plaintiff was at all relevant times an unregistered money-lender. The summons for the argument of questions of law was taken out by the defendants and asked that (*inter alia*) the following questions of law be determined before the trial of the action: "(1) Was the plaintiff at the time of the transactions complained of in the statement of claim an unregistered money-lender within the meaning of the Money-lenders Act, 1908? (2) If he was can he recover in this Court the damages claimed by him in respect of such transactions?" The summons was supported by an affidavit by the defendant A. based on the answers to interrogatories and upon an inspection of the plaintiff's diary, disclosed in the plaintiff's affidavit of documents; the affidavit stated that the diary showed that during the period between September, 1921, and February, 1922, a great deal of the plaintiff's time was taken up in money-lending transactions and did not show that he was engaged in any other business. The plaintiff filed an affidavit in reply alleging (*inter alia*) that all loans made by him in New Zealand were made on applications submitted to him by A. who prepared the security in each case, and alleging that A. did not advise the plaintiff that any of the money-lending transactions referred to in the proceedings came within the Money-lenders Act, 1908, or that the plaintiff should register as a money-lender.

Haddow for defendant in support of motion.
Prendergast for plaintiff to oppose.

SMITH, J., said that counsel for the plaintiff did not admit that the plaintiff was an unregistered money-lender within the Act. Counsel for the defendant claimed that defendant was entitled to take plaintiff's answers to interrogatories, and the extracts from plaintiff's diary, and say that, in the light of the plaintiff's affidavit in reply, those were all the relevant facts, and that a question of law then arose as to whether the defendant was an unregistered money-lender. Counsel for the plaintiff claimed that it was a question of fact, and then of law, whether the plaintiff was an unregistered money-lender, and that the facts had not yet been ascertained. Those facts included the ascertainment of defendant's intention in coming to New Zealand, and the circumstances surrounding his visit-his intention in making each loan, and the circumstances surrounding it. Plaintiff's counsel also claimed that the defendant might be estopped from raising the defence (if it existed), as defendant was plaintiff's professional adviser, and led him into the transactions, and that the facts regarding the defendant's advice and influence over the plaintiff required to be investigated in order to determine whether defendant was so estopped. He claimed also that the defendant might be held, by reason of the agreement to pay the plaintiff a sum in full settlement of all liability in respect of one transaction and the payment of certain sums in pursuance of that agreement, to have waived the defence of money-lending (if it existed) and that the facts regarding the payment of these two sums required investigation. He further claimed that the whole of the facts might show that the Court would not allow the defendant, as an officer of the Court, to raise the defence (if it existed) so as to deprive the plaintiff of his remedy. In short, counsel for the plaintiff said that it would only be beating the air to ask the Court to de-

termine the abstract question whether, assuming the defendant to be an unregistered money-lender, that fact would settle the action against the defendant. As the parties could not agree upon a statement of the facts, His Honour did not think that he ought to say that the material extracted by the defendant from the plaintiff in answer to interrogatories framed by the defendant, taken in conjunction with certain extracts from the plaintiff's diary, represented all the available and necessary facts for stating a question of law, the decision of which would dominate the action. Under Rule 160, any party might at the trial of an action or issue use in evidence any one or more of the answers of the opposite party to interrogatories. His Honour did not think that that authorised the use under Rule 154 of an answer to an interrogatory framed by one party, against the will of the other party, as containing the whole of the relevant facts on the subjectmatter of the interrogatory. Such an interpretation would, in His Honour's opinion, be highly dangerous. Again, His Honour did not know what authority defendant had to take certain extracts from plaintiff's diary, which purported to contradict plaintiff's statement on oath in his answers to interrogatories as to his occupation in New Zealand, and say that the extracts from the diary represented the true position.

Furthermore, it was admitted by Counsel for the defendant that the determination of the question whether the plaintiff was a money-lender included the determination of the question whether his business was that of money-lending. That involved a finding of fact: **Kerr v. Louisson,** (1928) N.Z.L.R. 154. It is necessary to prove some degree of system and continuity, in the transaction. In appraising the nature and degree of the system alleged against the plaintiff, it seemed to His Honour to be reasonable for the plaintiff to say that the nature of defendant's advice and relationship to him should be investigated. The plaintiff had been and was a boat-builder, and the kind of man he was might be important. Once the facts had been established, then it was, no doubt, a question of law whether plaintiff was a money-lender by reason of the facts bringing him within the definition of a money-lender in the Act: **Jowett v. Idle Local Board,** 57 L.T. 928. His Honour referred also to **Abrahams v. Dimmock,** (1915) 1 K.B. 663. In the present case, the preliminary question as to whether the plaintiff was a money-lender or not was in dispute, and in His Honour's opinion all the facts were not before the Court to enable it to come to a decision on that question. His Honour thought also that the plaintiff was entitled to say that the whole of the facts might show that the defendant was estopped from raising the defence of money-lending or that defendant had waived it.

In His Honour's opinion, then, the facts were not sufficiently established against the plaintiff to enable the question of law to be raised, or to make it convenient that it should be raised. It would, of course, be regrettable to expose professional men to an action for negligence, if on the ordinary principles to be applied in stating an issue of law, that issue ought to be stated and determined. The matter was of importance to the defendants, and His Honour had reviewed it at length. He was unable to see, however, that the allegations of facts were either complete or indisputable: they certainly could not be agreed upon by the parties. Even if the Court ventured to assume to itself, on the invitation of the defendant, the power to say that all the relevant facts were before the Court on the subject of money-lending, the Court could not refuse to hear the plaintiff's claim that the defence could not in all the circumstances be raised against him by the defendant Gatenby. Furthermore, it would be against practice and precedent to state for determination what was, at the present time, an abstract question, viz.: "Assuming the plaintiff to be an unregistered money-lender, is the plaintiff entitled to recover the damages claimed by him?" In any case, that was not what was asked for in the summons.

It appeared to His Honour, then, to be clear, firstly that the Court has not before it sufficient indisputable facts to enable the questions of law to be stated, and secondly that if the questions were stated and determined, they could only be so stated and determined conditionally, preserving to the plaintiff his right to claim that on the whole of the facts, the plaintiff was not a money-lender, and that, if he were, a defence based on that fact could not be raised by the defendant. Such determination would not then either dominate the action or render a trial unnecessary: see **Teira te Paea v. Roera Tareha,** 15 N.Z. L.R. 91, **Scott v. The King,** 10 G.L.R. 77. However the application were regarded, it should, in His Honour's opinion be dismissed.

Motion dismissed.

Solicitor for plaintiff: **Noel S. Gaze,** Auckland, agent for **R. Hardie Boys,** Wellington.

Solicitor for defendant A.: **Haddow and Haddow,** Auckland.

Solicitor for defendant B.: **H. W. Fiddes,** Auckland.

Kennedy, J. June 26, 27; October 17, 1929. Auckland.

AUCKLAND CITY CORPORATION v. HARRISON.

Slaughtering of Stock—Abattoir—"Available for Slaughter of Stock"—No Evidence that Stock Not Slaughtered or Delivered with Reasonable Promptitude—Evidence Not Establishing Material Damage Through Deterioration of Stock by Handling—Sufficient Chilling Accommodation Not on Occasions Available—Abattoir Not Ceasing to be Available When Unable to Render Services Additional to those of Slaughtering or Because Not Providing Means of Carrying Out Highest Ideals of Practice—Auckland City Abattoir Act, 1924, S. 3.

Claim by the plaintiff, as the controlling authority of an abattoir in the Auckland Abattoir District, to recover from the defendant, a bacon-curer and vendor, the sum of £142 being the fees charged by the plaintiff in respect of stock not slaughtered at its abattoir, but slaughtered at a duly licensed meat export slaughter-house situate in the district and sold or exposed for sale by the defendant between July, 1927, and August, 1928, in the Auckland Abattoir District. Bylaw No. 983 (a) (1) of the plaintiff Corporation, made pursuant to the powers conferred by Section 3 of the Auckland City Abattoir Act, 1924, provided that: "Every person who sells or exposes for sale meat from stock slaughtered at meat export slaughter-houses within any district for which the Auckland Municipal Abattoir is from time to time available for slaughter of stock shall pay to the Auckland City Council the following fees . . ."—and a fee of 10d. was prescribed for each pig. The defendant admitted that if he was liable to pay anything the amount payable was £142. He admitted selling and exposing bacon for sale within the Auckland Abattoir District but pleaded by way of defence that between July, 1927, and August, 1928, the Auckland Municipal Abattoir was not available for the slaughtering of pigs for the defendant's business. The facts relating to this defence appear in the report of the judgment.

A. H. Johnstone and Butler for plaintiff.

Leary for defendant.

KENNEDY, J., said that the defendant had for some years slaughtered his pigs at the plaintiff's abattoir and he ceased to slaughter there in the year 1926, and thereafter his pigs, made into bacon sold or exposed for sale in the Auckland Abattoir District, were slaughtered at a meat export slaughter-house. The plaintiff installed a mechanical scudder in 1921 and a singeing plant in 1922. In 1923 a chilling plant was installed. The defendant's trade increased very greatly and in the year 1925-26 of a total of 60,000 pigs slaughtered at the plaintiff's abattoir, 13,000 were slaughtered for the defendant. The manager of the plaintiff's abattoir stated that for the year 1927-28 the plaintiff was able to deal with the defendant's pigs. The defendant sought to controvert this evidence by evidence of his experience at the abattoir up to the date at which he ceased to slaughter stock there. His Honour reviewed the evidence on this point and said that he was satisfied upon the evidence that the killing was done as soon as was reasonably possible and that the defendant's past experience afforded no sufficient ground for the inference that the plaintiff would not in 1927-28 kill pigs, delivered by the defendant to the abattoir for slaughtering, as soon as was reasonably to be expected. The plaintiff's manager might not have had the best facilities for carrying out the work, but he did, whatever were his difficulties, slaughter stock with reasonable promptitude.

Nor did the evidence show that the plaintiff did not promptly deliver the quantities received for slaughtering. The fact was that the defendant's pigs were received in greater numbers towards the end of the week and naturally the defendant received from the abattoir, towards the end of the week, pigs in greater quantities. If that did not suit the defendant, his remedy was to regulate his deliveries of stock to the abattoir. That objection, however, merged into the greater objection that the plaintiff's abattoir was not available unless it was provided with chilling accommodation so that it could, if the defendant

required it, chill the pigs immediately after slaughtoring and dressing, and unless it was provided with sufficient chilled storage so that, in whatever numbers pigs were received from the defendant, the defendant might from time to time take deliveries of such numbers as might most conveniently be dealt with in his business. A chiller had been in fact provided at the abattoir and was used for beef, mutton and pigs. Subsequently an additional chiller was provided for beef and was available from December, 1925, and the chiller first installed was used for pigs and stock smaller than beef. That objection raised two questions: firstly, was the chiller provided not reasonably available in the period in respect of which the plaintiff sued, and secondly, was the Auckland Municipal Abattoir available for the slaughter of pigs if it were not provided with chilling accommodation which the defendant might use? Upon the first question the evidence given related to the past rather than to the period under consideration. The manager's attitude was described as being that the abattoir was erected principally for the supply of fresh meat for the Auckland City and that the abattoir services were to be available first for fresh meat and then for bacon pigs and lastly for pigs for export. His Honour thought that on occasions the defendant was informed that chilling space was not available, but, at the time, the defendant did not treat the matter as of sufficient importance to justify his writing any letter or making any formal complaint or protest. He did not seem to have pressed his request nor to have made clear to the manager the serious results attaching to a refusal which he at present attributed to it. Was then the plaintiff's abattoir available for the slaughter of the defendant's stock because, when the defendant required chilling space at the end of a week, the plaintiff was not always able to give it? The abattoir did not cease to be available for the slaughter of stock merely because it might be more expensive for the defendant to slaughter there, nor, in His Honour's opinion, was the abattoir unavailable because it was unable to render certain services, additional to those of slaughtering, which meat export slaughter-houses might render. If the meat, with such facilities and services as were available, could not be transported from the abattoir, where it was slaughtered, to any factory within a reasonable distance from the abattoir and within the Auckland Abattoir District where it was to be cured, without a substantial and not merely a fanciful deterioration, then the abattoir was not reasonably available; for an abattoir could not be said to be available when a person, who availed himself of its services, found his meat there slaughtered necessarily so deteriorated by handling that it was materially damaged. The evidence of the defendant did not, in His Honour's opinion, establish that. In His Honour's opinion the abattoir was not unavailable because it did not provide means of carrying out the very highest ideals of practice set forth in American publications, namely, chilling pigs immediately after slaughter. The practice of those using the abattoir for the slaughter of pigs was not invariably to avail themselves of the chilling space, nor was that the defendant's own practice. The chilling space was used only on certain days and the demand varied with the different users. The defendant's case was that he did not get chilling space in the past. It was admitted that on one occasion certain stock was damaged in the chiller. There was, however, no definite evidence of a kind which should have been available, to prove that the defendant's pigs must, even with care, suffer in transport if unchilled, and even if transported in proper vehicles, a damage which was not unsubstantial as distinct from damage suffered afterwards through curing bacon without first chilling the pig. It appeared that others used the abattoir and that the defendant's experience, if fairly reported, could not have been singular. No evidence was given by any other person using the abattoir and operating under conditions similar to the defendant's during the year, in respect of which hanging fees were claimed, that they experienced, as the defendant suggested he must have experienced had he continued to slaughter at the plaintiff's abattoir, one disaster after another or even any considerable inconvenience. His Honour was satisfied that if the defendant himself had provided his own facilities he could, without deterioration, transport slaughtered pigs in proper vehicles to his own premises and that he could there have chilled his pigs, if he so pleased. His Honour found on the evidence that the plaintiff's abattoir was available for the slaughter of the defendant's pigs during the period in respect of which hanging fees were claimed.

Judgment for plaintiff.

Solicitors for plaintiff: **Stanton, Johnstone and Spence**, Auckland.

Solicitors for defendant: **Bamford, Brown and Leary**, Auckland.

Court of Arbitration.

Blair, J. September 9; October 24, 1929. Auckland.

HUTTON v. STONEX BROTHERS.

Workers' Compensation—Accident—Basis of Assessment of Compensation—Worker Straining Heart While Lifting Weight—Daily Lifting of Heavy Weights for Seventeen Years in Defendant's Employment—Worker's Heart Originally Weakened Before Entering into Defendant's Employment—Daily Aggravation of Condition—Compensation Recoverable Only for Such Disability as Attributable to Last Strain—Workers' Compensation Act, 1922, Section 27.

Claim for compensation. The plaintiff was employed by the defendants as a milk-roundsman; he had been in their employment continuously for seventeen years. His duties were to call at the depot about 2.30 a.m., feed his horse, and load up his milk-float with full milk cans. The cart was placed alongside the kerb and he rolled the heavy cans on their bottom edge near the cart and then lifted them into the float. The height of the lift involved was about eighteen inches and the large cans weighed 150 lbs. each. The load was generally three big and three half-size cans. On 5th January, 1929, the plaintiff had just lifted the first big can off the ground when he felt a sudden pain across his left chest, and dropped the can. He could not move for some time but after sitting down for a while, felt easier. Another roundsman loaded his float for him and plaintiff then carried out his delivery duties that day. This he continued to do for a week, his fellow roundsman always loading his cart for him. He had not lifted a full can on to his cart since the accident, and stated also that on the rounds he did he was not able to carry a full serving can, the weight of which was about 37 lbs. His annual holiday being due on the 12th January plaintiff did not report the occurrence as he thought that he would be all right after his holiday. He stayed at home then and, being troubled when walking up a hill, consulted a doctor who informed him his trouble was due to his heart. Plaintiff then reported the matter to his employers who had him medically examined. About three months afterwards plaintff went back to defendants and attempted to work his round with the assistance of the relief man who was taking his place. He tried this for a fortnight but had to give it up. The plaintiff had had three attacks of rheumatic fever, the last one about 25 years previously, lasting 6 weeks. On recovering from this he commenced work as a milk-roundsman and followed that occupation constantly until the accident above detailed. The medical evidence showed that the plaintiff had valvular disease of the heart and that the rheumatic fever which the plaintiff had as a young man would tend to leave a weakness and that condition would be aggravated by lifting heavy milk cans for many years. The final failure and dilatation would be contributed to largely by the strain of 5th January. It was clear from the medical evidence that mitral stenosis and auricular fibrilation were present prior to the strain in question, and the doctors attributed to such strain no more than aggravation of the pre-existing symptoms. The question arising was as to the amount of compensation payable in these circumstances.

Tuck for plaintiff.

West for defendants.

BLAIR, J., delivering the judgment of the Court, said that the onus was on the plaintiff to establish his case, and the medical evidence on both sides admitted the possibility of auricular fibrilation being present before the particular strain of 5th January, 1929. That being so the Court could but accept as proved the fact that the strain of the 5th January did no more than accelerate the progress of the disease the plaintiff suffered from. The Court thought that it was the 17 years' daily lifting of heavy milk cans which, operating on a heart affected by rheumatic fever, ultimately caused a complete breakdown. Each of the heavy lifts that plaintiff performed every morning of that 17 years, to say nothing of similar work prior to that, was operating on plaintiff's weak heart and gradually further weakening it until it at last gave out, and it might be that amongst the thousands of similar strains the last one's effect might have been comparatively negligible. If the Court attributed to the last strain one year's disability it would, His Honour thought, be amply covering all injury that could be suggested as directly resulting from that strain. That such a

strain was an "accident" was clear from **Fenton v. Thorley and Co. Ltd.**, (1903) A.C. 443, and **Clover, Clayton and Co. Ltd. v. Hughes**, (1910) A.C. 242.

Mr. Tuck submitted, however, that once there was admitted a physiological change due to the "accident" even if the result were acceleration of the disease only, then the compensation was not limited to the period of acceleration due to the accident but included compensation for the whole disability due both to the disease and its acceleration. In support of that proposition reliance was placed upon the line of English cases dealing with compensation for death due to strain upon workmen affected with badly diseased hearts, and reference was also made to three New Zealand cases where the question of measure of compensation for acceleration of disease was considered. It was clear from the English authorities, followed as they had been repeatedly in New Zealand, that if the plaintiff had succumbed as the result of the strain on the 5th January his dependants would have been entitled to compensation. The Court pointed out in **Ayling v. Wellington City Corporation**, 5 N.Z.L.J. 263, that in death cases there was present the fact of death which constituted the conclusive evidence that the disease had made a marked advance. In **Clover, Clayton and Co. Ltd. v. Hughes**, (1910) A.C. 242, 247, Lord Loreburn applied the following test: "Did he die from the disease alone or from the disease and employment taken together, looking at it broadly. Looking at it broadly, I say, and free from overnice conjectures, was it the disease that did it or did the work he was doing help in any material degree?" If the "accident" materially accelerated death then compensation was payable. If the basis of compensation in the case of death were identical with the basis applicable in the case of injury only then the principles enunciated for fixing liability in cases of mere acceleration of death would apply to cases of acceleration of injury, and it would follow that a material contribution to an injury due in great measure to disease would impose on the employers liability not only for the injury but the results of the disease as well. But the basis of compensation differed in the case of death from that of injury. Where death resulted (and the meaning to be given to "result" must be the extended meaning defined by Lord Loreburn) the question of compensation in the event of the worker leaving total dependents was a mere matter of arithmetic. And in the case of partial dependency the quantum of compensation depended not on the injury to the worker but on the extent of the dependency. But in the case of injury an entirely different measure of compensation was provided. The basis was compensation for incapacity whether total or partial suffered by the worker as a result of the injury. If, therefore, it was possible to separate the incapacity due to the disease from the incapacity due to the injury to the worker it would follow that it was the latter and not the former which the statute made the subject matter of compensation. The three New Zealand cases quoted by Mr. Tuck were **Bush v. Napier Harbour Board**, 17 G.L.R. 629, **Remnant v. Dempsey**, (1920) G.L.R. 292, and **Neale v. Canterbury Frozen Meat Co. Ltd.**, (1921) G.L.R. 349. It would appear that if **Bush v. Napier Harbour Board** (*cit. sup.*) was to be treated as an authority it had not been followed in the two later cases. On the authority of **Burrell v. Selvage**, 14 B.W.C.C. 158, Mr. Tuck submitted that each of the strains which plaintiff bore during the 17 years of his employment contributed to the accident on 5th January and that plaintiff's breakdown was wholly due to that series of accidents and that full compensation was accordingly payable. His Honour did not see how that case helped the plaintiff. Over 20 years ago he became the victim of a disease which left him with a weak heart. Every strain throughout his life thereafter would bring nearer the ultimate breakdown of his heart. In **Burrell v. Selvage** (*cit. sup.*) the series of accidents to plaintiff's fingers was confined to a matter of weeks. In the present case the strains covered 20 years and extended to a period before plaintiff worked for defendants. All but a microscopic number of those strains were beyond the period of limitation provided by the Act. That contention involved aggregating 17 years of strain into one accident occurring within six months. There would be no necessity then for enumeration of industrial diseases in the first schedule in the act. The Court accordingly held that as the plaintiff sustained an accident arising out of and in the course of his employment on 5th January he was entitled to compensation for it, but such compensation must be limited to the injury he sustained as the result of such accident, and, as already indicated, one year's incapacity would amply cover the incapacity due to such strain. The plaintiff was awarded full compensation for the period of one year from the time he ceased work.

Solicitors for plaintiff: **Tuck and Wood**, Auckland.

Solicitors for defendants: **Jackson, Russell, Tunks and West**, Auckland.

Solicitor's Lien for Costs.

An Interesting Victorian Decision.

In re Long, (1929) V.L.R. 318, is an interesting decision of the Supreme Court of Victoria dealing with the lien of a solicitor for costs.

Long, a solicitor, whose retainer in an action had been withdrawn by his clients, held in his possession documents of the clients, despite repeated requests for their delivery. He also had in his possession the sum of £100 belonging to the clients, and he sent a registered letter to them enclosing his bill of costs and a cheque for the difference between £100 and the amount of the bill. The clients, through their new solicitor, thereupon wrote to Long assenting to his paying or securing himself by means of the money retained, but stipulating that the amount of his bill should be ascertained by taxation. The clients took out a summons for an order that Long deliver up the documents held by him for them.

Lowe, J., held that the solicitor had no right to retain the documents because, assent having been given to his retention of the applicants' fund, his lien for the payment of his bill had gone, either because he had been paid or because he had exchanged his lien for a security and thus waived it. It was contended on behalf of the solicitor that he had a lien for costs which the applicants might have to pay him under Section 103 of the Supreme Court Act, 1915 (Vic.), corresponding to Section 30 (5) of our Law Practitioners Act, 1908, in the event of the taxation not resulting in one-sixth of the bill being taxed off. The learned Judge held that one sufficient answer to this contention was that if any costs were so incurred on the taxation the solicitor would not be at that stage acting as solicitor towards a client, but as an adverse party to a former client.

Anglo-German Convention.

Service of Documents and Taking of Evidence.

The Convention between the United Kingdom and Germany regarding legal proceedings in civil and commercial matters signed at London on 28th March, 1928, and in respect of which ratifications were exchanged at Berlin on 15th February, 1929, has been extended to the Dominion of New Zealand and the mandated territory of Western Samoa, pursuant to the provisions of Article 17 of the Convention, as from 1st January, 1930. The Convention makes provision for the service of judicial and extra-judicial documents and for the taking of evidence.

The Registrar of the Supreme Court of New Zealand at Wellington, and the Registrar of the High Court of Samoa will act as the authorities to whom judicial and extra-judicial documents and "letters of request" should be addressed in New Zealand and Western Samoa respectively, and it is requested that communications and translations may be made in the English language.

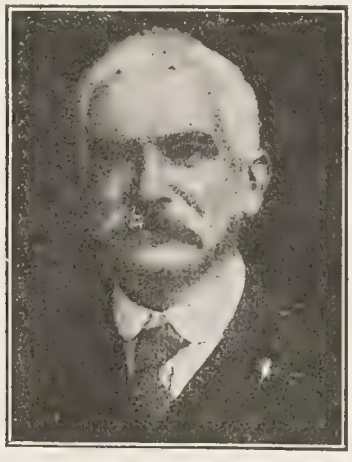
The text of the Convention is printed in the New Zealand Gazette of November 21st.

Obituary.

SIR JOHN FINDLAY, K.C.M.G., K.C.

Sir John Findlay, K.C.M.G., K.C., died in London on the 7th inst.

Sir John was born at Dunedin in 1862. He was educated at Scot's Academy, Hokitika, and at Otago University, securing his LL.B. degree in 1886. In the following year he was called to the Bar. In 1893 he gained the degree of Doctor of Laws—then awarded by the University of New Zealand on examination. Sir John commenced the practice of his profession at Palmerston South in partnership with Mr. F. G. Dalziell; subsequently, in 1894, he came to Wellington and joined Sir Robert Stout in partnership. On the appointment to the Chief Justiceship of Sir Robert Stout in 1899, he was again joined by Mr. Dalziell, this association continuing until 1914, when the latter retired from



active practice. Mr. Howard was then admitted to partnership, and the firm practised as Findlay, Dalziell and Howard until 1919, when Mr. Howard retired and Sir John then took into partnership with him Mr. D. R. Hoggard and Mr. J. C. Morrison. Mr. Morrison retired from the firm in 1926, and the following year Mr. A. M. Cousins and Mr. E. G. Wright were admitted to partnership, the firm practising under the style of Findlay, Hoggard, Cousins, and Wright. In 1907, Sir John Findlay was among the batch of "Silks" appointed in that year; this was the first occasion on which, in New Zealand, King's Counsel had been appointed, and Sir John was himself responsible for the creation of the office in this Dominion.

Sir John Findlay entered politics in 1906 by being appointed to the Legislative Council by Sir Joseph Ward, the then Prime Minister, succeeding the late Hon. Colonel Pitt as leader of that Chamber. He was given also the Attorney-Generalship and the Ministry of Internal Affairs, and later he became also Minister of Justice. In 1911, with the Prime Minister Sir John represented New Zealand at the Imperial Conference. Just before the General Election of that year he resigned from the Legislative Council and from his portfolios, and stood as Liberal candidate for the Parnell electorate; Sir John was, however, defeated and for a few years he retired from politics. Six years later he was returned at a by-election for Hawke's Bay, but the next General Election marked his final retirement from public part in the political arena.

In his early days, Sir John was lecturer in political science at the Otago University. Several works on social and political subjects came from his pen, and he was also the author of "Humbugs and Homilies," and "The Imperial Conference of 1911 from Within." For some years he was a member of the Council of Victoria University College.

Tributes of Bench and Bar at Wellington.

On the 11th inst. reference to the late Sir John Findlay, K.C., was made in the Supreme Court at Wellington. His Honour the Chief Justice and Mr. Justice Blair were on the Bench.

Sir Francis Bell, K.C., expressed the sentiments of the Bar. The members of the profession were assembled, he said, to claim their ancient privilege of expressing their united sorrow at the loss of one of their leaders, and one distinguished always in their ranks. Sir John Findlay was the friend of them all, and in all sincerity they mourned with those who more sadly mourned his loss. He brought into the practice of his profession that fund of knowledge and learning which he had gained in his very distinguished career at the Otago University, where he and many others acquired the habit and manner of lucid speech and power of address in the English language. When, after practice in the South, he came to Wellington, he stepped at once into the foremost ranks of the profession, and even joined as he was in partnership with one who held a great place among them—Sir Robert Stout—he rapidly became a leader. Sir Francis Bell referred to Sir John Findlay's appointment as Attorney-General and Leader of the Legislative Council when Sir Joseph Ward first became Prime Minister, and eulogised his work in that connection as showing courage in departure from the past and wisdom for the future. He created the office of King's Counsel in New Zealand, and was himself one of the first appointed to that position by Order-in-Council. Again, it was well known that he sought by creating a separate Court of Appeal to meet a complaint that, during the sittings of the Court of Appeal, the legal process in the north and the south was hampered. His project failed, but it was wisely and carefully thought out, and developed until it was plain that it must fail. The alternative adopted of dividing the Court was not one which he advised, and whatever might be the result of the division, those who survived from the past had not disagreed with the view that the united Court was the better solution. Sir John Findlay's part in the administration of the law was marked by real distinction, recognised more perhaps by the profession than by the public, but recognised also by the public and the Government. His political career, brief as it was, was a brilliant one, culminating in his presence with Sir Joseph Ward at the Imperial Conference, where his part was still remembered with admiration by many of the distinguished men who served at the Conference. When,

on the resignation of the Ward Government, his active political career ceased, his return to active practice in the profession was welcomed by them all. They knew how ready of speech he was, how apt the phrases were that came from his lips, illuminated from his learning, and wide study of literature and science, and how free he was from the use of the wit and sarcasm which was always available to him for offence.

"He lived with us, admired by us all," continued Sir Francis, "with a real friendship created by his own attractive personality. His power as an advocate and wide knowledge of legal principle made him recognised by those outside our ranks as a leader whose services should be sought. Amongst us, he was known as a dangerous adversary, but at the same time he was true always to the traditions of courtesy and quiet self-possession which marked the real leader in the profession. Those who had the privilege of close association with him in the life outside the profession have the most affectionate remembrance of that association." In conclusion, Sir Francis expressed the real sense of sorrow and loss which the profession felt at Sir John Findlay's death, and their deep sympathy with his widow and family.

His Honour the Chief Justice said: "I and my brother Judges heard on Monday with sincere regret the announcement of the sad event that has brought you together. I would like for myself, and I know that I can speak also for all my colleagues, to add a few words to the eloquent tribute that Sir Francis Bell, on behalf of the profession of the law in New Zealand, has paid to the memory of Sir John Findlay. Sir John practised as a member of the profession in Wellington for about 35 years. During the whole of that period he held a high position at the Bar, of which for many years he was one of its active leaders, as well as for six years the official head, as Attorney-General. It was on his initiative as Attorney-General, as Sir Francis Bell has said, that the rank of King's Counsel was established in New Zealand. Sir John was a sound lawyer and a great advocate; always a fair, generous and honourable opponent, always courteous, always reasonable, and always willing and anxious, as a leader should be, to help the younger men of the profession. But he was more than merely a sound lawyer and a great advocate. He was a brilliant scholar, an eclectic reader, a man of great culture, and a charming conversationalist and companion. With all those gifts, and with his indefatigable industry, it was natural that he should have possessed, as he did, a grace of diction in both the spoken and the written word which we all admired, and, I venture to say, most of us envied. We members of the Bench, like you of the Bar, mourn his loss. We, like you, offer our sincere and respectful sympathy to Lady Findlay and her sons, in the hope that this tribute of respect to the late Sir John's memory from those who outside the members of his family knew him best and admired him most, will, in some measure, however slight, alleviate their grief in the great loss that they have sustained by his death."

New Zealand Law Society.

A special meeting of the Council of the New Zealand Law Society was held in Wellington on Tuesday, 3rd December, 1929, to consider the proposed Rules to be made under Section 24 of the Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Act, 1929.

Mr. A. Gray, K.C., President of the Society, was in the Chair. The following gentlemen were in attendance as representatives of the District Law Societies, namely:—

Auckland, represented by Mr. P. B. Cooke (Proxy).

Canterbury, represented by Mr. K. Neave.

Gisborne, represented by Mr. C. A. L. Treadwell.

Hamilton, represented by Mr. E. M. Mackersey.

Hawke's Bay, represented by Mr. H. B. Lusk.

Marlborough, represented by Mr. W. T. Churchward.

Otago, represented by Mr. R. H. Webb.

Southland, represented by Mr. P. Levi.

Taranaki, represented by Mr. H. F. O'Leary (Proxy).

Wanganui, represented by Mr. W. A. Izard.

Westland, represented by Mr. A. M. Cousins.

Wellington, represented by Mr. A. Gray, K.C., Mr. C. H. Treadwell and Mr. C. G. White.

The Council resolved to make the following Rules, since approved by the Governor-General in Council.

1. The fee payable for the purposes of the said Act by every Solicitor to whom the said Act applies shall, as from the day the said Act comes into force and until a different fee shall be lawfully prescribed, be the sum of five pounds five shillings (£5 5s. 0d.).

2. The several persons receiving such fees shall pay or forward them to the Secretary of the New Zealand Law Society for the purposes of the Fund established by the said Act.

3. Any Bank charge for exchange payable in respect of moneys forwarded as above mentioned shall be paid out of the Fund established by the said Act.

4. Any Solicitor making application in any year for a Certificate under Section forty-five of "The Law Practitioners Act, 1908," and claiming that he is not a Solicitor to whom the said Act applies, shall satisfy the person to whom the application is made that he is not for the time being engaged in the practice of his profession of a Solicitor either on his own account or in partnership with any other person or persons.

The Council resolved to appoint the following as a Committee of Management under the abovementioned Act, namely: Mr. A. Gray, K.C. (President), Mr. C. H. Treadwell (Vice-President), Mr. P. Levi (Treasurer); all of Wellington, Mr. A. H. Johnstone (Auckland), and Mr. M. J. Gresson (Christchurch), and delegated its powers under the said Act to such Committee of Management.

Private Company Law.

A Suggested Alteration.

By W. M. Hamilton.

Amongst the much needed alterations in the field of company law is one to make the law relating to private companies more consistent with the rules of equity and justice and with common sense.

The system of company law evolved from the need of rules to govern the mutual relationship created between individuals, too numerous to be conveniently associated in ordinary partnerships, engaging in a common trading enterprise and to govern their relationship to the public. The law has always been fertile in invention in order to adapt itself to new and ever-changing conditions, but has been always careful, in modifying, or altering the application of its rules and in the making of new rules, to depart as little as possible from existing and well understood forms in which the rules have been expressed, and this is well exemplified in the development of company law. Where necessary, as is well known, the law will even invoke the use of fictions, as in the case of the fictitious legal process by which the old Statutes restricting alienation were circumvented.

Nowadays, of course, such crude methods are not so popular. Notwithstanding this there remains a certain tendency towards the use of fictions. This is shown by the every day use, particularly in statutes, of the expression "shall be deemed." A legal conundrum might be put: "When is a man not a man?" or, perhaps with more point, "When is a woman not a woman?" I would not be surprised to find that by force of a statutory rule somewhere that a woman sometimes is a man. Certainly by statutes the expression "man" is made to mean "woman" as well as "man"—see the Acts Interpretation Act which provides that words importing the masculine gender include females. There are certain cases when a man is deemed to be a corporation. He is in theory constituted a corporation, the Public Trustee for instance, in certain cases. Yet he is no corporation in fact. A real corporation is an association of persons constituting a single legal entity, and the attributes conferred by law on such an entity are designed to enable such associated persons to act in law as an individual within certain defined limits. Difficulties must arise when making attributes designed to meet the case of an association of persons applicable to an individual.

Whether this be so or not a certain amount of fiction is undoubtedly the basis of company law and while very convenient in enabling certain legal rules usually applicable to individuals to be applied to associations of men it has produced some curious and at times pernicious results. To take one instance there is the case where an individual can avail himself of the benefit of limited liability by means of forming himself into a company with one nominal shareholder besides himself. Now to all intents and purposes this man is the same trader after being what is called "incorporated" as he was before, but by reason of availing himself of the statutory provision he is now a different person. It is immaterial how infinitesimal an interest his co-shareholder may own. The capital may be £100, £1,000, or £10,000, divided into any shares however small. Shilling shares would do as well as pound shares, and the nominal shareholder need only have one. This has been definitely held to be legal and yet the law continually says it considers only the substance and not the form. Here is something only reconcilable as a fiction. Again the law says it takes no notice of trifles and yet it will hold that where a man has a shilling share in a company with a capital of £10,000, the other shareholder is in effect constituted a legal joint stock company with limited liability, though without the shareholder with his shilling share he is not. Truly the ways of the law are wonderful.

One result of this benign rule is that when a man has constituted himself into a company and thus become divorced from his natural self he can then give himself a debenture over the whole of his assets including his uncalled capital thus hypothecating to himself the money he owes to himself for the shares he has subscribed for, and he can further exercise a power of sale under his debenture and sell his assets discharged from all liabilities to other creditors. He can also be himself the purchaser, by incorporating himself into a new company and thus acquire at, it may be, a nominal price the assets which trusting unsecured creditors have provided for the old company.

The trouble arises from insisting that a man in order to be able to trade with limited liability must form himself into a joint stock company. It is suggested that there is no reason why an individual should not be allowed to trade with limited liability so long as his credit is limited to a specified undertaking. If a man is prepared to put money into a specified business, with assets which are the stock-in-trade of that business and which are represented to the public as all that is available for the creditors of that particular business, then what objection can there be to a man being allowed to trade under a trade name with a limit as to his liability in respect of the debts and liabilities incurred in carrying on that business.

There would then be no necessity for applying the doctrine that a company is a separate personality from the members of the company. A trader wishing to carry on with limited liability would simply register a memorandum setting out particulars of the proposed business and the assets and liabilities and the amount to which he desired to limit his personal liability. The name under which the business would be carried on would have to have the word "limited" added to it, as in the case of a company, but the man himself would retain his own personality and continue to be liable for the debts he had incurred prior to making the change and continue to exercise in respect of his business all the powers and authorities of an individual without having to invoke any fictions.

In this way all the cumbrous machinery of articles would be avoided in a case where a man is virtually the sole proprietor of his business. At the present time owing to the law that in order to carry on business with limited liability a man must in effect become a corporation and must have at least one nominal shareholder with him he cannot carry on his business without having a set of regulations which are designed primarily for the mutual protection of persons associated together. Owing to this and to the artificial rules relating to the manner in which the company or corpor-

ation can be bound many difficult questions arise by which, without any merit, the company can repudiate obligations entered into on its behalf. Questions, for instance, may arise as to power to contract and validity of execution of documents which cannot arise in respect of an individual trading as such.

In other ways difficulties may arise in carrying on the business of a company, e.g., where the memorandum contains a clause that the articles cannot be altered without the consent of the proprietor and the proprietor through infirmity is unable to give it as in *C.B.C.*, (1929) G.L.R. 41. In such a case a complete deadlock may even arise.

Such rules and regulations are for the protection of interests of other shareholders but are worse than useless when there are no such interests to protect. They are for the purpose of regulating the exercise of the powers and rights of individual co-proprietors in their relations with each other, but when in effect there is but one proprietor they are a pure anachronism and give rise to a confusion of ideas as to the real nature of the legal position of the proprietor. The fact is that a single proprietor remains such for all intents and purposes although he has to have an nominal co-proprietor for the purpose of acquiring statutory recognition as an incorporated company, and yet has to comply with the farce of having regulations for controlling him in his relations with his nominal co-proprietor.

Incidentally it may be noted that the law in regard to articles is not free from anomalies. To mention one, it appears that though a private company does not require to register its articles yet as articles can only be altered by special resolution and notice of every special resolution has to be given to the Registrar it follows that notice of every alteration has to be given. This is equivalent to registration. Thus, though a private company need not register its articles, it must register every alteration.

Again, as the law now stands, a man can carry on a trade with limited liability with one purely nominal shareholder but if he should acquire the solitary share of that one, then after a certain time his right to so carry on will cease, and his liability will become unlimited.

There seems no reason why a trader by registering a specified business with the scope and objects defined should not be able to carry on that business with limited liability, and thus continue it with all the rights and powers in relation thereto ordinarily possessed by an individual in relation to his business undertakings. This would help to prevent certain dubious transactions at present permissible and avoid a lot of the conundrums as to *ultra vires* and other questions which arise in consequence of the artificial changing of an individual into a corporation.

"There are many provisions in the Statute Book so unjust that it is hard to understand how they could ever have got there, or how any civilised Government could let a day pass without repealing them."

—Mr. W. H. Foster (President of the Law Society).

London Letter.

Temple, London,
23rd October, 1929.

My dear N.Z.,

I refer to matters in the City; the sudden collapse of the Hatry concerns; the quick decisions of the Stock Exchange authorities; the entrance, positively royal, of the superman amongst accountants; the presentation of themselves, to the Police authorities, by the protagonists in the financial operations concerned; and their subsequent apprehension and detention, upon a refusal to admit to bail. What exactly the financial operations consisted of and what there is about them which requires explanation and what that explanation may be and why it, or the need of it, is such that those purposing to make it must bide their time in detention: these are questions as yet to be answered. And what the powers of the Stock Exchange are in such crises, and what the power of bankers and others to comply with their demands for information as to customers' dealings, these are questions which many of us are asking ourselves but which may forever remain unanswered because never canvassed in a court of law. I fancy, however, that there will be legal repercussions, and that the sensational thrill of a criminal prosecution on a large scale will not be the ultimate end or the all-in-all of our professional interest in the huge collapse. It stands to reason there must be many battles as to where the loss is to be left lying, as amongst innocent disputants; and the losses are so big, in many cases, that the litigation with regard to them may well achieve equally big proportions. I was up before a Master last week, praying for expedition of an action by the proprietors of a private company who had attempted flotation in the form of a public company but whose financiers, underwriters, and others had entirely failed to come up to anything approaching "scratch" when called upon to fulfil their obligations. The Master observed that a special court would soon have to be constituted to deal with this class of business, so manifold and mischievous were the instances of it brought to his notice during the Long Vacation! It is a dismal matter to have to record. The Hatry group collapse appears only to be a glaring example of what is happening in many quarters. No longer is the city a place where men may resort with confidence. Let us hope that a purging is begun. Macnaghten, J., has taken the place of Luxmore, J., as Vacation Judge. I am not so sure, after four interviews with him of a professional nature, that Macnaghten, J., is not going to make an exceptionally good Judge. It is ever thus, with those whose merits are subject to a faint praise upon their appointment. Experience as Vacation Judge is unusually trying, since every sort of business falls to be dealt with and to be dealt with on the spot, as a matter of extreme urgency. I have tried him as well with chancery points, as with common law, as well with intricate matters of finance as with abstruse matters of practice: neither seemed to alarm him, unduly, and my opponent, at the last encounter, entirely failed to shift him from his ground, although that ground was in the area of remote practice procedure at which my opponent is said to be a past-master. Mackinnon, J., told me that, when he was acting Vacation Judge, one enterprising barrister made an application to him not only when he was in his bathroom,

but when he was in his bath! At least, he knocked on the door for the purpose and was with difficulty staved off for a few moments. We had to pursue Macnaghten, J., to his house, and to discuss our problems with him over his dinner table.

The Lists of impending causes reflect, except as to the divorce business, a falling away which is in proportion to the continued murmurs heard of hard times in very many chambers. If it was not for motorists the King's Bench Division lists would be so depleted as to give rise to something like alarm. The "personal injuries" actions, however, maintain at least appearances.

The new Judge of the Chancery Division, Mr. Justice Farwell, is known to you already, not only by reason of his father's fame, but also by reason of his having appeared in appeals to the Privy Council from New Zealand, in the past. Assuming, and not enquiring whether my assumption is warranted or not, but assuming a view, subject to argument, that Farwell, K.C., as we once knew him, is by no means strong enough or wise enough nor has enough of personality for the High Court bench, let the following be considered before that view is finally accepted. The earlier Farwell, of our judicial history, was as modest, even shy, a man as he was undoubtedly able; and his modesty, or shyness (as I, as a youngster, remember him) took an odd form and assumed a strange manner, indeed! To the eyes of my generation this all went for nothing, of course; his values were, by the time we saw him, proved, and his reputation made; he could be as shy and as modest and as blushing and ineffective, in consequence, of manner, as he pleased. We attributed it, rightly, to mere manner, and we listened to his wisdom and observed his intellect none the less and all the more, possibly. A great, or at any rate a made, man can afford to be shy, and to blush; but if his habit and demeanour descend, with his abilities, upon his son, we (of the same generation) shall by no means so readily forgive in that son what we were trained to overlook in the father? The present Farwell, J., an exceedingly agreeable man and in every way to be approved in his personality, inherits his father's peculiarities beyond a doubt. It may be mentioned that they are none the less nice, those qualities, because they are rare at the Bar, where modesty, shyness, blushing and the other outward signs of an inwardly sensitive nature are, to say the least, not typical! May it not be, then, that he inherits also his father's abilities? I have no reason to doubt the latter proposition, but I am wondering whether possibly your Chief Justice (who was opposed to him and who trounced him in the appeals to which I have referred) has not some reason to doubt? Ask him, and let me know; I confess I am dying of curiosity on the point. I could have given you the "tip" in advance. I don't know how it all got out, but the race was almost an open one; and there was the thrill of much gossip, and even a little scandal, in connection with it. Names were mentioned, and were insisted upon, as possibles . . . . as probables . . . . as certain winners. Farwell was not among them. Then rumour implied disqualifying circumstances as to these hotly backed favourites . . . . Farwell suddenly appeared from the crowd of dark horses, and there was never any other in the race. It was all great fun, though I only saw it from the back of the stand, so to speak. It was Lincoln's Inn Stakes, and no affair of any Inner Templar's save in so far as any hazard, upon which a bet may be laid, is the common property of all in whose veins runs our Imperial blood?

There is said to be the prospect of further vacancies in the Chancery Division within the year. Eve, J., may retire; one or two of the others may "go up" on rearrangement, or remanning, of appellate benches. Goodness knows whence the new recruits will be drawn! The thought gave rise, with us and at our lunch in Hall, to a discussion of the great Wilfrid Greene, K.C. I wonder if that subject interests you? There is no point in it, of course, as to the filling of vacancies on the Chancery Division or any other first instance Bench; Greene could have been such a first instance Judge any number of times over, had he wished. The point to which we were led is quite another, and has no bearing upon judges or judicial benches. How high stands Wilfrid Greene among the great of all periods? Of what magnitude is this star in modern firmaments? I should say, and our unanimous conclusion was, that he is as great among advocates (except that he makes no pretence to be a cross-examiner) as could be, in our memory. He is a far more effective weight than was Simon at the end at any rate of his practice at the Bar. He is of a far higher class, among luminaries, than are his peers, Birkett and Jowitt. So far as concerns the last-named two, we make perhaps not a very wonderful show as to our leading advocates, compared to the show made by other generations and times. As to Greene we, so we concluded, need not fear comparison. While the discussion was proceeding, I was in fact being led by him in the Privy Council. Starting quietly and developing exactly according to a plan which he had adumbrated in consultation overnight (when it had been seen how violent their Lordships were, in a preconceived opposition to our case before ever they had heard a word of it) I can only say that he was marvellous, and that I have never heard the like before in more than twenty years' experience at the Bar. And it is in that strain, that everyone speaks of him. Let me recommend you, when you are in England, to make a point of hearing him, whether in the Privy Council or in the Lords.

The first-named tribunal has, as you will have observed, been sitting in three divisions this term, an unprecedented phenomenon. We were, for our sins, the third. Not that I complain of the manning of our tribunal, except that for a case turning entirely upon questions of fact and value of human testimony in the box, we were a little unfortunate to have three Judges entirely of the abovementioned Chancery Division sort: Lords Blanesburgh, Warrington, Sargent! But the place! A makeshift court was constituted in a tiny room; the sublime persons who as civil servants work in the building were presumably unable to fit themselves into it or to clear a larger one for the comparatively insignificant entity, the Final Court of Appeal of the Empire. The room was not so big as my own room, in the Temple; and we, counsel and Lords, Lords and counsel, were all jumbled up upon the top of one another. It is said that the congestion of Indian appeals, combined with no present falling off of others, necessitates this expedient.

Yours ever,

INNER TEMPLAR.

"It may be an exaggeration to say that the roads of this country are covered with dead and dying; but it is not a very long way off the truth. One can hardly take up a newspaper without seeing someone killed on our roads by motorists." —Mr. Justice Horridge.

Solicitors' Guarantee Fund.

Lower House Debate on New Bill.

For general information we reprint below the Hansard report just to hand of the debate in the House of Representatives on the Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Bill.

On the question, *That this Bill be now committed,*

The Hon. Mr. WILFORD (Minister of Justice) said,—Sir, the Bill that stands in my name has been promoted by the legal profession, and has been considered by all the district committees of the Law Societies of New Zealand, by the executives of the various District Law Societies, and by the Council of the Law Society of New Zealand. The object of the Bill is to reimburse those people who have lost money through the dishonesty of solicitors. Provision is made for the establishing of a fund for this purpose. The measure is the outcome of a voluntary move on the part of the profession, and casts no liability on any one outside the profession. The honour of the whole profession is bound up with the honour of each individual member of the profession. It is the desire of the lawyers to whom people entrust their money to give to people an assurance that they will not lose it even though some solicitor might convert the money to his own use.

Mr. NASH.—Have all the district branches agreed to this ?

The Hon. Mr. WILFORD.—Every branch of the Society has agreed to it ; also every District Society and the Council of the New Zealand Law Society. There are in New Zealand 1,750 solicitors who take out their certificates each year, but a number of them are in the offices of practising solicitors or in the Public Trust Office. There are, roughly speaking, fifteen hundred practising lawyers to whom the Bill will apply, and under the Bill the governing body can collect not less than £5 and not more than £10 a year from each. The average amount of defalcations in the last ten years has been about £3,700 a year ; and the revenue derivable under the Bill will be twice that amount, or approximately £7,500 a year. When a lawyer goes out of practice his contribution is to be refunded, and no lawyer will be charged any larger sum than £50 for the whole time he is practising. Of the funds that are collected by way of contribution from the practising lawyers, the surplus will be invested in trustee securities. On behalf of a profession which wishes to raise its status and standing, I ask this House to give me the opportunity of placing on the statute-book this voluntary measure.

Mr. MARTIN (Raglan).—The general statement of the Minister is quite correct, but there is objection to certain features of the Bill, although I believe that all the solicitors practising in the country are favourable to a Bill of this character. On behalf of some country solicitors I was asked to place before the Committee certain suggestions which they consider would be for the improvement of the measure. Under the Bill it is provided that solicitors who are practising are to pay an amount of not less than £5 and not more than £10. The country solicitors feel that this is placing the larger firms in a different position from those practising in country districts. Some large firms with perhaps two or three in the firm may employ five or ten solicitors in their offices, but only the three members of the firm are to pay the fee, though I understand that when necessity arises these junior solicitors, who have their certificates, undertake work which would otherwise go to other solicitors.

The Hon. Mr. WILFORD.—But they do not have any trust funds placed in their possession. Those funds are in the hands of the firm.

Mr. MARTIN.—That is an argument which was used before the Committee, but it was not sufficient to satisfy those who are practising in the country. For instance, an Auckland firm will have agencies with solicitors in charge of them in small towns in competition with resident solicitors, and those solicitors will not pay anything into the fund.

Mr. LYSNAR.—In the country they would.

Mr. MARTIN.—No ; they are simply there as managing clerks —theirs is a branch. Quite a number of country solicitors feel that in this respect an advantage is being given to the large firms, and they consider that every solicitor, when he receives his certificate, should pay into the fund. It is quite true what the Minister of Justice has said, that these solicitors have not control of trust funds, but at the same time they are in competition with solicitors who are paying into the fund, and they therefore feel that in that respect the large firms have a decided advantage. They ask, therefore, that the amount should be payable by all solicitors who receive their certificates to practise. There are one or two other clauses of the Bill which are not favourably regarded by the solicitors, and one is in regard to the power given to the Council by which it can practically blast the future of a practising solicitor. I refer to clause 6, subclause (4). Under this clause the Council can notify the client of a solicitor in writing, warning him or them against employing the solicitor, and if they continue to employ the solicitor and there is any embezzlement or defalcation then he would have no claim against the fund ; and the solicitors I am speaking for feel that the clause is too drastic. They consider the clause should be amended by providing that such notice can only be given after application to the Supreme Court. I merely wish to place on record the objections which I have received in regard to the Bill, and to put before the House the views of country solicitors as represented to me.

Mr. BROADFOOT (Waitomo).—As a country member of the profession interested in this measure I desire to say that there has been a feeling running right through the profession for the last twenty years that something of this nature should be put into effect. In the past there have been objections to such a scheme, but at the present moment these objections in the main have been wiped out. I think that with an annual premium of £5 or £10 every practising solicitor who is in business on his own account should regard that as a small payment to make to bring stability to his business and security to his clients. No measure is ever brought forward which is perfect when first introduced. This measure establishes the principle of security to the general public, and I am intensely proud of the members of my profession who have taken this step in order to give security. I feel that if there are any small matters which may inflict some degree of hardship upon any individual member, such matters can be brought forward at a future sitting of Parliament ; but I do ask honourable members of this House to accept this Bill and place it on the statute-book. It is the principle that we want established ; afterwards any details can be attended to.

Mr. HAMILTON (Wallace).—I was not intending to speak on this Bill, but I realise it is an important measure. I presume that it does not affect the Crown, but only concerns the members of the legal profession.

The Hon. Mr. WILFORD.—It concerns fifteen hundred solicitors.

Mr. HAMILTON.—Yes, of course, it does affect the solicitors very materially. They have a certain duty to perform in the legal order, and they have now certain privileges and protections which you cannot get past. That may be all right. Personally, I am in favour of the Bill, for I like to see a body of professional men coming to Parliament with an evident intention to put their house in order. With the number of defalcations which have taken place in recent years public confidence in the legal profession has been somewhat shaken, and it is desirable that that confidence should be re-established. It is also necessary that when people entrust their funds with members of the legal profession they should have some measure of protection, otherwise the profession would ultimately suffer and the business would drift into hands where a greater measure of security was obtainable. But the question has been put to me as to whether now that a fund is to be set up out of which defalcations may be met, this may encourage defalcations. It is on the lines of the old story that when a man's house is insured its destruction by fire does not matter so much.

The Hon. Mr. WILFORD.—I do not think that any legislation will make a dishonest man honest.

Mr. HAMILTON.—Perhaps not. I agree that it is very desirable that the public should have this measure of protection. I am glad to hear that no objections to the measure have been received from any one, but I was wondering whether the public was represented on the Statutes Revision Committee.

Mr. BODKIN.—They are all lawyers there.

The Hon. Mr. WILFORD.—No ; the honourable member for Egmont represents the public on that Committee.

Mr. HAMILTON.—But that honourable gentleman has many other duties, and he may not be in a position to give the details of this measure all the consideration they deserve. Some of the legal gentlemen may be able to overcome any criticism he may have to offer. I am not saying that they would do so, because I believe in the principle underlying the Bill. But I would like to take this opportunity of saying that I am inclined to the opinion that the public should have a little more protection against the scale charges of solicitors. I do not know where the public come in there.

Mr. SPEAKER.—I am afraid that the honourable member is going outside the Bill altogether.

Mr. HAMILTON.—I shall conform to the ruling of the Chair. The legal profession has a measure of protection.

The Hon. Mr. WILFORD.—Like doctors.

Mr. HAMILTON.—No, there are hospitals.

The Hon. Mr. WILFORD.—One cannot call a hospital to the house in a case of emergency.

Mr. HAMILTON.—But one can go to the hospital.

The Hon. Mr. WILFORD.—Not always.

Mr. HAMILTON.—Usually.

The Hon. Mr. WILFORD.—The honourable member will admit that we are of use in time of trouble ?

Mr. HAMILTON.—Very handy. We have no complaint against the legal profession, which is an honoured and a useful profession, but while it receives protection it should be recognised that the public also deserves some protection.

Mr. BROADFOOT.—We are not asking for a subsidy.

Mr. HAMILTON.—I appreciate that fact.

Mr. LANGSTONE (Waimarino).—The solicitors in my district are unanimous in their desire to have this provision, although we have been quite free from any defalcations. Clause 11 provides for the payment of a uniform fee, irrespective of the amount of business or the nature of the business done by solicitors. That seems somewhat unfair, because the wealthy solicitor and the struggling solicitor are called upon to pay the same amount, although in the one case the clients may be running little or no risk. Indeed, the solicitor in a small way may not handle any trust funds. In the matter of defalcations the solicitor in a big way of business is just as great an offender as the man doing very little business.

The Hon. Mr. WILFORD.—That is not so.

Mr. LANGSTONE.—I could cite half a dozen instances. There ought to be a sliding scale under which the solicitor with a large business and a big staff should pay a much larger fee than the small man, otherwise the small man will practically be providing the fidelity fund for the benefit of his more successful colleagues.

Captain RUSHWORTH.—The small man prefers a uniform fee.

Mr. LANGSTONE.—No, he does not. The large firms wish it ; they have been asking for the Bill.

The Hon. Mr. WILFORD.—No.

Mr. LANGSTONE.—I think so. The matter has been discussed by the Law Societies, which are controlled by the wealthy solicitors.

The Hon. Mr. WILFORD.—I know that the big firms are the least interested in the Bill. They are helping the others.

Mr. LANGSTONE.—The Minister of Justice may believe that, but no one else does. The only point I want to make—and it is a reasonable one—is that there should be a differentiation in the scale of charges—they should be based on the amount of business done, or, say, the number of employees engaged by the practitioner. I do not see why a young man, struggling at the commencement of his career, should be called upon to pay the same amount as a wealthy firm of solicitors, long established and conducting a lucrative practice. There is no justice in it. The same anomaly applies in the hotel business, where the proprietor of a wayside bush inn has to pay as heavy a license fee—£40—as the proprietor of a large city hotel.

The Hon. Mr. DOWNIE STEWART (Dunedin West).—The point raised by the honourable member for Waimarino was carefully considered by the Statutes Revision Committee, but it was found impracticable to attempt drawing up a sliding scale because the circumstances vary from day to day. The honourable member says it is unfair that a man with a small practice should pay the same as a big city firm, but a moment's reflection will show that assuming some transaction is entrusted to a practitioner in a small way of business, involving a few thousand pounds purchase-money, he, in proportion to his resources, may not be able to make good shortages so easily as the partners in a big and wealthy city firm. The partners in the wealthy firm may, it is quite true, be just as open to misappropriating funds as the smaller man, but it is unlikely that in the event of one of them going wrong the firm as a whole would not make good any deficiency.

The Hon. Mr. WILFORD.—In the case of land-agents, the biggest firm and the smallest each pay the same fee towards a fidelity bond.

The Hon. Mr. DOWNIE STEWART.—Yes, that is so.

Mr. MARTIN.—They should pay according to the risks.

The Hon. Mr. DOWNIE STEWART.—But it is very difficult to define the risks, because they fluctuate—even a country lawyer may have thousands of pounds in his trust account.

Mr. MARTIN.—Some deal with £500,000.

The Hon. Mr. DOWNIE STEWART.—Then the risk is just as great as in the case of the big city firm. However, as I say, the point was considered very carefully, and I do not think it is possible to meet the point suggested by the honourable member for Waimarino. A Bill was introduced last year, but at that time there was a division of opinion among the lawyers—they had not sufficient time to consider it before proceeding with the measure, but this year it was thoroughly considered before it was brought in again. All the Law Societies had an opportunity of considering and expressing an opinion on it, and, in addition, the whole Bill was considered clause by clause by the Statutes Revision Committee. If experience proves that it is open to any criticism it is always possible to amend it. It is experimental legislation, and I think the House will agree that the main object is a wise one, and that it should be given a trial.

Mr. LYSNAR (Gisborne).—I think the House need not be concerned at the suggestion of the honourable member for Waimarino. The matter was carefully considered by the Statutes Revision Committee, and it had the advantage of the presence of Mr. Gray, K.C., who stated that the matter had been gone into thoroughly by the various branches of the Law Society, and they had come to the conclusion that what was proposed in the Bill was the best course to take. As has been pointed out, the responsibility is a self-imposed one on the part of solicitors, and the various branches of the Law Society have agreed to it, so that I do not think the honourable member would be justified in suggesting that the Bill should be altered. The Bill should be accepted as it is put forward. The measure is a wise and prudent one, and I am satisfied that the House will be well advised to accept it, and allow it to become law as early as possible.

Mr. H. E. HOLLAND (Buller).—The experiences of different localities within recent times have furnished proof that some legislation of this kind is very necessary in New Zealand. As far as my district is concerned, the Law Society people have asked that the Bill be supported. I understand that the Bill represents a voluntary effort on the part of the legal fraternity throughout the Dominion. Personally, I am convinced that the overwhelming majority of solicitors in New Zealand are honest and capable men, who are carrying on what is a perfectly legitimate calling, and I do not think that the proportion of defaulters in the legal profession is any greater than that in any other calling. Undoubtedly both the opportunity and the temptation will come to solicitors who find themselves in adverse positions—and sometimes to those who are not in adverse positions—to default. Probably one of the causes that give rise to the need for legislation of this kind is the fact that far too many young men are entering the legal profession. I never study this question without being impressed with the fact that there is too great a tendency for small business men, farmers, and working-men to get their sons into what are regarded as the genteel occupations, and the result is that a number of the professions, including the legal profession, are overcrowded. My own opinion is that for every two lawyers needed throughout New Zealand there are three available at the present time, while quite a number of young men are preparaing to enter the profession. Nobody can blame any young man for that ; but recently there have been heavy defalcations on the part of several young men. Fortunately, those defalcations are few and far between, but the fact that defalcations do take place renders necessary some method of protection for the general public. I would like to suggest that people who want to be perfectly sure about their trust funds might place them with the Public Trustee, and get over this difficulty once and for all.

An Hon. MEMBER.—No.

Mr. H. E. HOLLAND.—I am only expressing my own personal and perfectly unbiased opinion. I saw a joke in a newspaper the other day that is worth repeating. It was to the effect that a couple of footpads were following up a well-to-do gentleman, who suddenly entered a lawyer's office ; whereupon one of the footpads said to the other, " The old blighter has gone

into the lawyer's to get legal advice," and the other replied, "Then the best thing we can do is to wait until the lawyer comes out." I would like to ask the Minister what is the idea of laying it down that the accumulated fund is not to exceed £100,000. Is not a limitation of that kind likely to operate adversely in the long-run? There may be a perfectly good reason for the limitation, and, if so, I would like to hear what it is.

Mr. MASON (Auckland Suburbs).—Surely the honourable gentleman who last spoke must recognise that when the solicitors have £100,000 accumulated the fund is sufficient. I do not know that solicitors will be so anxious to go on paying—that they desire to pile up limitless funds.

Mr. LYSNAR.—But they are to invest the funds.

Mr. MASON.—But this is a fund for a particular purpose.

Mr. H. E. HOLLAND.—Is that the reason for modifying the contributions?

Mr. MASON.—Surely £100,000 is a sufficient guarantee. I rose to say that I sympathise with some of the criticisms offered, but I disagree with some of the remarks as to the impossibility of improving the Bill. I shall vote for the Bill as it stands, but I want to explain my position. I believe that the general principle of the measure is so important that any question as to improving its details should not be raised, because that would jeopardise its passing. I say that very firmly, believing that the details could be improved, and quite sympathising with the representations made in that direction. I say that in defence of my own position, because I do not want it to be thought I have not considered very sympathetically the representations made. I think there would be no special difficulty in giving effect to them; but at the same time I would urge that it would be tragic to raise that question now, as the importance of this legislation quite transcends any question of the injustice, which is not tremendously great, yet which may be due to some of the details not being adjusted in an ideal manner. I say this because, if the question comes up in the form of amendments in another session, I do not want to have it suggested that I, by my silence, countenanced the idea that it is impracticable to improve the Bill. I shall stand for the Bill as it is, merely because its main principle is so important and so urgent that comparatively slight matters should not cause it to be imperilled.

Mr. BARNARD (Napier).—I concur fully with the remarks of my learned friend the honourable member for Auckland Suburbs. In expressing his own point of view he has aptly expressed mine. There is no doubt as to the necessity for a Bill of this kind, and I hope that it will pass. I should like to point out that, although some mention has been made of country solicitors objecting to the measure, the fact remains that no objection has been made except through the honourable member for Raglan. I am satisfied that the great majority of practising solicitors are in agreement with the principles of the Bill. It is important, both from the point of view of the legal profession and of the public, that this Bill should pass, and I would suggest to honourable members that if, after it is passed, it is found to be unpopular in some respects among any considerable number of legal practitioners, an effort will, no doubt, be made to have an amending Bill brought down and any objectionable sections amended. There has been no move of that sort yet. The profession generally is acquainted with the provisions of the Bill, and we may take it, from the silence of practitioners generally, that the Bill receives the general support of the whole profession.

The Hon. Mr. WILFORD (Minister of Justice).—I desire to thank the House for the cordial way in which it has met the introduction of this measure. I shall proceed to deal in the course of a few moments with the objections raised during the course of the discussion, but before I do so I would like to say that so far as the honourable member for Raglan was concerned, he handled a difficult subject well. At the same time I have to point out that the objector he represents, and who had placed his objections in concrete form for presentation to the Committee, is the only objector to the Bill so far as we know out of the fifteen hundred lawyers who are practising in New Zealand. It does not follow, of course, that all the others are right and he is wrong, but while every Council of the Law Society and every District Law Society has agreed on this Bill, and come to the conclusion that it is a necessary measure, we have had that one objection, and the honourable member for Raglan, as a layman, presented the case of the objector well and thoroughly before the Committee, but I am afraid the rest of the fifteen hundred cannot accept his judgment as to the necessity or otherwise for the Bill.

Mr. MARTIN.—Some of the clauses were opposed by the Auckland Law Society.

The Hon. Mr. WILFORD.—In the first instance they were opposed by the Auckland Law Society, but at the annual conference this year the delegate who came down to represent the Auckland District withdrew all his objections, and came in behind the Bill, and to-day we have the extraordinary sight of 1,499 lawyers out of 1,500 agreed on a subject.

Mr. H. E. HOLLAND.—That has never happened in history before.

The Hon. Mr. WILFORD.—I should think not. There is one important provision in the Bill that I never referred to in moving the second reading, but which is of great value to the public. I might explain that to-day every lawyer must have his trust account audited once a year. If he fails to have that done he can be prosecuted, but between one annual audit and another twelve months elapse, and all sorts of irregularities might take place. Under this Bill the local Law Society may at any time order a registered accountant to investigate the trust account of any solicitor practising in New Zealand, and get a report upon the state of his trust account in order to protect any client who may be in doubt as to the solicitor's action. That is quite a new provision and is an advance in the right direction. One honourable member seemed rather apprehensive as to the right of the Council to warn a client where a solicitor was palpably misbehaving himself and going downhill. I admit that is a difficult clause in a way. But honourable members will see that there are ample safeguards when they come to realise that those members who get on to the governing body of the Law Society are men of good reputation and solid character; and, moreover, that a man who is prepared to put in writing complaints against a legal practitioner to his client has got to be very careful before he does so, because the law of libel pertains and he is taking a step which he may have to pay very dearly for indeed, if it is not justified. There has been some talk about big firms and little firms, and I cannot help saying this—although I do not know how one could define "a big firm"—that the big firms of New Zealand have solid reputations for honesty, and these firms have been most earnest in supporting this Bill with the idea of making a fidelity guarantee for all the members of the legal profession. The honourable the leader of the Labour party hit the nail on the head when he said that there are too many men in the legal profession in this country. That is a fact. I was informed recently that there are as many young men now going through the course by which they will become solicitors as there are practising solicitors already in New Zealand. That seems difficult to believe, because there are fifteen hundred practising solicitors in the Dominion. But, if so, it shows the necessity for this Bill, because a young man starting out in life, having only just passed his examinations and opened his office, finds clients come slowly. But his rent has to be paid regularly and it is dear. In fact, his office rent is probably the only thing he finds dearer than his wife; and it comes round with monotonous regularity. His bills for board and lodging and washing have to be met; and, then, perhaps, when he is right "up against it," some client trusts him with £100 or £200 or so, and temptation comes and he is not strong enough to resist it. The defalcations in this country have not been with the big firms, but with young men, who started out brilliantly, perhaps, but have not been able to keep the pace. On behalf of the Government, I desire to thank Mr. Alex Gray, K.C., for the help he gave the Statutes Revision Committee in connection with the clauses of this Bill; and I am sure that the whole of the House and of the Statutes Revision Committee feels that we are indebted to that gentleman.

Bill committed.

IN COMMITTEE.

The amendments made by the Statutes Revision Committee were agreed to.

Bill reported and read a third time.

"In a doubtful case prefer a construction of an Act of Parliament which will make it work to a construction which will make it stick. I am putting this in very simple, plain language, because I know that I am on thorny ground, and I am revealing to you the real keystone of many decisions of great learning in the House of Lords."

—Lord Shaw.

The Formation of a Company.

The Responsibility of the Solicitor.

"The Solicitors' Profession and the New Companies Act, 1929," was the title of a paper read at the English Law Society's Provincial Meeting, recently held at Bournemouth, by Mr. E. Leslie Burgin, LL.D., M.P. The paper dealt in the main with the new provisions introduced in the consolidating Act passed this year by the English Parliament, and in such provisions no doubt the average practitioner in this country is hardly likely to evince a great deal of interest unless and until some real attempt is made to bring our law into line with that of England. Dr. Bergin's paper, however, was more than a mere commentary on the new Act and contained some interesting observations on the responsibility of the solicitor, in his view, in connection with the formation of a company. As to whether or not all Dr. Bergin's suggestions are either practicable or desirable there is room, perhaps, for more than one opinion, but his comments are at all events of sufficient general interest to warrant the reprinting of them below.

"There should be," said Dr. Bergin, "a very real sense of responsibility on the part of a solicitor in the case of any matter transacted by him in which a company is involved or concerned. After all, the formation or constitution of a company is the birth of a new legal entity, a creation, and responsibility would seem to attach almost automatically from such a fact. True, a solicitor can only tender advice, and at the most decline further to assist if his advice is not acted upon: he cannot in any way compel acquiescence. But whilst this is patently obvious, it is equally true that whilst the operation is in a fluid state, strong advice, capably and tactfully given and considered, is an influence of enormous power, and experience tends to show that it is one comparatively rarely disregarded.

"What responsibility, is it suggested, really attaches to the solicitor engaged in the formation of a company? I suggest that due regard should be paid to considerations of this order.

"First, that the average company is inadequately capitalised, that it starts with a self-imposed (or, on my thesis, very often a solicitor-imposed) handicap. A word of correction or even of caution from the solicitor would often avoid this pitfall.

"Secondly, remember that a company is no robot equipped with mind and brain, but much more resembles a convoy or association of ships, with the result that the speed of the convoy is the speed of the slowest vessel, or, phrased differently, the company will have no greater aggregate wisdom than that possessed by the cleverest of its members—in fact, the tendency will be to dilute or water down this efficiency, as is the case in all committees or groups where responsibility and ideas are pooled.

"Thirdly, a company intended to operate in some new and individual manner is worthy of more shaping and design than a somewhat hurried adaptation by red ink pen of the Memorandum and Articles applicable to some wholly different corporation. If we consider the skill, care, and attention lavished upon any addition to the fleet of any well-known shipping company we may feel some twinges of conscience at recollections of the wholly original manner in which certain Memoranda and Articles have been rushed into print, and of how euphemistic a description the entry in the bill "Drawing Memo. and Arts." really is. In my opinion, the time has long since arrived when the modern Memorandum of Association should be completely redrawn. The present-day habit of lopping and tailing a sort of universal provider's catalogue is far from being efficient, and has the definite demerit of being completely unintelligible to a layman and incapable of translation for a foreigner, and of being of wholly unnecessary advantage to those who are printers by trade. It seems quite illogical that to carry on an artificial silk business at Manchester it should still be necessary to get power to erect a floating dock at Borneo.

"Then, fourthly, I am inclined to think the solicitor wields, or should wield, a very great influence in the actual working life of many a big company, both as regards work behind the scenes, for instance, the phrasing of minutes, the keeping of records and the general internal machinery, and also the relationship of the company to the public, this latter feature being of literally enormous importance if the true relationship between the solicitor and the accountancy professions is to be maintained.

We must, in my judgment, as a profession very definitely decline to allow the whole chapter of the relationship of the company to the outside public to be relegated merely to a matter of balance sheet and auditors' certificate. Far more is involved than any valuation of assets, or any interrogation of directors and officers as to such matters as stock, book debts, or any specious phrasing of adroitly-worded certificates, the purpose of which is at least as much to avoid responsibility on the part of the signatory as it is to be a vehicle of information. Whilst I in common with the whole of the profession have no quarrel of any sort with the sister profession of accountancy, I am quite confident that there are limits to the functions which an auditor can properly fulfil and that there remain abiding responsibilities on the part of the solicitor to the company, which our profession will be wise to recognise and wiser still most scrupulously to observe.

"This is no exhaustive nor all inclusive list, but merely some reflections prompted by the opportunity which is afforded to the profession by the coming into force of the new Companies Act."

Court of Appeal.

Constitution of Divisions for 1930.

The first and Second Divisions of the Court of Appeal for 1930, have been instituted by Order-in-Council as follows:—

First Division: Myers, C.J., Herdman, Blair, Smith, and Kennedy, JJ.

Second Division: Myers, C.J., Herdman, Reed, Adams, and Ostler, JJ.

Swearing-in of New K.C.

Comments of Chief Justice on Nature of Patent.

On November 26th at the Wellington Supreme Court Mr. T. M. Wilford was sworn in as a King's Counsel. As there has, so far as we are aware, been no such public ceremony since this journal commenced publication this fact of itself would probably justify an account of the proceedings in these columns; but the occasion was a special one as it was marked by some comments by His Honour the Chief Justice, who was on the Bench, as to the true nature of the patent, and as to the privileges conferred and the obligations imposed by a call within the Bar. His Honour's comments have certainly met with the entire approval of the profession and it is to be hoped that it will be long before they are forgotten.

The ceremony, it may be stated for the benefit of those who are unfamiliar with the practice on such occasions, was commenced with the reading by the Registrar of the letters patent under the hand of the Governor-General. Mr. Wilford then read the declaration required to be taken by a King's Counsel and was then formally called within the Bar by His Honour; there being no Bar in the Courts of this country, this process consisted in the new Silk taking his seat in the front row of the benches provided for counsel.

His Honour the Chief Justice then said: "I had hoped when the appointment was being made, that you would at once commence and continue to exercise the privileges conferred, and assume the obligations imposed, by the possession of the patent. But I recognise that your new appointment as High Commissioner has prevented that for the time being, and I take the opportunity of congratulating you as a member of the profession on your appointment to that high office.

"I used the words just now 'for the time being,' because I hope that at the end of your term as High Commissioner we shall see you back here in your place in this Court, and that you will have many years enjoyment in active practice of the honour that this patent confers upon you. That is what the patent is intended for. It is not intended to be given to a practitioner, however eminent, merely to carry with him into retirement. The patent not only confers a privilege and an honour: it imposes obligations, not only express, but implied—and the implied are greater than the express because they involve the responsibility of leadership of the Bar and of helping, in a way that only leaders can do, the younger men of the profession to maintain in their integrity the great traditions established in England and followed in this country. The express obligations are greater since The Law Practitioners Amendment Act, 1915, because one of them is that the holder of a patent granted since that year shall not practise as a solicitor. It is greatly to be desired in the interests of the profession, and, I believe, of the public, that the patent shall not be allowed to fall into desuetude. I know that it requires a certain amount of courage for a practitioner to give up practice as a solicitor, and restrict himself to practice as a barrister only, but I take the opportunity of expressing the hope that from time to time the leaders for the time being of the Bar will take their courage in both hands and not hesitate to make the necessary application required by the rules governing the granting of the patent."

Form of Patent.

Many practitioners would no doubt be interested to learn precisely what is the form of the letters patent of a King's Counsel appointed in New Zealand. The document used in England reads thus:

> George the Fifth by the Grace of God of Great Britain and Ireland and of the British Dominions beyond the Seas King Defender of the Faith To all to whom these presents shall come Greeting: Know Ye that We of our especial grace have constituted ordained and appointed our trusty and well beloved . . . . . one of our Counsel learned in the Law And we have also given and granted unto him as one of our Counsel aforesaid place precedence and preaudience next after . . . . . in our Courts And we also will and grant to the said . . . . . full power and sufficient authority to perform do and fulfil all and every the things which any other of our Counsel learned in the Law as one of our said Counsel may do and fulfil We will that this our Grant shall not lessen any Office by Us or by Our Ancestors heretofore given or granted In witness whereof we have caused these our Letters to be made Patent Witness Ourself at Westminster the day of in the year of Our Reign.
>
> By the King Himself.

In New Zealand, of course, the letters patent are under the hand of the Governor-General and this fact necessitates some alterations to the concluding portion of the document; but with that exception there would appear to be no justification for any departure in this country from the terms of the letters patent customary in England. If we heard correctly Mr. Wilford's letters patent read by the Registrar they by no means followed the English form. The matter is, of course, not of great importance, and would not affect the validity of the appointment, but nevertheless the traditions of and the customs relating to the profession of the Law, long ago established and long observed in England, should not lightly be departed from here. The refusal of our request to the Under-Secretary for Justice to be allowed to inspect the print in his possession, understood to be, apart from names and date, a copy of the patent used on this occasion, would indicate that the divergence was due to an error in Departmental draftsmanship which it is to be hoped will not be repeated.

Form of Declaration.

The form of oath taken on this occasion followed, it is believed, exactly the form of the oath taken in England, and reads as follows:—

> "I, ... , do declare that well and truly I will serve the King as one of his counsel learned in the Law, and truly counsel the King in His matters, when I shall be called, and duly and truly minister the King's matters and sue the King's process after the course of the law and after my cunning For any matter against the King, where the King is party, I will take no wages nor fee of any man I will duly in convenient time speed such matters as any person shall have to do in the Law against the King as I may lawfully do without long delay, tracting, or tarrying the Party of his lawful process in that that to me belongeth. I will be attendant to the King's matters when I be called thereto."

Bench and Bar.

We regret to record the death of Mr. W. H. S. Moorhouse, M.B.E., aged sixty-nine. The late Mr. Moorhouse was a son of William Sefton Moorhouse, formerly Superintendent of Canterbury, and Mayor of Wellington in 1874. He was born in Christchurch, and was educated at the Wanganui Collegiate School and Wellington College. Articled to his father, he studied law, and was admitted as a barrister and solicitor in 1884. After practising for a time on his own account at Wellington he was joined in partnership by Mr. Ernest Hadfield, the firm being known as Moorhouse and Hadfield. Mr. Moorhouse retired from the firm in 1910. For many years he took a prominent part in the Volunteer movement, ultimately retiring with the rank of lieutenant-colonel. During the Great War Mr. Moorhouse acted as chairman of one of the military appeal boards, and at the conclusion of the war was appointed a member of the Commission to inquire into and make recommendations with respect to the changing of the military administration to a civil administration.

The practices carried on at Invercargill by Messrs. W. A. Stout and J. F. Lillicrap, under the name of Stout and Lillicrap and by Mr. B. Hewat under his own name have been amalgamated and will be carried on by them with Mr. Robert Stout, who has been admitted a partner in the new firm, under the style of Stout, Lillicrap and Hewat.

Chief Baron Pollock.

His Reply to the Garter King-at-Arms.

In the course of a review in the *Law Quarterly* of Lord Hanworth's *Memoir of Chief Baron Pollock* a hitherto unrecorded incident in the life of the learned Chief Baron is published.

"There was an incident in the Chief Baron's life which could not well have found a place in Lord Hanworth's memoir, but which it may be permissible to print here. It is supported by the best authority. When Pollock was appointed Attorney-General he had to acquire armorial bearings, and applied for that purpose to the College of Arms. He thought the fees excessive, and after many colloquies there came a messenger from Garter King-at-Arms with the ultimate terms.

"The Attorney-General's reply was as follows: 'Tell Garter King-at-Arms with my compliments that he may go to the devil *sable* in flames *gules* with a pitchfork *ardent* stuck in his backside proper.'

"It is not known whether Garter King-at-Arms ever had official knowledge of the words used; he might have rejoined that *sable* on *gules* is incorrect. The Attorney-General, true to his Scottish ancestry, procured from Lyon King-at-Arms, presumably for a more moderate fee, the arms which his descendants now bear."

The Late Chief Justice.

Unveiling of Portrait in Wellington Supreme Court.

Portraits in oils of three late members of our Supreme Court Bench—Prendergast, C.J., H. S. Chapman and Richmond, JJ.,—have for some years now been on the walls of the main Court-room of the Supreme Court at Wellington. Hanging alongside that of Prendergast, C.J., a portrait of the late Sir Charles Skerrett, K.C.M.G., presented by the members of his family to the New Zealand Law Society, was unveiled on the 13th inst., in the presence of a large gathering of members of the profession. His Honour the Chief Justice, Mr. Justice Ostler and Mr. Justice Blair were on the Bench.

Mr. A. Gray, K.C., president of the New Zealand Law Society, spoke on behalf of the Bar. Members of the Bar had, he said, met to join him in inviting the Chief Justice to unveil a portrait of his predecessor, the late Sir Charles Skerrett. This ceremony had been made possible by the members of Sir Charles Skerrett's family, who desired that there should be some form of memorial which should always serve as a reminder of him to those with whom he was associated, and to those who came after. Sir Charles Skerrett's family had had the portrait painted, and had presented it to the New Zealand Law Society, who had great pleasure in accepting it, especially since the late Chief Justice had been its president for some years, and had always upheld and maintained its traditions. The portrait had been placed on the wall with the approval of the Chief Justice, and it was fitting that it should be placed there as the Court was the scene of so many of his activities. The artist, Mr. W. A. Bowring, had succeeded in effecting a splendid piece of portrait work, all who had seen it having declared it to be a speaking likeness. The society acknowledged its debt to Miss Skerrett and to her sisters, and her brother for their generous gift.

His Honour the Chief Justice said that it was with great pleasure that the Judges had given approval to the Law Society's request to have the portrait hung in the Court-room which was both the Supreme Court room of the Wellington district, and the Court of Appeal room of New Zealand. It was in that very room that most of, though not all, of Sir Charles Skerrett's triumphs were won. It was therefore singularly appropriate that the portrait should be hung in the room. His Honour and his colleagues desired to join with the Law Society in expressing to Miss Skerrett, her sisters and her brother, their thanks for the generous gift of the portrait. For the purpose of the acceptance of the gift, His Honour apprehended that the Bench might assume that they still belonged to the New Zealand Law Society. His Honour then unveiled the portrait.

"Lawyers have warded off infinitely more litigation than they have caused—and this, not merely by the curative process of healing strife which has already arisen, but much more by the equally difficult preventive process of making arrangements which have avoided litigation in the future."

—Professor E. Jenks.

Modern Methods.

The full importance to the profession of the recent publication of Butterworth's Annotations of New Zealand Statutes is probably not recognised by the majority of practitioners. The old method of annotation was rendered possible only by the general consolidation of statutes in 1908; and though at first glance the method of noting cases and amendments in the volumes of statutes themselves seemed an ideal one, each successive year showed the defects and dangers of the old method. In recent years, indeed, the original idea of quoting amendments in full was tacitly abandoned, mainly on account of the alarming manner in which the older volumes were becoming distended beyond the holding power of their bindings. Apart altogether from this consideration, the danger of the printed slips becoming misplaced or lost through the wear and tear of every-day use was a very real one.

The danger just mentioned is totally eliminated by the new method of annotation, since the annotations of the public and general statutes will be reprinted in full each year, the amendments during the session immediately past being incorporated in each annual volume. In order therefore to ascertain the present position in regard to any point of statute law only one reference to the Annotations will be necessary. To follow the same practice with the case-law annotations would result in the cost of the service being prohibitive. The method adopted by the publishers will, therefore, be to keep the volume of case annotations (Vol. I of the two volumes now published) up-to-date by means of a supplement issued annually. Each supplement will be compiled on the cumulative system; that is to say, the latest supplement will contain notes not only of the previous year's cases, but also of all cases included in previous supplements. The effect will therefore be that every case arising out of statute law will be found either in the original volume or in the latest supplement; and all intervening supplements can be discarded.

Part of the original Vol. II (which deals mainly with the statutes themselves and their amendments) will not be wholly superseded by the annual supplements. Thus, it is not proposed to reprint annually the historical tables of sections, or the tables of Imperial Acts and provincial ordinances, or the alphabetical table of local, personal and private acts. Changes in these tables can be effectively and much more economically dealt with in the annual supplements by means of special sections, which will be on the same cumulative principle as is to be used for the case annotations.

Mr. Nelson Matthews, LL.B., the compiler of the cases volume of the Annotations, has completed, with an accuracy truly remarkable, a task involving exhaustive personal research over so extensive a field that most of us would quail before it; the greatest credit is due to him for his notable achievement.

No doubt the new method of annotation will go through exhaustive tests at the hands of the profession in general. The publishers will, of course, welcome having their attention called to such typographical and other errors as are inevitable in a work of such size; and as these are corrected in the annual supplements, practitioners will tend to rely on the work without question, once they have proved its accuracy and completeness.

The publishers state that the supplementary volume will be issued in January each year, so that each subscriber will have at his service the complete annotations up to the end of the November last past practically as soon as he resumes work for the year. Under the old system, where the personal attention of the annotator to each set of statutes was involved, such prompt service was quite out of the question.

It is also announced that the forthcoming supplement will contain annotations of the 1929 cases including references to all important decisions of the magistrates (up to December) in a fuller form than that hitherto adopted, in that an abbreviated note indicating the nature of each case will be printed. This will, of course, show at a glance whether the case is likely to be in point or not. It is understood that the publishers hope to be able, in course of time, to reprint the present Volume I in *toto*, giving a similar note on each case. Considerations of time alone prevented this course being followed in the first instance. When it is realised that nearly 21,000 references are given in Volume I, it will be understood that the work of preparing that volume would have been greatly increased, and publication correspondingly delayed, if more than the present reference to each case had been attempted.

The recasting of Volume I on the lines indicated is, however, promised to be put in hand forthwith; and when the work is ready the publishers intend to give specially favourable consideration to original subscribers to the service. Meanwhile, the system of quoting the "catchword" will be adopted with regard to every case mentioned in the cumulative annual supplements.

There are various other features of the new method to which attention may profitably be called. For example, Volume I contains a complete alphabetical index of every New Zealand case dealing with statute law; so that any case known by name can be readily traced. This volume also gives references to New Zealand cases under various Imperial, Australian and American Statutes which are here quoted for the first time. In Volume II the regulations in force under various statutes are noted; and where the regulations are numerous, a system of classification has been instituted. Special attention is also called to the Historical Tables in this volume, which make it possible for the first time for a practitioner to consult not only the cases decided since the passing of the statute which he is consulting, but also the cases decided on the corresponding sections of the earlier statutes which have been superseded by the current statute.

The following statistics with regard to the new service have been supplied by the publishers and give some indication of the great amount of detail work involved in the preparation of the first two volumes.

Number of sections of statutes dealt with in the Historical Tables ..	15,075
Number of annotations of Local, Personal and Private Acts	3,716
Number of Acts included in Alphabetical Table of Public and General Acts	4,846
Number of annotations of Public and General Acts (excluding Rules and Regulations)	12,396
Number of references to Rules and Regulations in the annotations of Public and General Acts ..	1,511
Number of references to cases in N.Z.L.R. and G.L.R.	20,837

Summary of Legislation.

The following brief summary of the public legislation of general application passed during last session is published for general information; the classification adopted below is for practical convenience of reference and general indication of subject-matter—many of the Acts might, with propriety, be classified under others or another of the headings adopted. Sessional numbers and dates of coming into force are inserted following the titles of Acts.

The number of public acts (excluding local acts deemed to be public) which passed both Houses is 34, of which one has not yet received the Royal assent. The number of local acts is 19, and of private acts 5. The corresponding figures for last year were 58, 23, and 4. Thirty-nine public bills and three local bills were introduced and not passed.

1. FARMING, INDUSTRIES AND COMMERCE.

Patents, Designs, and Trade-marks Amendment. (No. 14; 1st November, 1929). The Registrar and Deputy Registrar respectively of Patents, etc., have their titles changed to Commissioner and Deputy Commissioner. Divers sections of the principal Act are, say the marginal notes, "amended to conform to corresponding provisions of Imperial Act, 18 Geo. V, c. 3."

Products Export Amendment. (No. 24; 8th November, 1929). Tobacco is inserted in the list of exports which may be subjected to compulsory grading under the principal Act.

Rural Intermediate Credit Amendment. (No. 27; 8th November, 1929). The loan maximum (to members of rural credit associations) is raised from one to two thousand pounds. Wide exemptions are granted from company license fees and from stamp duties. There are various machinery amendments.

2. PROFESSIONS AND TRADES.

Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund). (No. 15; 1st January, 1930). This Act has been already fully treated in our columns.

3. LAND LAWS.

Land Laws Amendment. (No. 8; 1st November, 1929). Part I is a scheme for the settlement of undeveloped Crown lands. It creates a Lands Development Board (the Minister and Under-Secretary of Lands, the Permanent Head of the Department of Agriculture, and a nominee member), with Advisory Committees, (who will probably be local) of a Commissioner of Crown Lands and not more than two others. Unless they are permanent state servants, they all get allowances. In exercising the powers of the Act, the Minister acts on the Development Board's recommendation. These powers include the general improvement of Crown land, and the purchase and sale of live-stock for the lands under development. The Land for Settlements Account finds the money. Local bodies get no "thirds," "fourths," or flax or timber royalties out of such lands. Crown tenants may get advances for various improvements, and purchase of materials and other things "required for the profitable occupation of the land," but not live-stock. Part II is a virtually identical scheme, applicable to land which, instead of being ordinary Crown land, is subject to the Land for Settlements Act. Part III contains miscellaneous amendments. River-bank roads may now be closed under Sec. 12 of the 1924 Act. Part XIII of the principal Act (restricting aggregation) is not to apply to town, village or suburban land; on the other hand, husband's land and wife's land are aggregated for computation under Part XIII. Further revaluations may be made of soldiers' lands already revalued. The Permanent Head of the Department of Agriculture is added to the Dominion Land Purchase Board; two assistant Land Purchase Boards are set up, for the North and South Islands respectively. The "subsidiary roll" under the Land for Settlements Act is abolished from 31st March next, and compensation for lands acquired is to be assessed like that for any other land compulsorily acquired.

Native Land Amendment and Native Land Claims Adjustment. (No. 19; 7th November, 1929). Persons who trespass on Native land and remove timber, flax, kauri-gum or minerals, are liable to £20 fine or 3 months' imprisonment. A Maori Land Board may have such products seized. The Native Land Court may make orders granting timber-tramlines over Native land, subject to payment of rent or compensation. In the Native Land Act equivalent of the Testators' Family Maintenance Law, "Child" is henceforth to include a natural child, and "grandchild" one who is, so to speak, "natural" in either or both degrees. When a minor attains his majority a trustee of the minor may be continued in office by the Court. A lessee with a charge on the land for the value of his improvements is given six months to get the amount fixed by the Court, and a receiver appointed; otherwise, unless an extension of time (up to six months) is granted, his rights lapse. All rights of Natives in land, whether the land be Native land or not, are made subject to the jurisdiction of the Native Land Court, the provision being retrospective to the commencement of the Act of 1909. Every Maori Land Board is to have the powers given by the Public Bodies' Leases Act 1908. Where the Government owes money to Natives a Board shall, and where a private individual does, it may, accept the money and give the debtor a good discharge. The Native Minister is to have, in respect of Native land or land owned by Natives, much the same powers as are given to the Minister of Lands by the Land Laws Amendment Act, 1929, of improving and developing such land; the Native Trustee or a Maori Land Board may be the delegate of such powers; the Native Land Settlement Account finds the money. Advances may be made to Natives from this account. A Maori Land Board may guarantee a Native dairy-farmer, and register against his land a charge for its liability. Maori Land Boards are jointly to create a Guarantee Fund, to accumulate up to £10,000 (or less, if the Native Minister prefers), and to meet losses of the Boards in loans to Natives or in guaranteeing them. Power to the Court to discharge survey liens, and order payment from the landowners' moneys in hand, may perhaps be administered so as to throw the release of these incumbrances upon vendors, instead of, as in general practice hitherto, leaving them to be met by a purchaser from his own money, in addition to the full purchase price, for the sake of clearing his title; but the section does not extend to Crown survey liens. Thirty-five sections follow, dealing with particular blocks, and other matters of local and private legislation.

Rent Restriction Continuance. (No. 4; 31st July, 1929). Part I of the War Legislation Amendment Act 1916, as hitherto amended, is further continued in force until 1st August, 1930.

4. LOCAL GOVERNMENT.

Counties Amendment. (No. 25; 8th November, 1929). Separate rates hereafter made for special works, and special-works rates, may, if the petition for their imposition so requests, be made once for all as annually-recurring rates till the undertaking is completed. Similar rates heretofore imposed may be made annually-recurring by special order, unless a majority of ratepayers affected object. Such rates may be imposed if authorised by a ratepayers' poll, alternatively to the present procedure on ratepayers' petition. Two slight machinery amendments.

Local Authorities Empowering (Aviation Encouragement). (No. 9: 1st November, 1929). A local body may contribute towards the funds of an "approved aviation authority" (meaning a person or body licensed under the Aviation Regulations to use aircraft, and approved by the Minister of Defence) sums equal to its possible unauthorised expenditure for the year, and, with the Local Government Loans Board's approval, greater sums. Borough and County Councils, Harbour Boards, and Town Boards outside a county, may establish aerodromes as a public work, carry on subsidiary businesses, and contribute to the aerodrome of another local body, or may unite in establishing an aerodrome. The City Councils of Auckland, Wellington, Christchurch and Dunedin separately, and the Gisborne Borough and the Cook and Waikohu County Councils jointly, may each borrow £5,000 for aerodrome purposes without consulting their ratepayers.

Local Authorities Empowering (Relief of Unemployment) Extension. (No. 2; 29th June, 1929). Existing borrowing powers (needing consent from the Local Government Loans Board, but none from the ratepayers) are extended until 30th June, 1930.

Town-planning Amendment. (No. 28; 8th November, 1929). The "regional planning schemes" of the principal Act are renamed "extra-urban," and "regional planning schemes" in a new sense of the term are introduced. Localities are to be grouped by natural boundaries and community of interests, and regional planning schemes for conservation and economic development of natural resources are to be introduced, either by the initiative of the local authorities or on the Town-planning Board's recommendation, with compulsory powers on default. The local bodies appoint regional planning committees, who may co-opt as members, experts and representatives of various semi-public organisations. They prepare a preliminary survey and a provisional scheme. Approved regional schemes are to be a guide for local schemes, but may apparently be departed from. The cost of preparing regional schemes is to be apportioned among the local bodies by Order-in-Council, if necessary, and the estimated cost is to be kept within 1-50th d. in the £

of the capital rateable value of the area. Such schemes are to deal with (1) communications and transport facilities, (2) zoning, (3) public utilities, and (4) amenities—each further particularised. The time for completing town-planning schemes is extended by two years. The exclusion of rights to compensation when works are forbidden *ad interim* by the local body is removed. The power of a local body, subject to appeal to the Town-planning Board, to impose interim prohibition of works is re-cast and extended, so that the restriction of such powers found to exist in **James v. Waimairi County Council, (1929) N.Z.L.R. 449,** is now removed.

Land Laws Amendment Act, more fully noted above in Part 3 ("Land Laws"), provides that lands held under temporary license or temporary permit for grazing purposes shall be rated on the basis of a special valuation of the value of the permit, or, for annual-value rating, on the annual rent.

5. REVENUE AND FINANCE.

Appropriation. (No. 33; 9th November, 1929). Contains the usual appropriations from the Public Accounts, validation of unauthorised payments therefrom, and writing-off of sums irrecoverable. Certain payments to individual members of Parliament for special services are authorised. Section 10 directs payment for the current financial year of £100 to every member of the House of Representatives except Ministers.

Customs Amendment. (No. 11; 1st November, 1929). Primage duty (first imposed in 1921) is doubled, rising from one to two per cent. The Customs agreement with South Africa is saved, and there is a two-and-a-half page schedule of exceptions—foodstuffs, groceries, and fertilisers. The Governor-General in Council may in effect repeal the Act at any time after 31st March, 1930.

Finance. (No. 29; 8th November, 1929). New borrowings authorised are: £4,000,000 for Public Works; £1,000,000 for educational purposes; £500,000 for State Forest purposes. Unexercised authorities under a number of loan Acts heretofore passed are cancelled. A number of other Acts, which have authorised the raising of money and its subsequent expenditure for defined purposes without express appropriation, are amended by omitting references to payment without further appropriation, and substituting a requirement of annual Parliamentary appropriation. The House of Representatives thus regains a direct annual control over, and the nation secures an annual review of, certain channels of expenditure where such control and review had in recent years been relegated to Ministers. "Miner's phthisis" for Pensions Act purposes is to include certain allied and resulting diseases. Special stamps (the term "Christmas seal" is not actually used) are authorised, 2d. in denomination and price but 1d. in postal value, the net additional revenue going to the Health Department for disease-prevention and health-promotion. A friendly society may, with Department permission, transfer an actuarial surplus from one benefit fund to another. Certain payments by the Government and payments and borrowings by local and other bodies are validated or authorised. Other detail amendments of administrative statutes not affecting the public as individuals can hardly be noted in a general summary of an Act running to 20 pages.

Imprest Supply. (No. 1; 29th June, 1929).

Imprest Supply (No. 2). (No. 3; 31st July, 1929).

Imprest Supply (No. 3). (No. 5; 31st August, 1929).

Imprest Supply (No. 4). (No. 6; 28th September, 1929).

Land and Income Tax Amendment. (No. 12; 1st November, 1929). "Special" land-tax (at a rate to be imposed by the annual taxing Act, which proves to be a graduated rate) is payable by owners (as at 31st March preceding each tax-year: i.e., to start with, 31st March, 1929, so the Act works retrospectively) of "farm lands" (defined as lands used or "capable" of being used for agricultural or pastoral purposes) of a total unimproved value of more than £14,000. First the ordinary land-tax is apportioned by the Commissioner of Taxes between the taxpayer's farm lands and his other lands; then the special land-tax is assessed as a percentage, rising with the unimproved value, of the ordinary land-tax on the farm lands. Lands owned by or in trust for bodies established exclusively for charitable, educational, religious, or scientific purposes of a public nature and not carried on for private pecuniary profit, are exempt; so are lands used for growing trees, or any purpose that renders impracticable their use as "farm lands." A refund or release may be granted in cases of hardship so found by a Commission set up under the Commissions of Enquiry Act, 1908, for that purpose. Income-tax is to be assessable on the profits of holdings of land used for agricultural or pastoral purposes whose unimproved value is not less than £14,000; on profits from minerals, timber, and flax; and on profits from dealing in livestock and products of land (with apportionment for the farmer-dealer, if he comes below the £14,000 mark). Such income-tax is reduced by the amount of land-tax payable for the same land. The "subsidiary roll" under the Land for Settlement Act being elsewhere repealed, there is a consequential repeal of references thereto in the Land and Income Tax Act, 1923. Various minor modifications of the principal Act are made. In respect of lands that the Public Trustee has bought in as mortgagee, he is to remain assessable as a mortgagee in possession; but this provision does not extend to mortgagees in general.

Land and Income Tax (Annual). (No. 13; 1st November, 1929). Rates of income-tax and ordinary land-tax are the same as last year. Special land-tax is from 1%, rising to 100% of the ordinary land-tax payable for the same (farm) lands.

Land Laws Amendment Act, more fully noted above in Part 3, ("Land Laws"), authorises the borrowing of £5,000,000 for land settlement and land development, in addition to the borrowing authorised by the Land for Settlement Act, 1925.

6. GENERAL ADMINISTRATION.

Cinematograph Films Amendment. (No. 26; 8th November, 1929). The Censor's certificate, when given for a "sound-picture" film, need not be incorporated with the film, but may be notified separately. The advance-booking restrictions of the principal Act are modified.

Marriage Amendment. (No. 10; 7th November, 1929). Validates retrospectively (unless a putative spouse, relying on present invalidity, has already entered into other bonds), and authorises for the future, marriages with one's deceased wife's niece or one's deceased husband's nephew. Niece or nephew may be child of either deceased's brother or deceased's sister.

Native Trustee Amendment. (No. 20; 7th November, 1929). Native Trustee's powers somewhat extended. Machinery amendments. Natives who are beneficiaries may or may not be pleased that trust funds in the Native Trustee's account may now be invested on floating charge or otherwise in respect of any co-operative dairy or other company or other corporation if a majority of shareholders or members are Natives and the Native Minister approves.

New Zealand University Amendment. (No. 30; 8th November, 1929). Restores to the Council of the University the old name of "Senate." The principals of registered private and endowed secondary schools are to elect two members of the Entrance Board. The statutory annual grant of £3,845 from the Consolidated Fund is restored. The financial year of the University is to end on 31st March. Subsidy provisions are slightly extended.

Pacific Cable Sale Authorisation. (No. 17; 7th November, 1929). The Governor-General in Council may concur in the sale of the Pacific Cable undertaking. New Zealand's share of the proceeds is to go into the Consolidated Fund.

Railways Authorisation. (No. 22; 7th November, 1929). Authorises construction of four new lines: (1) 2 miles odd from Lower Hutt Valley railway to Point Howard on Wellington Harbour; (2) 28½ miles, Murchison to Inangahua; (3) 54 miles from Clarence River to Parnassus; and (4) 35 miles from a point on the Gisborne-Ngatapa line to Waikokopu.

Rest-homes. (No. 31; 8th November, 1929). Framed as part of the Destitute Persons Act, 1910. Rest-homes may be established and closed, Crown lands set apart, private lands purchased or leased, superintendents and other public servants appointed, official visitors appointed. Private institutions and those under Hospital Boards may be declared rest-homes; in the latter case this Act will prevail over the Hospitals and Charitable Institutions Act. Persons are admitted on application in person to a Magistrate, or in writing to a Superintendent, who refers the application to a Magistrate, or on the complaint on oath of any reputable person, followed by summons; in each case the ground is that the applicant or defendant is a destitute person, unable by reason of age and infirmity to take proper care of himself. Charges of vagrancy may be suspended during residence in a rest-home. Mental hospital patients whose infirmity arises from age or decay of faculties may be transferred to rest-homes, and re-transferred. Inmates unlawfully absent may be arrested without warrant, and returned. Inmates may be discharged by the Minister, voluntary inmates also by the Superintendent. Every reception order is to fix the term of residence. The Minister may make contracts for reception of persons into private rest-homes. Where any person contracts with the Minister, Superintendent, or Managers for maintenance of a person in a rest-home, the agreement may be registered in the Magistrate's Court and enforced like a maintenance order. Hospital Boards are not relieved of their

(*Continued on p. 384*)

Sir Edward Marshall Hall.

A Fearless Advocate.

Sir Edward Marshall Hall was born in 1858; he died in 1927. In that period, just short of seventy years, he made an outstanding name for himself at the Bar, and had he possessed the necessary qualities of learning and judgment he would have attained the legal eminence which his abilities and character deserved. Without these, he missed the highest success with the permanent memorial which judicial rank can give; the greatest advocacy has alone only a transient effect. Even of Erskine there remains little but the tradition of a marvellous eloquence. In his book "The Life of Sir Edward Marshall Hall" (Victor Gollancz Ltd.) Mr. Marjoribanks has told the story of a career which will live long in the memory of the English Bar.

At one time, indeed, Marshall Hall looked for judicial promotion. In 1917, when he had been knighted, and when Lord Finlay became Lord Chancellor, he hoped to receive the reward to which he considered his long services to the Unionist party entitled him. But politics have, or are supposed to have, ceased to count in such matters, and the first vacancy went to the late Mr. Justice Salter. It was a bitter disappointment, though Salter was an old friend. Long before, Marshall Hall had got him his first brief. "How are you getting on, Clavell," Marshall Hall said, meeting him one day in the Strand. "Oh, very badly, Hall. I don't see how I shall ever get a brief." "Never get a brief," said his sanguine and generous friend. "Come along with me; *I'll* get you a brief." And he did. Again there seemed a chance of promotion when, in 1922, the Recordership of the City of London became vacant by the retirement of Sir Forrest Fulton. "It has always been the ambition of my career," he wrote to each alderman, "to be Recorder of London, and I hope you will help me to attain it." But he withdrew his candidature when he knew that the Common Serjeant, Sir Henry Dickens, wished to stand. In fact, however, Sir Ernest Wild was elected, and no other prospect of judicial rank opened before Marshall Hall.

Parliament was equally barren. In 1900 Marshall Hall, after a campaign of only nineteen days, won Southport for the Unionists, charming everyone "by his lightning repartees, his torrential eloquence, and his versatile accomplishment." "No candidate," said Mr. F. A. Greer, now Lord Justice, who spoke for him, "has ever become more popular than Mr. Marshall Hall in so short a time." And Lord Birkenhead (then F. E. Smith) not yet himself seeking for Parliamentary honours, was there to help as well. But in Parliament he made no mark. His first speech was a failure, and he had not the Disraeli touch so as to compel the House later on to hear him. In 1906 he lost his seat to Mr. J. M. Astbury, K.C., later to exchange the Bar and politics for the Bench, and though Marshall Hall won the East Toxeth division of Liverpool in January, 1910, and increased his majority at the December election in the same year, he never gave himself with any zest to Parliamentary duties, and in 1916 he retired from politics. Thus his career was really confined to advocacy, save for the Recordership of Guildford, which he obtained on leaving the House of Commons.

But his career at the Bar was diversified by strange vicissitudes, and his private life was afflicted by a calamity which might well have crushed him. The story of it is told in the chapter "Tragedy," and we need not reproduce it. His first marriage was on his side a love match, and he did all that was possible to make it a love match on the wife's side as well. But it was useless. "Marriage," he burst out once in his last years, "can be one of the most immoral relationships in the world." There was a separation, and the wife died a year later under an operation performed by a quack doctor, Albert Laermann. "A prosecution," says Mr. Marjoribanks, "followed at the Old Bailey, and Laermann was sent to fifteen years' penal servitude. Thus in the Court which he knew so well, and which was so often to be the scene of his great triumphs, was enacted the aftermath of his own terrible tragedy. No wonder the atmosphere of that grim old building was hateful to him for ever afterwards, till it was pulled down and succeeded by the present edifice."

At the Bar circumstances, though not so tragic, were none the less very unfortunate. Marshall Hall became engaged in disputes with the Judges, and he attracted enmity in the Press. "He had his periods of eclipse, from which a less brave man would probably never have recovered. Twice it seemed as if the day were over, but with indomitable courage he fought through the dark days that seemed to promise failure, and he died in harness at the very height of his powers and reputation." His contests with the Bench were due to his fearless advocacy and to his determination to spare no effort in the cause of his clients. But they probably did not help the clients, and they certainly damaged himself in reputation and pocket. To what was due the enmity which appeared to exist between Lord Justice Mathew and himself can only be guessed. "Mathew," says Mr. Marjoribanks, "was a lawyer of the first rank and the creator of the Commercial Court, withal an exceedingly witty Irishman, with a gift of dry and sarcastic humour which penetrated the chinks in Marshall's armour, and wounded him deeply." There was probably something in Marshall Hall's style which got on Mathew's nerves. Marshall Hall regretted the position, and was anxious for peace. Lockwood volunteered to be the intermediary, but came back saying, "It's no use, Marshall, the Judge says he hates you." This was Marshall Hall's version, but it probably gained in the telling. And there was a "scene" with Mr. Justice Bigham (afterwards Lord Mersey) which, however, ended amicably. "Marshall," says Mr. Marjoribanks, "was always grateful to Lord Mersey for his generosity, and when the latter was confined to his house, as an invalid, used to visit him often and sit with him. 'Marshall,' he once said, 'you come to me like a breath of fresh air.'"

More serious were the animadversions of the Court of Appeal on Marshall Hall's conduct of the Chattell libel case. Miss Chattell, for whom Marshall Hall appeared, got from the jury 2,500*l.* damages against the *Daily Mail*, although only 1,500*l.* was claimed by the writ, and Marshall Hall incurred the enmity of Sir Alfred Harmsworth, afterwards Lord Northcliffe, by an unfortunate reference to his wife. Later an apology was made and accepted, but meanwhile the warfare had been carried to the Court of Appeal, and the comments of that Court, which unfortunately included Lord Justice Mathew, on an unfounded allegation as to the tactics of the paper were such as seriously to damage Marshall Hall professionally. This was in

1902. He had taken silk in 1898. In 1901 he received 4,420 guineas; in 1902 his total receipts were 2,099 guineas, of which the greater part was arrears from the previous year. By August, 1902, he was in serious financial difficulties, and Rufus Isaacs was offering a loan of 500*l.*, which, however, was not accepted. The Northcliffe Press took a particular joy in reporting any failure of his. At this period his life was anything but enviable, so much so that he applied for a Colonial appointment and those most closely associated with him felt the man was broken. However, time will heal most wounds and Marshall Hall had his chance again in 1907 when his brilliant defence of Wood in the Camden Town Murder established him as the greatest criminal advocate the world probably has ever seen. It was about this time Marshall Hall saw the editor of the *Daily Mail* and asked him the cause of their enmity. In his blind enthusiasm he had completely overlooked the statements he made in the libel action years ago. When the editor of the *Daily Mail* told Marshall Hall the personal nature of the insult offered he was shocked and immediately wrote to Lord Northcliffe a free and frank apology in the matter. This resulted in a friendship establishing itself between these two great men and it is on record that afterwards Marshall Hall was briefed on behalf of their Press.

There is not space to describe the famous trials, many of them for murder, in which Sir Edward Marshall Hall was engaged. In Annie Dyer's case he secured acquittal, before Mr. Justice Wills, by getting a favourable accent put on words used by the accused: "How *can* anyone get rid of a baby like this?" He lost, in the defence of Bennett, the Yarmouth murder case, but he himself believed in his client's innocence, and did all he could for a reprieve. The case was memorable for his protest against "trial by the Press." These and other cases in which he was engaged are described in detail by Mr. Marjoribanks. They include the Camden Town murder case, the Seddon case, the "Brides in the Bath" case, and the trial of Harold Greenwood.

In the days of financial stress Marshall Hall had had to sell his collection of silver and antiques, "a monument of his versatile and accurate judgment in such matters." It realised nearly 6,000*l.* But in his later years his old prosperity was more than restored—though at no time were his fees anything like those of counsel of the same eminence in civil practice; the Press had become friendly, and Judges and Bar alike had learned to appreciate and respect the most fearless advocate of the day.

Rules and Regulations.

Defence Act, 1909. Financial Instructions and Allowance Regulations for the New Zealand Military Forces. Amendment No. 31.—Gazette No. 81, 5th December, 1929.

Fisheries Act, 1908. Regulations for Trout-fishing in the Whangarei Acclimatization District.—Gazette No. 79, 21st November, 1929.

Judicature Amendment Act, 1913. Order-in-Council appointing members of the First and Second Divisions of the Court of Appeal.—Gazette No. 79, 21st November, 1929.

Land and Income Tax Act, 1923. Notice to make returns of income. Additional Regulations relating to returns of income.—Gazette No. 79, 21st November, 1929.

Forensic Fables.

THE NERVOUS YOUTH WHO DID HIS BEST IN THE CIRCUMSTANCES.

A Nervous Youth, after Waiting and Watching for Many Months, Received his First County Court Brief. The Brief Conveyed to the Nervous Youth that he was to Appear for the Plaintiff, a Merchant in Whitechapel, who Considered that he was Entitled to Commission on the Sale of a Fish-and-Chips Establishment in the Mile End Road. It Seemed, also, that there was Some Doubt as to whether the Claim was Well-Founded, and that the Utmost Discretion in

Handling the Plaintiff's Case would be Necessary if a Satisfactory Result was to be Secured. The Nervous Youth Repaired to the County Court, Determined to Do or Die. Owing to the Slow Progress of the Bus in which he Performed his Journey, the Nervous Youth Found, on his Arrival, that he had Kept the Court Waiting and that the Judge was Considerably Ruffled. Much Agitated by the Sharpness of the Judge's Comments, the Nervous Youth Rose to his Feet, to Find that he was Afflicted by a Sudden Condition of Aphasia and Loss of Memory. The Nervous Youth has no Distinct Recollection of what Happened Next; but from the Account of the Proceedings Given to Him by Bystanders, the Nervous Youth Understands that in Faltering Tones he Read Aloud to the Jury the First Two Pages of his Brief, and that, when he Came to the Bit which Recommended that he had Better not Call the Plaintiff, as he had Been in Prison More than Once, the Jury had Stopped the Case.

MORAL: *Take a Taxi.*

"The law will probably always be a conservative profession; for it deals with a science which rests upon the traditional and corporate instinct of the community. But the wise conservative will never allow his conservatism to degenerate into blind opposition to all proposals for amendment; for he knows that the alternative to internal reform is, ultimately, reckless and ignorant attack by external forces."

—Professor E. Jenks.

Legal Literature.

Willis's Workmen's Compensation Acts.

Twenty-sixth Edition: By W. A. Willis, C.B.E., LL.B.

(pp. cxvii; 791; lxxxiv: Butterworth & Co. (Publishers) Ltd. and Shaw & Sons Ltd.)

The twenty-sixth edition of *Willis's Workmen's Compensation* is just to hand. The legal profession has now come to regard the publication of new editions of this invaluable text-book as a matter of almost annual necessity. Its origin began in 1897, and such was its popularity that two editions were necessary that year. Three editions were necessary for the next year. Since that date new editions have appeared every year or so, and it is now almost an annual publication. With the great volume of litigation adjudicated upon under the Workers' Compensation Acts new phases of the law and further refinements are appearing nearly every month, and it is of the greatest value to a legal practitioner to be able to find reference to these additional decisions in a compact volume, such as *Willis*, on the subject. It goes without saying that every practitioner who frequently practises in the Court of Arbitration in New Zealand finds *Willis* a necessity. To the practitioner who only infrequently appears in that Court *Willis* provides a ready and accurate reference. This latest edition contains every material decision that has been decided up to May of this year. With the text brought up-to-date and the index enlarged it is no exaggeration to say that *Willis* is one of the indispensable text-books to the New Zealand practitioner.

—C. A. L. Treadwell.

Kelly's Draftsman.

Seventh Edition: By J. A. Reid, assisted by B. G. Burnett-Hall, B.A., and C. J. F. Atkinson, LL.B.

(pp. liii; 734; lxxxv: Butterworth & Co. (Publishers) Ltd.)

Probably there is no volume of concise precedents which has been in more general use in this country than *Kelly's Draftsman* and, although since the English Law of Property Acts of 1925 the New Zealand conveyancer when using forms drafted for use in England has, as to a few matters, now to proceed with extra caution, nevertheless he still finds a reliable collection of English forms not only of great value and utility but indispensable. *Kelly* is a book for immediate reference—a book not so much for the library as for the desk. It contains simple, concise forms expressed with commendable clarity and free from those long, rambling provisions which on occasions seem to add only length to a document. It is surprising how thoroughly the work covers within such a small compass the whole range of conveyancing and general matters. In the table of contents among other headings indicative of forms frequently required, one finds appointments, arbitration, arrangements with creditors, bills of sale, bonds and guarantees, building agreements, change of name, contracts and conditions of sale, conveyances, declarations, disclaimers, easements and boundaries, endorsements, formal parts of instruments, gifts, hire-purchase agreements, leases and tenancy agreements, loan agreements, mortgages, notices, partnership, powers of attorney, receipts, releases, separation deeds, service agreements, settlements, trusts and trustees and wills. For conciseness and lucidity it would indeed be difficult to rival *Kelly*.

New Books and Publications.

The Contract of Sale of Goods. By R. A. Eastwood, LL.D. (Longmans Green). Price 4/6.

Criminal Law and Procedure in a Nutshell. By Marston Garsia. (Sweet & Maxwell Ltd.). Price 5/-.

Principles of Mercantile Law. By J. Charlesworth, LL.D. (Lond.). (Stevens & Sons Ltd.) Price 10/-.

The Earl of Halsbury, Lord High Chancellor (1823-1921). By A. Wilson Fox. (Chapman & Hall). Price 35/-.

Procedure at Meetings. By A. Crew. Eleventh Edition. (Jordan & Son). Price 6/-.

The Sovereignty of the British Dominion. By A. B. Keith. (MacMillan). Price 21/-.

Insurance Law. By S. D. Cole. Second Edition (Effingham Wilson). Price 7/-.

The Companies Act, 1929, with Commentary and Appendices. By F. J. Varley. (Effingham Wilson). Price 18/-.

(*Concluded from p. 381.*)

obligations to provide for aged, infirm, and destitute persons. Various matters may be provided for by regulations.

Shipping and Seamen Amendment. (No. 34; date to be fixed by proclamation). In respect of candidates for third-class engineer's certificate, statutory conditions are replaced by rules to be made by Minister of Marine, with power to exempt from examination.

Summer Time. (No. 7; 11th October, 1929). Replaces by a permanent statute last year's temporary act, putting legal time half an hour ahead of standard time, from the second Sunday in October to the third Sunday in March.

Transport Department. (No. 32; 9th November, 1929). Makes the Transport Department a Department of State, under a Minister of Transport, who is added to the list of Ministers in the Civil List Act, 1920, and with the Commissioner of Transport as its administrative head. This Department will administer the Motor-vehicles Act, 1924, the Motor-omnibus Traffic Act, 1926, the Motor-spirits Taxation Act, 1927, the Motor-vehicles Insurance (Third-party Risks) Act, 1928, and those parts of the Public Works Act, 1928, which relate to heavy traffic and motor-vehicles, references therein to the Minister of Public Works or other Ministers being read as references to the Minister of Transport.

7. LOCAL AND PRIVATE LEGISLATION PASSED AS PUBLIC ACTS.

Hospital and Charitable Institutions Amendment (No. 16; 7th November, 1929).

Local Legislation (No. 21; 7th November, 1929).

Reserves and Other Lands Disposal (No. 18; 7th November, 1929).

Taupiri Drainage and River District (No. 23; 8th November, 1929).

No Acts were passed capable of being classified under the headings, previously adopted in this Summary, of **Criminal Law** or **Consolidating Statutes.**

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"There has never been a moment in our history when it has been more vital for every member of the profession, from the highest to the most humble, to remember that he is in the most real sense a minister of justice, and to co-operate in its most equable and rigorous administration."
—Mr. Justice Finlay.

Vol. V. Tuesday, February 4, 1930 No. 23

Legal Rights of Pedestrians.

Running down actions have been described as forming the staple litigation of to-day: *Grinham v. Davies*, (1929) 2 K.B. 249, per Salter, J., at p. 249. Many of such actions concern collisions between one vehicle and another, but probably the greater number of them are cases where pedestrians, walking along, crossing, or standing upon the highway, have been run-down by some form of fast-moving traffic. Questions, therefore, as to a pedestrian's right of user of the highway, or as to the duties of a pedestrian, are of considerable practical importance to-day, and the recent judgment of Myers, C. J., in *Cooper v. Symes*, 5 N.Z.L.J. 325, (1929) G.L.R. 463, attracts attention.

The case was one in which the appellant while walking along a road at night, the footpath not being fit for use, was knocked down and injured by an overtaking motor car. The learned Chief Justice said:

> "Apart from the fact that in the present case there is an express finding that the footpath was not fit for use, it would appear plain that a pedestrian has a right whether by day or night to walk along a carriageway of a road, and is entitled to the exercise of reasonable care on the part of persons driving vehicles along it."

Although, so far as we have been able to ascertain, there would appear to be no reported case decided since 1839 where this right has been considered by an English Court, the passage quoted is certainly in accordance with what is generally understood to be the law. In *Boss v. Litton*, (1832) 5 C. & P. 407, Denman, C.J., summing up to the jury, said (p. 409) that all persons had a right to walk in the road and were entitled to reasonable care on the part of persons driving carriages along it. And during the course of the argument (p. 408) the learned Judge is reported as having observed, perhaps not altogether consistently with his summing up: "A man has a right to walk in the road if he pleases. It is a way for foot-passengers as well as carriages. But he had better not especially at night when carriages are passing along." In *Cotterill v. Starkey*, (1839) 8 C. & P. 691, which we believe is the only other English decision on the point, Patteson, J., directed the jury (p. 694) as follows: "A foot-passenger has a right to cross a highway, and I believe it was held in one case that a foot-passenger has a right to walk along the carriage way; but without going that length, it is quite clear that a foot-passenger has a right to cross . . ." While these two authorities, by themselves, can hardly be regarded as completely satisfactory modern English text-writers appear to be unanimous in conceding the existence of the right, and in Scotland it has always been held that a pedestrian may properly walk along the highway notwithstanding the presence of a footpath on each side of the street: *Anderson v. Blackwood*, (1886) 13 R. 443; *McKechnie v. Couper*, (1887) 14 R. 345; and see *Craig v. Glasgow Corporation*, (1919) S.C. (H.L.) 1, per Lord Dunedin.

On these authorities there is no room for doubt that the learned Chief Justice's statement of the law in the passage quoted above is correct, and in fact no other conclusion would appear open to a Judge of first instance. Our only doubt is whether the law is really in conformity with modern conditions and particularly with the demands of present-day traffic. If all pedestrians using our city thoroughfares were suddenly to take it into their heads to leave the footpaths and to exercise their legal right of walking along the street itself, transport could obviously not be carried on for a day. Of course, such an eventuality is extremely unlikely to occur, but nevertheless pedestrians—even though they be few in number—walking upon the streets in preference to the footpath may seriously incommode traffic and, always provided that there are footpaths, it seems hardly reasonable that they should be allowed by the law to do so, at all events without their conduct being considered, in the event of the occurrence of an accident, negligence *per se*.

The unreasonableness of this legal right of a pedestrian to walk along the highway is increased by reason of the failure of the law to require him to observe any "rule of the road." It appears that he may walk where whim and fancy take him—on the left, on the right, or in the middle of the street. In England the rule is that foot-passengers walk on the right side of the road: *Beven on Negligence*, 4th Edn., 684; *Roberts and Gibb on Collisions on Land*, 2nd Edn., 93, though we are aware of no English case in which it has been held to be negligence for a pedestrian to walk on the left-hand side. An attempt was made in *Cooper v. Symes* (*cit. sup.*) to argue that the pedestrian was negligent in not keeping to the right; but as to this the learned Chief Justice said, after referring to the English rule as stated in *Beven*:

> "Nor do I find it necessary to attempt to determine the question as to whether the rule referred to operates in New Zealand. I am satisfied that it is a rule which is very little known in this country, and it is desirable in the circumstances to leave the question of its existence open until it expressly arises."

Probably there is a good reason for the English rule that pedestrians should keep to the right and vehicles to the left, for then vehicles overtake pedestrians on that side of the road which the latter leave free, thus giving a pedestrian what he does not have when walking on the left, a sense of security against being run down from behind. The correctness, however, of the observation of Myers, C.J., that the rule is little known in this country cannot be doubted. Here the custom is for foot-passengers as well as vehicles to keep to the left, though as regards pedestrians the practice would not appear to amount to a "rule of the road," or at all events not to such a rule the non-observance of which would be held to constitute negligence.

Pedestrians must, of course, *cross* the highway, and their right to do so is well recognised, but the requirements of modern fast-moving traffic certainly seem to demand, where there are footpaths, some reasonable restriction of the present legal right of the pedestrian to walk *along* a busy thoroughfare on what part of it he pleases.

Supreme Court.

Myers, C.J. December 3, 1929.
Wellington.

WOOLCOTT v. WOOLCOTT.

Divorce—Adultery—Proof—Admissions of Respondent—Uncorroborated Admissions Received with Circumspection, Caution and Distrust But if Clear, Distinct, Unequivocal and *bona fide* and No Ground for Suspecting Collusion Sufficient Proof of Adultery—No Absolute Rule of Law that Such Admissions Not Sufficient Proof of Adultery—No Absolute Rule of Law that Decree Ought Not to be Granted on Uncorroborated Evidence of Petitioner.

Petition for divorce on the ground of respondent's adultery. The petitioner's case was based chiefly on evidence of admissions, both oral and written, made by the respondent to the petitioner. The petitioner also gave corroborative evidence.

O'Regan for petitioner.

MYERS, C.J., said that in **Wilkie v. Wilkie,** (1928) N.Z.L.R. 406, Blair, J., seemed to have expressed the view that admissions by the respondent, whether in writing or oral, were not in any case sufficient proof in themselves of adultery. No authorities were cited in support of that view. His Honour had looked into the authorities and it seemed to His Honour that the view expressed in **Wilkie v. Wilkie** (*cit. sup.*) was not in accordance with them. It was sufficient to refer to **Williams v. Williams and Padfield,** 1 P. & D. 29 (where the material portion of the judgment in **Robinson v. Robinson and Lane,** 1 Sw. & Tr. 393, was set out in a footnote); **Getty v. Getty,** (1907) P. 334; **Le Marchant v. Le Marchant,** 34 L.T. 367; and **Collins v. Collins,** 115 L.T. 936. Those authorities showed that, while the admission unsupported by corroborative proof should be received with the utmost circumspection, caution and distrust, nevertheless if the Court were satisfied that the confession was a clear, distinct and unequivocal admission and was *bona fide,* that there was no doubt of its genuineness and sincerity, and that there was no reasonable ground to suspect collusion, a decree should be granted even if there were no confirmatory proof. His Honour had had the opportunity of discussing the matter with Blair, J., who, he was authorised to say, was himself of opinion that what he said in **Wilkie v. Wilkie** (*cit. sup.*) was too wide and concurred in the view His Honour had just expressed. His Honour understood indeed from Mr. Justice Blair that in a later case, which had not been reported, he corrected the statement made in **Wilkie v. Wilkie** (*cit. sup.*).

In the present case it might be suggested that the written admission was not in terms a confession of adultery, but, looking at the allegation in the petition and at the circumstances of the case as proved by the evidence of the petitioner, His Honour had no doubt that the confession must be regarded and construed as an admission of the misconduct alleged. If that written admission were the only proof adduced, however, without the further evidence given by the petitioner, His Honour would not have been prepared to grant a decree. But the petitioner, as to whose truthfulness His Honour had no doubt, gave evidence of oral statements made by the respondent in terms admitting adultery, and she gave other evidence which afforded corroborative proof.

There was another way of looking at the case. The petitioner had given evidence of having seen the respondent on two occasions at night in company with a woman under unusual circumstances but not such as would, without something more, have sufficiently proved her case. She taxed him with his conduct and he orally admitted misconduct. Later on he made the written admission already referred to. It had been suggested in some cases that the uncorroborated evidence of a petitioner should not be acted upon in a divorce suit and a decree granted upon that evidence alone. No doubt that was a prudent and proper general practice, but there was no absolute rule to that effect. There were cases where on a consideration of all the circumstances, the Court, being satisfied of the truth of the story and that there was no collusion, had granted a decree upon the evidence of the petitioner alone. But in the present case it could not be said that the case depended upon the petitioner's evidence alone. In **Dunstall v. Dunstall and Williamson,** 32 N.Z.L.R. 669, where the circumstances seemed to have been very much like those of the present case, a decree was granted by Stout, C.J. In the present case, as in that, the petitioner's evidence was supported by the statement in writing made by the respondent. From whichever point of view, therefore, the case was looked at, the evidence in His Honour's opinion satisfied the requisite tests, and the petitioner was entitled to a decree.

Decree *nisi.*

Solicitor for petitioner: **P. J. O'Regan,** Wellington.

Adams, J. November 1, 4; 22, 1929.
Christchurch.

IN RE HARMAN: HARMAN v. ANDERSON.

Will—Construction—Acceleration—Bequest of Income to Wife During Life or Widowhood and "Immediately After the Death or Future Marriage of My Wife" Bequest of Capital and Income to Brothers and Sisters Named—Codicil Revoking Bequest of Income to Wife and Directing Payment of an Annuity to Her in Lieu Thereof—Acceleration of Interests of Brothers and Sisters—Words "Immediately After the Death or Future Marriage of my Wife" Construed as Meaning From and After the Determination of the Estate by Death or Otherwise—Interests of Brothers and Sisters Vested in Possession at Testator's Death Subject to Annuity—Doctrine of Acceleration Applying to Both Real and Personal Estate.

Originating summons for the interpretation of the will and codicil of the abovenamed testator. By his will the testator devised and bequeathed to his trustees all his real and personal estate on trust after conversion to pay the annual income to his wife during her life, if she should so long continue his widow, and immediately after the death or future marriage of his wife, as to as well the capital as the income of the trust fund, in trust to divide the same into eleven equal parts or shares and to stand possessed thereof as to two of these shares to pay the income thereof to his sister during her life and from and after her death to divide the capital thereof equally between her two children, but if her children should predecease her then "the capital thereof should fall back into and form part of my residuary estate." He then settled the remaining nine shares upon similar trusts for his brothers and sisters and their children with provision for the wives of his brothers in certain events. In each case the ultimate trust on failure of children was in the same form. The testator then provided that the residue of his estate, including all moneys which under the terms of his will should fall back into residue should be divided equally among those of his brothers and sisters who should be living at the respective dates on which the capital of each or any of the eleven shares hereinbefore mentioned should revert to or fall back into residue. The testator on 20th October, 1924, made a codicil to his will revoking the direction for payment of the annual income to his wife during her life if she should so long continue his widow, and in lieu thereof directing that the trustees should stand possessed of the said trust moneys or the securities whereon the same should be invested upon trust to pay out of the annual income thereof the sum of £200 per annum to his wife during her life if she should so long continue his widow. The questions submitted to the Court were: 1. Whether there was an intestacy as to the income over and above the £200 per annum bequeathed by the codicil to the widow. 2. Whether the surplus income over and above the said £200 per annum should be paid by the trustees during the lifetime and widowhood of the widow to the life tenants of the eleven shares of the residuary estate. 3. Whether the said surplus income should be allowed to accumulate and form part of the capital of the said eleven shares at the death or remarriage of his widow, and a further question as to vesting which at the request of counsel, was not answered by the Court.

Wilding for plaintiff.
Donnelly for widow and others entitled on intestacy.
Sim for brothers and sisters mentioned in will.
K. M. Gresson for children mentioned in will.

ADAMS, J., said that he had come to the conclusion that the case fell clearly within the well settled rule as to acceleration, the earliest reference to which was to be found in **Perkins' Conveyancer,** sec. 567, where it was laid down that "if a man, seized of land devisable in two, devise it to a monk for life, the remainder to a stranger in fee, and the devisor dies, the monk

being alive, in this case the remainder shall take effect presently." In the case in Perkins the devise to a monk was illegal and void under the then existing Statute. The present case was in His Honour's opinion within the authority of **Lainson v. Lainson,** 18 Beav. 1, affirmed on appeal, 5 D.M. & G. 754, and **Eavestaff v. Austin,** 19 Beav. 591, to which His Honour referred at length. The testator in the present case had revoked the whole of the clause in his will containing the provision of the first trust for his wife but had left standing the words following "and immediately after the death or future marriage of my said wife." Those words must be construed as meaning "from and after the determination of her estate by death or otherwise," or on the happening of any event which removed the prior estate or interest of the wife out of the way. See **Jarman on Wills,** 1st Edn., 513; 6th Edn. 719. Construing the words of the will in that sense, there could be no doubt that the equitable estates or interests immediately following the revoked estate or interest given to the wife were accelerated, and therefore that the trusts for the brothers and sisters named vested in possession on the death of the testator, subject only to the annuity of £200 given to the testator's wife by the codicil. That construction gave effect to the clear intention of the testator. It was settled that the doctrine of acceleration applied both to real and personal estate. **Eavestaff v. Austin,** 19 Beav. 591; **Jull v. Jacobs,** 3 Ch. 703, 712; **In re Clark, Clark v. Randall,** 31 Ch. D. 72. See also **In re Willis,** (1917) 1 Ch. 365; **In re Conyngham,** (1921) 1 Ch. 491; **In re Brooke,** (1923) 2 Ch. 265. His Honour accordingly answered questions 1 and 3 in the negative, and question 2 as follows: Subject to the annuity of £200, the income was to be distributed between the life tenants of the eleven shares.

Solicitors for plaintiffs and trustees: **Wilding and Acland,** Christchurch.

Solicitors for widow and others entitled on intestacy: **Raymond, Stringer, Hamilton and Donnelly,** Christchurch.

Solicitors and sisters mentioned in will: **Duncan, Cotterill and Co.,** Christchurch.

Solicitors for children mentioned in will: **T. D. Harman and Son,** Christchurch.

MacGregor, J. November 1; 4, 1929. Wellington.

KIRKLAND v. MERRETT AND LUCAS.

Practice—Costs—Co-defendants—Plaintiff Reasonably Joining Both Defendants and Succeeding Against One But Failing Against Other—Costs Payable by Plaintiff to Successful Defendant Included in Costs Recoverable by Plaintiff from Unsuccessful Defendant—Discretion of Court—Code of Civil Procedure, Rule 555.

Motion for judgment by plaintiff at the conclusion of the trial by a common jury of 12. The plaintiff was a passenger in a motor car driven by the defendant McLucas. A collision took place during the night between that car and another car driven by the defendant Merrett, and the plaintiff was thereby seriously injured. He sued the defendants jointly and severally in one action for damages for his personal injuries. Both defendants defended the action, each alleging, and endeavouring at the trial to prove, that the negligence of the other defendant was the sole cause of the injuries sustained by the plaintiff. At the trial the jury found by their verdict that the defendant Merrett was solely to blame for the accident, and that the defendant McLucas was not to blame. The jury also assessed the amount of damages which they considered the plaintiff to be entitled to recover.

Mazengarb for plaintiff.

O'Leary for defendant Merrett.

Cornish for defendant McLucas.

MacGREGOR, J. (orally), said that judgment must be entered for the plaintiff against the defendant Merrett for the amount of the damages awarded by the jury, with costs according to scale on the amount so awarded. Judgment must also be entered for the defendant McLucas, with costs against the plaintiff according to scale, calculated on the amount claimed in the action. His Honour thought further that the costs so payable by the plaintiff to the successful defendant McLucas should be included in the costs to be recovered by him from the unsuccessful defendant Merrett, as was ordered in the parallel case of **Besterman v. British Motor Co.,** (1914) 3 K.B. 181. It seemed to His Honour that it was quite reasonable for the plaintiff to join both defendants in the same action. Each defendant blamed the other for the collision. In those circumstances His Honour thought it just that he should exercise the wide discretion as to costs given the Court by Rule 555 of the Code in manner indicated.

Judgment accordingly.

Solicitors for plaintiff: **Mazengarb, Hay and Macalister,** Wellington.

Solicitors for defendant Merrett: **Bell, Gully, Mackenzie and O'Leary,** Wellington.

Solicitors for defendant McLucas: **Webb, Richmond, Cornish and Swan,** Wellington.

Ostler, J. November 6; 23, 1929. Napier.

NAPIER BOROUGH v. NAPIER HARBOUR BOARD.

Rates—Exemption—"Harbour Works Under the Control and Management of any Harbour Board"—Reclaimed Land on Which Offices Erected Solely for Use of Board Within Exemption—Quarry Owned by Harbour Board Used to Supply Stone for Harbour Works Not Within Exemption—Rating Act, 1925, S. 2—Harbours Act, 1923, S. 5.

Originating summons under the Declaratory Judgments Act, 1908, to determine whether the plaintiff Corporation was entitled to levy rates on two properties vested in the defendant Board. One of the properties was land which had been reclaimed from the sea by the Board, and on which offices, used solely as offices for the Board had been erected. The other property was land composed of limestone which had been quarried in order to obtain stone for the harbour works of the Board. The Board had removed stone over a considerable portion of the land almost down to sea level, and the land so cleared and levelled had been cut into town lots and leased. There still remained unleased an area of 3¾ acres which was still required for the purpose of obtaining stone for harbour works.

Lusk for plaintiff.

Grant for defendant.

OSTLER, J., said that the plaintiff rightly admitted that the property used solely as offices for the Board was exempt from rates by virtue of Section 2 of the Rating Act, 1925, which exempted "Harbour works under the control and management of any Harbour Board." It had already been decided by the Court of Appeal in **Wellington City Council v. Wellington Harbour Board,** 10 N.Z.L.R. 534, that land reclaimed from the sea by a Harbour Board upon which were erected offices and a bonded store which were used solely in connection with the harbour, was exempt as a harbour work. As to the 3¾ acres used for the purpose of obtaining stone for harbour works, His Honour was of opinion that it was not exempt from rates. "Harbour Works" were not defined in the Rating Act, but they were in the Harbours Act, 1923, Section 5, and that definition applied: **Wellington City Council v. Wellington Harbour Board,** 10 N.Z.L.R. 534; **Timaru Harbour Board v. Timaru Borough Council,** (1926) N.Z.L.R. 210, 216. His Honour read that definition and said that a quarry did not come within it. It was the work which was made from the stone taken from the quarry which was the harbour work, but the land from which the stone was taken for the construction of a harbour work was no more a harbour work than the land on which grew the trees which were cut for the construction of a wharf. It was a mere accident that that land happened to be near the harbour. If that was a harbour work because the stone quarried from it was used for harbour works, then if the quarry were 25 miles inland it would still be a harbour work. A harbour work included the land upon which stood a completed harbour work, but not the land upon which stood the materials used for the construction of a harbour work, even though that land was owned and the materials extracted therefrom by the Harbour Board. The work was under the control and management of the Board, but in His Honour's opinion it was not a harbour work and therefore was not exempt from rates.

Solicitors for plaintiff: **Kennedy, Lusk and Morling,** Napier.

Solicitors for defendant: **Sainsbury, Logan and Williams,** Napier.

Ostler, J. November 1; 21, 1929.
Wellington.

HAMMOND v. DUNCAN.

Practice—New Trial—Judgment Against Weight of Evidence—Appeal Appropriate Remedy Where Trial Before Judge Without Jury—Discovery of Fresh Evidence—Evidence Procurable Before Trial—Alleged Unfair and Improper Practice of One Defendant—Action Claiming that Defendant Indebted to Estate of Deceased—Defendant Failing to Disclose Payment Made to Him by Deceased—Not Shown That Such Payment was to be Set-off Against Deceased's Debt to Defendant—Fact That Plaintiff Not Given Opportunity of Cross-Examination as to Set-off Not Ground for New Trial—New Trial Refused—Administration Action—Costs—Defendant Trustees Refusing to Furnish Proper Information Ordered to Pay Costs of Unsuccessful Plaintiff.

Motion for new trial on the grounds: (1) unfair and improper practice on the part of one of the defendants, Lloyd Hammond; (2) discovery since the trial of material evidence; (3) the judgment being against the weight of evidence. The action was an administration action claiming accounts on the basis of wilful default. The facts are sufficiently set forth in the report of the judgment.

Cohen and Cooke in support of motion.
Treadwell and Hussey to oppose.

OSTLER, J., said that the third ground could be dismissed at once. The trial was not before a Judge and jury but was before a Judge alone. Consequently if the losing party considered that the judgment was against the weight of evidence his remedy was to appeal: see **Klingenstein v. Walters,** 3 N.Z.L.R. (C.A.) 18. With regard to the first ground, the unfair and improper practice alleged was that Lloyd Hammond did not disclose to the Court that on 18th June, 1920, the sum of £2,200 had been paid to him by his father, John Hammond. The plaintiff was the residuary legatee under John Hammond's will. One of his claims in the action was that Lloyd Hammond owed £3,000 to John Hammond's estate. Lloyd Hammond proved that at the time when John Hammond agreed to giving a mortgage over his Rata property to the plaintiff for a sum of £3,000 which was then owed by Lloyd Hammond to the plaintiff, John Hammond owed him approximately £3,000. In proving this Lloyd Hammond produced clear evidence showing that on 30th June, 1921, he paid £1,448 17s. 10d. to the New Zealand Loan and Mercantile Co., at Wanganui. That was the balance owing by John Hammond to that company upon an account, which had been running since 1919. Lloyd Hammond did not produce that account at the trial. After judgment was given the plaintiff procured a copy of the account from the company. As he procured it without any difficulty and as before the trial he knew of its existence (as was shown by the fact that he periodically paid money into it which he owed to John Hammond), it could not be said that the plaintiff could not have procured a copy before the trial if he had exercised due diligence. The account showed that on 18th June, 1920, John Hammond paid £2,200 to Lloyd Hammond. It was claimed that it was an unfair and improper practice on the part of Lloyd Hammond not to disclose this fact to the Court. If the plaintiff had been able to show as a fact that the £2,200 was to be set-off against the £1,448 17s. 10d. then the claim would, His Honour thought, have been a valid one. But he could not show that. All he could say was that it was possible that that was the position. His complaint was that he was deprived of an opportunity of cross-examination of Lloyd Hammond to ascertain whether it was the position. In His Honour's opinion that was not in itself a sufficient ground for ordering a new trial. Lloyd Hammond had sworn an affidavit on the present motion in which he explained the £2,200. His Honour accepted that explanation as true, and said that it was perfectly satisfactory. His Honour had seen and observed Lloyd Hammond while in the witness-box under the stress of a long and severe cross-examination, and he was quite prepared to accept his explanation as true. That being the case His Honour could not hold that he was guilty of any impropriety in not mentioning the receipt of the £2,200.

The second ground upon which a new trial was asked for was the discovery of fresh evidence. Lloyd Hammond swore during the trial that since 1919 he had not kept any books of account recording the transactions between John Hammond and himself. He stated that up till 1918 he was in partnership with John Hammond and he kept books then. A Mr. Ewen had sworn an affidavit to the effect that in 1921 Lloyd Hammond said to him: "I keep my father's books and my own." He further said that Lloyd Hammond showed him a ledger and a day-book and that opening a ledger he showed him how he kept the accounts. Mr. Ewen was unable to say that the accounts he was shown were not the partnership accounts, which Lloyd Hammond admitted that he had kept, and Lloyd Hammond swore that the books he showed to Mr. Ewen were the partnership books. Consequently the discovery of that fresh evidence did not show that Lloyd Hammond's evidence was untrue, and it was not evidence which if produced at the trial would have had any effect on His Honour's judgment. The next evidence relied on as material evidence discovered since the trial was the evidence as shown in the New Zealand Loan and Mercantile Co.'s account of the payment by John Hammond to Lloyd Hammond of the £2,200. His Honour had already pointed out that that evidence could with reasonable diligence have been procured before the trial, but even if it could not have been, the explanation of Lloyd Hammond, which His Honour accepted as true, robbed it of all materiality, and the motion must fail on this ground. These were the only grounds relied on by counsel for plaintiff.

When giving judgment for the defendants His Honour reserved the question whether the Court had jurisdiction to order the defendants to pay the plaintiff's costs, saying that if he had jurisdiction he would so order. His Honour had examined the authorities quoted by Mr. Cooke, particularly **Heugh v. Scard,** 33 L.T. 659; **Jeffreys v. Marshall,** 23 L.T. 548; **Kean v. Burn,** 7 L.T. 666; **In re Skinner,** (1904) 1 Ch. 289; and **Easton v. Lander,** 62 L.J. Ch. 164, and in His Honour's opinion, seeing that the defendants were trustees, and that they failed in their duty of giving proper information to the plaintiff His Honour had jurisdiction to order them to pay the plaintiff's costs of the action. His Honour made an order accordingly.

Solicitor for plaintiff: **L. Cohen,** Wanganui.
Solicitor for defendants: **J. M. Hussey,** Wanganui.

Blair, J. April 12, 15, 16, 19; November 15, 1929.
Auckland.

CHESTNUT v. SEATON.

Misrepresentation — Fraud — Damages — Fraudulent Misrepresentation by Vendor as to Area of Land Subject to Floods—Measure of Damages.

Action claiming £800 damages for alleged false and fraudulent representation on the sale of a farm by the defendants to the plaintiff at the price of £2,900. The fraudulent representations alleged were: (1) that the farm would carry 30 cows for 10 months in the year and that that number had been carried for that time on the property. (2) That the farm was not subject to floods. The Court found that the liability of the land to floods had been misrepresented to the plaintiff to the extent of at least ten acres and that the plaintiff had acted on those representations. The allegation of misrepresentation as to the carrying capacity of the farm was not proved. The question arose as to the proper measure of damages. The case is reported on this point only.

West for plaintiff.
Haigh for defendants.

BLAIR, J., said that upon the question of damages the plaintiff framed his case in the following way. He purchased the farm, stock included, as a going concern at the price (including mortgages) of £2,900. He called a number of witnesses, valuers and farmers, who said that the value of the stock and farm was so much less. Plaintiff himself claimed £800 damages and that claim was made on the basis of misrepresentation as to carrying capacity as well as to liability to flooding. Chestnut himself valued the farm at £1,860 and stock at £240, total £2,100. He had the right to repudiate the purchase as induced by fraud, but had elected to retain the property and sue for damages. The witnesses called for the plaintiff based their valuation of the property on its current market value. They did not base their values upon what Chestnut paid with a proportionate reduction for the depreciation due to the misrepresentation. It seemed to His Honour that that was the proper basis. If A bought 100 tons of potatoes at £10 per ton on the representation that the potatoes were all high grade Oamaru potatoes and the vendor had fraudulently included 20 tons of rubbish, the basis of damages, if the purchaser elected to retain the whole

100 tons, would be to reduce the price the purchaser paid by an allowance for 20 tons of worthless rubbish charged at £10 per ton, in all the sum of £200. It might happen that the purchaser's price for the good potatoes was too high according to the then market price. It seemed to His Honour that he could not, however, in such a case be heard to say that the real market price at the time he bought was only £9 per ton and that his damages instead of being £200 were £280. He could repudiate the contract as induced by fraud, but if he elected to accept the contract and claim damages for fraud then his damages must be limited to the damages due to the fraud itself and not damages due to the fact that he made a bad bargain in relation to that part of the contract the benefit of which he elected to retain. It appeared to His Honour that to do that would in effect be reframing the whole contract between the parties, when the action was one for damages in deceit such deceit being limited to a portion of the contract and severable from the rest of the contract. To apply a test to the present contract, the plaintiff bought stock along with the farm, and amongst the stock was a pedigree Jersey bull. If in the calculations of the price of the farm and stock that bull had been included at say £50 and it subsequently were established that the bull was fraudulently represented as pedigreed whereas in truth and fact it was not: in an action for damages for that misrepresentation would it be competent for the plaintiff to do as he had done in the present case, namely to call witnesses to prove that the whole farm and stock was worth less than he had paid for it and assess his damages on that basis rather than on the difference in value of a pedigree bull as compared with the bull which was the sole item of deceit.

His Honour understood Mr. Haigh for the defendant, on the authority of **Smith v. McKenzie**, 1 N.Z.L.R. C.A. 1, 17, to admit that if any of the plaintiff's allegations of fraud were established then the measure of damages was the difference between what Chestnut paid and the fair value of the property as at September, 1927, the date of purchase. Mr. West claimed that if he established deceit as to one of his allegations then the plaintiff was entitled to succeed for the whole difference in value according to the valuer's estimates, and that the damages were not referable to the particular item of deceit established, nor was the basis of value to be proportionable to the price paid. His Honour after referring to the judgment of Williams, J., at pp. 17 and 19 and to the judgment of the Court of Appeal at p. 33, in **Smith v. McKenzie** (*cit. sup.*) said that in that case there was the greatest difficulty in fixing a specific sum for a representation not having a definable effect on the price. In the present case the area actually subject to flood and the extent of the flooding and its effect on the value of the land could be more or less defined. Mr. West cited **20 Halsbury's Laws of England**, 734, 735, as justifying his contention that in the present case the damages must be arrived at by taking the estimate of market value from what was agreed by Chestnut to be paid. The principle of all cases on damages for misrepresentation was to arrive at the representee's "net loss arising from the representee's alteration of position." His Honour did not see how in the present case one could arrive at a fair basis of damage, confined as it was to the flooding, by endeavouring to reconcile divergent views as to the market value of the farm, and having collated all that data use it to ascertain what Chestnut should have paid had he known that 15 acres of the property were subject to flood. On the facts as His Honour had found, Chestnut's damages were due to 10 of those 15 acres being subject to flood when he bought them in the belief that they were not. The only satisfactory way His Honour could see of arriving at "the increase which the representations actually and truly made to his bidding" was to ascertain from the evidence what difference the flooding made in the prices. The article in **Halsbury** was by Spencer Bower and he at pp. 218 and 219 of his book on **Actionable Misrepresentation** repeated what appeared in **Halsbury**. Spencer Bower at page 218 of his book prefaced the chapter on damages by stating that the governing principle was that the sum to be awarded must represent neither more nor less than the total amount of the moneys irrevocably paid away and the value of any property irrevocably parted with by the representee in consequence of having altered his position in the manner proved. The damages in the present case crystallised themselves round the flooding of 10 acres of land, and His Honour assessed damages on that basis free from differences of opinion by witnesses as to the value of the stock and the farm generally. Assessing damages on that basis the position was that Chestnut must have expected about 5 acres to be flooded, but actually about 15 acres were subject to flood, so that to the extent of 10 acres there was flooding to be compensated for. The evidence satisfied His Honour that the misrepresentation affected an area of about 10 acres covered with water for a period of 24 hours and sometimes longer, about 6 times a year. The witnesses dealing with the flood damage said that flooding left the grass dirty until cleaned by rain and it would take some time for the ground which had been submerged with water to become dry enough not to become unduly "pugged" by stock. Flooding took place normally at a time when there was not an excess of feed on the farm. The best basis that His Honour could adopt for compensation to the plaintiff for that handicap on his farming operations was to endeavour to assess the reduction of value at per acre. A witness for the defendant, Osmond, a valuer, was in cross-examination questioned as to the difference in value if the farm were not subject to floods and he said there would be a difference of £5 per acre. That on the 33 acres would be £165, but he was referring to the whole property being free from flood. If his estimate were accepted a reduction would have to be made for that portion which was known to be subject to flood. Another valuer, Hemphill, said that he made a reduction of £7 per acre for the ten acres subject to flood. That no doubt was low, because the liability to flooding of a greater area than represented affected to some extent the whole farm's working. His Honour did not think he should in favour of the defendant weigh the damages with nice scales. He would fix the damages at £150 which was more than double Hemphill's figure and only a slight reduction on the figure given by Osmond for the whole farm being free from flood. A witness for the plaintiff—Mr. Bell—made a difference of £15 an acre for land subject to flood.

Judgment for plaintiff.

Solicitors for plaintiff: **Jackson, Russell, Tunks and West**, Auckland.

Solicitors for defendant: **Russell, McVeagh, Bagnall and Macky**, Auckland.

Smith, J. September 5, 6; November 26, 1929. Masterton.

OTARAIA DAIRY CO. LTD. v. FLYNN.

Company—Articles—Contract—Restraint of Trade—Co-operative Dairy Company—Articles purporting to Require Shareholder to Supply Milk to Company from One Cow for Every Share Held—Obligation to Supply Determinable Only on Sale of Land, Termination or Sale of Lease, or on Shareholder Satisfying Directors of Inability to Supply and on Shareholder Paying Double the Value of Each Share Held—Obligation Unlimited in Point of Space—Quaere as to Severability of Condition as to Payment of Double Value of Shares—Remaining Conditions Invalid as Unreasonable Restraint of Trade Even if Such Condition Severable—Articles *ultra vires*—Dairy Industry Amendment Act, 1924, S. 2.

Action to recover £415 15s. 7d. the balance alleged to be due on 455 suppliers' shares of £1 each of which the defendant was registered as the holder in the share register of the plaintiff company. In 1923 the defendant and his father decided to engage in dairy-farming and they entered into a deed of partnership for that purpose, dated 1st August, 1923, for a period of five years from that date. The defendant agreed with the plaintiff company (on what date does not appear in the judgment) to supply his milk to it, his obligation under this arrangement being limited to a period of five years. On 16th July, 1923, shortly before the partnership commenced, the directors of the company allotted 30 suppliers' shares to the defendant. At the end of the defendant's first milking season, viz., 8th August, 1924, the directors allotted to him 425 additional shares, being the number of shares in proportion to butter-fat delivered which the directors might allot to him under the then existing provisions of Article 17 of the company's articles of association. The defendant continued to supply the company until 1st June, 1928, or thereabouts, and after that date supplied his milk elsewhere. On 10th October, 1928, the directors resolved that the defendant be required to pay the whole of the balance unpaid on his shares within three months and that the secretary to the company should make a demand on the defendant accordingly. Demand was duly made, the secretary stating that the resolution of the directors was authorised by Article 13 (a). The company sued to recover the amount claimed. The defendant counterclaimed for an order rectifying the register by the removal of his name and issued a third party notice to his father. The third party did not appear. The defendant submitted (1) that he was not a shareholder; (2) that the directors never made any call on the members of the company; (3) that the amount claimed was not claimed under any call made in accordance with the Articles; (4) that the claim was invalid as the defendant was not legally bound to supply milk

to the company; (5) that if any contract to supply existed that contract was in restraint of trade and invalid and unenforceable; (6) that Article 13 (a) constituted a penalty and was unenforceable. His Honour found on the facts that the defendant was a shareholder in the plaintiff company to the extent, in all, of 455 suppliers' shares. His Honour held, on a review of the Articles of the company, that no contract to supply milk on "a share per cow" basis, under Article 13 attached to the 425 shares allotted to the defendant on 8th August, 1924, these shares having been allotted on a butter-fat basis under Article 17. As to the 30 shares first allotted to the defendant His Honour assumed for the purposes of that part of his judgment which is reported below that an obligation to supply milk from one cow for every share allotted attached to them. Article 10 and 13 read as follows:—

"10. An application signed by or on behalf of any applicant for shares in the Company shall, if an allotment of shares be made thereon, be an acceptance of shares within the meaning of these Articles, and every person to whom such allotment shall be made shall be entered upon the register of shareholders and shall be liable for allotments and all calls made upon shares so allotted, and, if the shares be suppliers' shares, shall also be bound to supply milk to the Company from one cow for every such share so allotted."

"13. (a) Should any holder of suppliers' shares cease to supply one cow's milk for every share held by him in the Company, the directors may call upon him immediately upon such default or at any time thereafter to pay the whole of the balance due by him on such shares to the Company within three months, without releasing such shareholder from his liability for breach of contract to supply milk from cows in the proportion aforesaid.

"(b) Any supplier may, with the leave of the Directors, retire from the Company, on good and sufficient reason being shown to the Directors, and the Company may repurchase his shares at the discretion of the Directors.

"(c) A fine of 2s. 6d. per share in respect of which no milk is supplied per month shall be levied at the end of each season, at the discretion of the Directors, against all holders of suppliers' shares who shall fail to supply milk to the Company from cows in the proportion of one cow to each such share so held by such shareholder between the months of August and April, both inclusive.

"(d) It shall be competent for any supplier or his representatives in case of death to determine his contract with the Company on a sale of the land on which his cattle are running, or on the termination or sale of the lease of the land on which his cattle are running, in case he shall hold the same on lease, or on his or their satisfying the Directors that he is or they are otherwise unable to continue to supply, upon payment to the Company of the sum of 40s. per share for every suppliers' share held by such supplier. For the purpose of ascertaining the number of such shares held by such supplier the entry or entries in the share register of the Company shall be *prima facie* evidence thereof for the purposes of this and the preceding subsection of this Article.

"(e) The Directors may, in their absolute discretion, enforce and apply the whole or any subsection or subsections of this Article."

The case is reported only upon the question of the validity of the contract purported to be created by the above-quoted Article.

Biss for plaintiff.

Macassey and Lawson for defendant.

SMITH, J., said it was clear that subclauses (a) and (c) of Article 13 must be construed to refer only to shares allotted on the basis of one share per cow. Subclause (a), under which the directors had acted in bringing the present action, could refer then only to the defendant's 30 suppliers' shares. The most the company could recover would be the balance payable on those shares; and for that purpose His Honour assumed that the word "due" in subclause (a) should be construed as "payable." In His Honour's opinion, however, the company could recover nothing under Article 13 (a). The clause operated only "upon default" under the contract to supply milk which the Articles purported to attach to the shares. It contemplated that the balance payable on the shares might be called up, and that a liability for breach of contract would remain. But if there were no valid and enforceable contract, there could, in His Honour's opinion, be no default, and Article 13 (a) could not apply. His Honour thought that the alleged contract was invalid and unenforceable because it was in unreasonable restraint of trade. That question was to be determined apart from the Dairy Industry Amendment Act, 1924. Section 2 (3) of that Act gave a limited protection and effect to provisions in then existing Articles of Association, purporting to oblige shareholders to supply milk, cream or other dairy produce, to a company. But the last clause of Section 2 (3) could only mean that the force of the Section was limited to a period of 6 months ensuing after the passing of the Act. The object was no doubt to enable dairy companies to put their contracts with suppliers in order, should that be necessary. Section 2 (3) had no force in the action in validating the obligation to supply milk which Articles 10 and 12 purported to impose. The validity of that obligation must, therefore, be determined irrespective of the provisions of the subsection.

The contract which His Honour assumed in favour of the plaintiff company was to supply milk to the company from one cow for every share allotted, on "a share per cow" basis, i.e., from 30 cows. No limit of time or space was fixed by Articles 10 or 12. Article 13 (d) permitted a supplier, or his representatives in case of death, to determine the contract, (1) on a sale of the land on which his cattle were running, or (2) on the termination or sale of the lease of the land on which his cattle were running, if he held his land on lease, or (3) on his or their satisfying the directors that he was or they were otherwise unable to continue to supply. But the power so given was made dependent upon payment to the company of the sum of 40s. per share for every suppliers' share held by such supplier. The shares to which such a contract with such a power of determination was attached, might be transferred subject to the power of the directors under Article 36 (c) to refuse to register any transfer "where the directors in their absolute discretion consider that the registration of such transfer would not be beneficial to the company for any reason or reasons whatsoever." The obligation to supply, though positive in form, had a restrictive effect. The milk from the 30 cows might not be supplied elsewhere. That was sufficient to permit the application of the doctrine of restraint of trade: **Shalfoon v. Cheddar Valley Co-operative Dairy Co. Ltd.,** (1924) N.Z.L.R. 561. Counsel for the plaintiff did not attempt to defend the restraint when backed by a penalty of 40s. per share, i.e., double the value of such share. But he submitted that that part of the restraint was severable from the rest, and when so severed, the rest of the restraint was reasonable. Even if such severance were possible, His Honour did not think that the restraint was reasonable. In His Honour's view, the restraint even then exceeded what was reasonably necessary for the protection of the plaintiff company. "In order to test that question—and no less test can be satisfactory—," said Lord Shaw in **McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.,** (1919) A.C. 548, 588, "it is necessary to assume that these rules may be put in force . . . . to the full extent and rigour of their terms." Upon that basis, the restraint was, in His Honour's opinion, unreasonable both in time and in space. (a) As to time—the power to determine the contract on satisfying the directors that the supplier or his representatives could not continue the supply confided too much discretion to the directors. It was a restriction of the same type as that placed on the transfer of the shares; and a restriction of that type was held to be a seriously invalidating circumstance in **McEllistrim's case,** (*cit. sup.*). Furthermore, the restriction in respect of supply in question was tinctured with an obvious bias. It contemplated that the supplier might be required to supply the plaintiff company with the milk of 30 cows so long as he was physically and financially able to do so. Under that provision, the directors might hold the supplier in thraldom. The only other power in the supplier to determine the contract depended upon the sale of the freehold or leasehold land upon which the supplier's cows were running. It seemed to His Honour unreasonable to say that a supplier who did not wish to sell his farm must continue to supply the plaintiff company with the milk of 30 cows, say for fifty years and more—indeed for his lifetime. He scarcely escaped the plaintiff company when he died, for his representatives were to continue the supply after his death. That must include his personal representatives. If the deceased's shares were specifically bequeathed, and the dairy farm specifically devised, to a son, it would appear to be open to the directors to refuse to register a transfer of the shares, and to hold the representatives to the obligation to supply the milk of 30 cows. If the directors agreed to the transfer of the shares, and the son did not desire to sell his inheritance, he would be tied to the plaintiff company by the contract attached to the shares for, say another fifty years—indeed for his lifetime—to supply the milk of 30 cows; and so *ad infinitum*. In either case, such a restriction, construed according to the rigour of its terms, was not merely unreasonable: it was absurd. (b) As to space—if the supplier did not wish to sell his farm near the factory, but wished to convert it to another type of farming, and if he bought another dairy farm, say in Taranaki, he would still be bound to supply the milk from 30 cows to the

factory near Martinborough. That restriction was, in His Honour's opinion, unreasonable: **Shalfoon v. Cheddar Valley Co-operative Dairy Co. Ltd.** (1924) N.Z.L.R. 561. The price of freedom of contract in respect of the supply of milk from cows to the extent of the shares allotted on "a share per cow" basis might well be the sale of the homestead on which the cattle were running, although the supplier had supplied for many years, and merely wished to change to another type of farming, a course which might then be both more profitable to him and more beneficial to the community. A sale might even be the price of a change from the supply of milk to the supply of cream. Reasonableness was a question of law to be determined in the special circumstances of each case: **Morris v. Saxelby,** (1916) 1 A.C. 688, 707. His Honour must assume that at some time all the shares in the company might be allotted on "a share per cow" basis. In the present case, the evidence for both the plaintiff and the defendant showed that a compulsory supply on the part of each shareholder for a period of from 5 to 10 years would be reasonably sufficient for the protection of the plaintiff company. His Honour did not feel called upon to determine precisely whether 5 years would be a reasonable period, although His Honour could not resist the impression that it was so regarded by some of the directors, at the time the defendant was induced to supply his milk to the company. In His Honour's opinion, then, even if the penalty of 40s. per share were severed from the other conditions of Article 13 (a), the remaining conditions were invalid and unenforceable as being in unreasonable restraint of trade, on the ground that they exceeded what was reasonably necessary for the protection of the plaintiff company, both in time and in space.

His Honour thought, too, that *ex facie*, neither the Memorandum nor the Articles of the plaintiff company purported to impose any obligation on the plaintiff company to take the milk of its suppliers. It might be that on the true construction of the Articles, such a mutual obligation was to be implied. On the other hand, the company might not in fact admit that its suppliers could compel it to take all the milk from their cows to the number of shares allotted on "a share per cow" basis. If there were no mutuality at all, His Honour thought that the restraint would be unreasonable. See **Victorian Onion Association Ltd. v. Finnigan,** (1922) V.L.R. 384.

His Honour concluded that the contract which the Articles purported to attach to the defendant's 30 shares was invalid and unenforceable. There could, therefore, be no default under that contract such as was contemplated by Article 13 (a), and the directors could not call up the balance "due" (or payable) on the shares, and if they did so, their action had no legal effect. The plaintiff must, therefore, fail in respect of its claim for the balance payable on the 30 shares. It was scarcely necessary to say that if, contrary to the view His Honour had adopted, the Articles did purport to attach the same obligation to supply milk to the 425 shares as His Honour had assumed they did to the 30 shares, the calling up of the moneys payable on those shares would be invalid on the same grounds.

The same result was reached by holding that a contract to supply milk could not be attached by Articles of Association to shares in a co-operative dairy company, so that the contract would derive its force solely from the Articles. In that respect, His Honour ought to follow the reasoning of Salmond, J., in **Shalfoon v. Cheddar Valley Co-operative Dairy Co. Ltd.,** (1924) N.Z.L.R. 577, and the decision of Ostler, J., in **Johnson v. Eltham Co-operative Dairy Co. Ltd.,** (1929) G.L.R. 372. If then, the only contract in the present case depended on the force of the Articles, such contract would be *ultra vires*, and no default could arise under it for the purposes of Article 13 (a). The Articles might, of course, be evidence of a contract to be proved *aliunde*. In that regard, the only contract which could be established against the defendant would be a contract to supply for 5 years, and he completed a supply for that period some 4 months before the directors purported to call up the balance of his shares. No default, therefore, arose, and the calling up was invalid. The position, then, was that the defendant was the holder of 455 suppliers' shares in the capital of the company, in respect of which he was under no binding obligation to supply milk to the company. See per Hosking, J., in **Macdonald v. Normanby Co-operative Dairy Co. Ltd.,** (1923) N.Z.L.R. 122, 129. As a shareholder, the defendant retained his shares, with voting rights, and he was entitled to any interest or dividends payable under or pursuant to the Articles of the company, and also to participate in the assets on a winding-up. On the other hand, he was liable for calls when duly made in accordance with the Articles of Association of the company, but the company would not be able to deduct the calls from the advances for milk or from the monthly milk payments (Articles 22 and 23), for there would be none. In the present case, the company had not made any calls on the share capital pursuant to Article 22, and the defendant was not liable for the amount for which he was sued.

Judgment for defendant on claim, and for the plaintiff on the counterclaim.

Solicitors for plaintiff: **Gawith, Biss and Wilson,** Martinborough.

Solicitors for defendant: **Card and Lawson,** Featherston.

Kennedy, J. October 17; November 30, 1929. Dunedin.

IN RE PEARCE: BOVETT v. PEARCE.

Will—Condition—Condition Subsequent in General Restraint of Marriage—Void When Annexed to Gift of Personalty—Void When Annexed to Devise of Realty Where Intention of Testator is to Discourage Marriage and Not Merely to Make Provision Until Marriage—*Semble* Void Even if Intention is Merely to Make Provision Until Marriage and Not to Discourage Marriage.

Originating summons for the interpretation of the will of T. J. Pearce, deceased. By his will the testator provided for a specific devise to his brother, R. G. Pearce and then gave devised and bequeathed to his sister, R. C. T. Pearce certain real estate and all his household furniture, plate, linen, china and personal household effects. The testator gave, devised and bequeathed the residue of his estate after payment thereout of his debts and funeral and testamentary expenses to his said brother R. G. Pearce and his said sister R. C. T. Pearce in equal shares as tenants in common. The will then provided as follows: "I declare that if my said sister Rebecca Catherine Tilrey Pearce shall marry at any time after my death the gifts devises and bequests to her aforesaid shall divest and she shall no longer have any estate or interest in the said property which shall go absolutely to my brother Richard George Pearce." At the date of the death of the testator, R. G. Pearce was married and lived on the premises specifically devised to him, while R. C. T. Pearce was unmarried and had resided for four years with the testator on the land specifically devised to her. She contemplated marriage and the question arising for determination was whether the condition in the will as to her marriage was null and void and of no effect.

Anderson for trustees.
Hay for R. G. Pearce.
Lloyd for R. C. T. Pearce.

KENNEDY, J., said that in his opinion the condition, which purported on her marriage to divest the sister of all interest in the estate of the testator, was void and of no effect and the original gifts stood. R. C. T. Pearce might, accordingly, in His Honour's opinion, marry without forfeiting her interest in the estate of her deceased brother. The gifts to the sister under the will were gifts of personalty, of realty, and of what might be both personalty and realty. The question, then, arose for determination, what was the effect of a condition subsequent in general restraint of marriage annexed respectively to a gift of personalty, to a gift of realty and to a gift of what might be both personalty and realty.

The bequest to the sister of household furniture plate linen china and personal household effects, might first be considered. It could not be said to appear, upon the true construction of the will, that the real intention of the testator was to benefit the brother in whose favour the legacy was limited over, or to provide maintenance for the sister until her marriage, rather than to compel the celibacy of the sister. It had long been clear that a condition in general restraint of marriage annexed to a gift of personal estate was *prima facie* void: **Morley v. Rennoldson,** 2 Ha. 570; **In re Bellamy: Pickard v. Holroyd,** 48 L.T. 212. The gift of personalty to R. C. T. Pearce accordingly would not be liable to be divested by her subsequent marriage.

There was not the same agreement amongst text writers as to the validity of a condition in general restraint of marriage annexed to a gift of realty. In **Jarman on Wills,** 6th Edn., 1539, it was said: "Even in regard to devises of real estate, it seems to be generally admitted (though the point rests rather on principle than decision) that unqualified restrictions on marriage are void, on the grounds of public policy." The contrary opinion was expressed in **Theobald on Wills,** 8th Edn., 703, where

it was said: "A condition subsequent in restraint of marriage, where the estates are for life or in fee, is, it seems, valid as regards realty." It was necessary to consider the authorities in support of and against the proposition that a condition subsequent, in general restraint of marriage, annexed to a gift of realty was void. They would be found conveniently collected in **Law Quarterly Review,** vol. XII, p. 36, and in **Jarman on Wills,** 6th Edn., 1539 and 1540, note (e). His Honour referred to and discussed **Fry v. Porter,** 1 Mod. 300; **Shepp. Touch.** 132; **Harvey V. Aston,** Com. 726; **Low v. Peers,** Wilm. 364; **Keily v. Monck,** 3 Ridg. P.C. 205, 260; **Perrin v. Lyon,** 9 East 170; **Cooke v. Turner,** 15 M. & W.727; and **Egerton v. Brownlow,** 4 H.L. C.1, 125. All those authorities, as the learned editor of **Jarman on Wills,** 6th Edn., said, either expressly stated or impliedly assumed that a condition in general restraint of marriage was illegal by the rules of common law from which it followed that such a condition could not be annexed to a gift of real estate. His Honour also referred to and discussed **Jenner v. Turner,** 16 Ch.D. 188; **Allen v. Jackson,** 1 Ch.D. 399; **Earl of Arundel's Case,** 3 Dyer 342; **Bellairs v. Bellairs,** L.R. 18 Eq. 510; **Jones v. Jones,** 1 Q.B.D. 279; and **In re Hewett: Eldridge v. Iles,** (1918) 1 Ch. 458. The great weight of authority was, in His Honour's opinion, in favour of the view that a condition in general restraint of marriage was void and that such a condition subsequent, annexed to a gift of realty, was void and of no effect and the original gift of realty stood: **Egerton v. Brownlow** (*cit. sup.*). But even if such a condition subsequent were valid if an intention were shown, not of discouraging marriage and of encouraging celibacy, but of making a provision until marriage, then, upon no sound principle of construction, could such an intention be properly inferred from the present will. The Court could infer such an intention only by attributing to the testator motives which were not expressed in his will. The specific devise of land to R. C. T. Pearce, therefore, stood and the provision in the will, that purported to divest it on her marriage, was of no force or effect.

The gift of residue, which might consist of realty or of personalty or of both to R. C. T. Pearce was, it followed, likewise unaffected by her marriage.

Solicitors for plaintiffs: **Brodrick and Parcell,** Cromwell.

Solicitors for Rebecca C. T. Pearce: **Callan and Galloway,** Dunedin.

Solicitors for R. G. Pearce: **W. G. Hay,** Dunedin.

Court of Arbitration.

Frazer, J. November 8, 1929. Wellington.

ARCHIBALD v. UNION STEAMSHIP CO. OF N.Z. LTD.

Workers' Compensation—Death by Accident—Worker Found Crushed Between Two Railway Trucks Close to Place Where Working—Worker Seen at His Work Very Shortly Before Accident—No Evidence as to Reason for Worker's Going Between Trucks—Presumption of Continuance in Course of Employment.

Action by a widow for compensation in respect of the death of her husband, a waterside worker, aged 78, who was killed by accident on the Railway Wharf, Wellington, on August 15th, 1929. The defendant Company's steamship, "Kaimai," was moored on the western side of the wharf, and on the opposite side was another of the defendant company's vessels, the "Komata." Coal was being discharged from each, that from the "Kaimai" being lifted into trucks which were pushed along an overhead trolley-way and tipped into lorries below. On either side of the wharf were metal crane-ways, and a width of 30 feet intervened between the inner ways. Within this intervening space deceased was employed to sweep up the coal droppings from the baskets as they were tipped from the overhead trolley-way, and shovel them into the lorries. On either side and between the crane-ways was a railway truck extending the full length of the wharf, and on each of these was a train of waggons standing. A locomotive, pushing a number of empty waggons, backed down the wharf on the railway track on the eastern side, the object being to connect with the several waggons standing there, between two of which deceased was found fatally injured in close proximity to the locality of his employment. It was admittedly no part of his duty to go between the waggons, but there was evidence that workers frequently went there at night to urinate, and, as the night was windy, it was suggested that he might well have gone between the waggons to pick up his hat or to light his pipe. Apparently there was no person who witnessed the accident.

O'Regan for plaintiff.

Levi and Virtue for defendant.

FRAZER, J. (orally) delivering the judgment of the Court said that the deceased was employed to sweep up coal droppings from the deck of the wharf and shovel them back into lorries as they were being filled. No coal would fall beyond the crane-ways on either side. That did not necessarily conclude the matter, however, because the Court had evidence that the deceased was certainly seen at his work very shortly before the accident. As nobody witnessed the accident, it was impossible to say definitely why he got between the railway trucks, but there was a presumption that he continued in the course of his employment. **Astley v. R. Evans and Co. Ltd.,** (1911) A.C. 674. That case established the rule that where the last acts before the death of a worker were known to be consistent with the continuance of employment, it was for the defendant to prove the cessation thereof. The presumption did not continue in every possible circumstance, however, and hence where a deceased worker, a shackler in a coal-mine at the pit bottom, was found dead under a cage in a part of the mine where he had no right to be, and there was no evidence how he got there, it was held that to be within the Act the deceased must have been acting consistently with the continuance of his employment a reasonable time before his body was discovered: **Prosser v. Graham Navigation Colleries,** 14 B.W.C.C. 42. In the present case there was no doubt that the deceased was seen very shortly before his death in a position consistent with the continuance of his employment. The Court's greatest difficulty was presented by **Highley v. Lancashire and Yorkshire Railway Co.,** (1917) A.C. 352. There, the deceased met his death through being run over while crawling under a train, but in that case the train of waggons was "alive" and the immediate cause of the accident was the sudden starting of the locomotive. Moreover, there were several routes by which the deceased in **Highley's case** might have got to the other side of the train. In the present case the waggons were unconnected with the locomotive when the deceased got between them, and his death was caused by a locomotive unexpectedly pushing a rake of waggons against the standing waggons and putting them in motion. There were several possible explanations for the deceased getting into the position in which he was found, and the presumption that he continued in the course of his employment took the case beyond the region of conjecture. It would be different had he walked a considerable distance to get into the fatal position. The evidence made it clear that he was killed in very close proximity to the locality of his employment.

Judgment for plaintiff for £1,000 compensation.

Solicitor for plaintiff: **P. J. O'Regan,** Wellington.

Solicitor for defendant: **Wilford, Levi and Jackson,** Wellington.

The Prisoner's Name.

A man who turned out, according to police records, to be Eddie Guerin, who escaped from Devil's Island while undergoing a life sentence passed upon him by a French Court, in 1901, appeared at the County of London Sessions recently, to stand trial on a charge of larceny. A brief announcement had appeared in at least one paper that a man of that name had been arrested. When next day he appeared in the dock in the police court he gave his name as Edwin Edwards admitting that that was not his whole name. Counsel for the defence then urged that his full name should not be published because it might prejudice his trial. The learned Chairman of the London Sessions approved, saying: "I think your view is quite right. It would have been unfair if the jury had known his name."

Drunkenness.

Pathological Conditions Akin to Alcoholic Intoxication.

By T. E. Maunsell, S.M.

The vast increase in motor vehicular traffic with its attendant rapid transportation has brought in its train in this country, as well as in all civilised countries throughout the world, a correspondingly great increase in collisions on the highways. An unduly large proportion of these collisions and other motor accidents are alleged, rightly or wrongly, to be due to excessive indulgence in alcoholic liquor. In the great majority of cases the allegation has been held to be proved—at least when the defendant has been apprehended. Many of these accidents result in personal injuries, and not infrequently the member injured is the head. The question under consideration in this article is as to whether there is or is not a grave danger that a person suffering from head injuries may not so act as to be mistakenly believed to be intoxicated.

Some few months ago one F. was prosecuted in Wellington for being in charge of a motor vehicle while in a state of intoxication. The charge was a sequel to F. having run into a stationary motor car with his own car. The evidence of the owner of the stationary car, in so far as it is relevant to this article, was that at about 9.50 p.m. he parked his car on Marine Parade, Island Bay, on the left-hand side of the street, hard against the footpath, opposite a house which he entered. His car's head and tail lights were alight. Hearing a crash he came out and saw that his car had been run into by another car which was making off down the road. He hailed another passing car, the driver of which was Dr. Slater, who, at his request, took him in pursuit of the offender. A short distance down the road they found a stationary car in a damaged condition with no lights. F. was in the front seat without a hat. When he was asked how the accident happened, F. asked what had happened. He then asked how the other owner hit him and suggested that it was about "fifty-fifty." The car owner was of opinion that F. was under the influence of liquor because he could not walk properly, he was staggering and tottery, and was drowsy. Under cross-examination he stated that F. had a mark on his forehead and the glass of the windscreen was cracked. Constable Baker deposed that when he arrived on the scene F. was in the back seat, and when asked to account for the accident had said that the other car ran into him. To further questions F. refused to reply. At the constable's request F. got out of the car and in walking round he supported himself by holding the sides of the car. In stating that he was satisfied that F. was intoxicated the constable mentioned that F.'s breath smelt of spirits, he appeared by the look of his eyes to have had liquor, he was thick of speech, and could not answer questions coherently. The constable then conducted F. to the police station, stating that his gait was "none too steady." At the station, at the request of F., Dr. Slater was called to test him for drunkenness. Dr. Slater arrived at 11 p.m. and proceeded with the tests, the results of which the constable described, and all of which indicated intoxication, but which were more fully set out by Dr. Slater in his evidence. Under cross-examination the constable stated that he noticed some blood on F.'s forehead. Dr. Slater corroborated the evidence of the car-owner and was of opinion at the scene of the accident that F. was intoxicated as he was incoherent and dazed. When called to the police station he explained to F. that he had come to test him for drunkenness, but F. did not appear to understand. Dr. Slater gave the following reasons why he was satisfied that F. was intoxicated: (a) his breath smelt of alcohol; (b) he was morose and stupid in answering questions; (c) he refused at times to answer; (d) he was irritable; (e) his speech was slurred; (f) he had no idea of the time of the accident saying that it happened at 4 p.m two days ago; (g) his face was hot and flushed; (h) his pupils were moderately and equally dilated; (i) he had a full bounding pulse; (j) his eyelids were inflamed; (k) he was uncertain and staggering in his gait. There were signs of minor head injuries, but he was satisfied that F.'s condition was due to over-indulgence in alcohol. If the trouble were due to shock he would expect the pulse to be feeble and rapid; he would be pale with a sighing respiration, and his skin would be cold. Under cross-examination Dr. Slater said that there was a resemblance at times between a drunken man and a man suffering from head injury; but it was unlikely that the symptoms that he had described would all be present in combination in the case of a head injury. A blow on the head would accentuate intoxication. Constable Strawbridge, who went to the scene of the collision, gave evidence that he noticed F. was unsteady on his feet, he smelt of alcohol, and could not account for the accident, stating that the other car ran into him. He was so muddled with drink that it was hopeless to get any explanation from him. He was staggering and certainly intoxicated. This was the evidence for the prosecution, and it appeared to be absolutely overwhelming.

The defendant in evidence explained his movements during the night. He had consumed some alcoholic liquor, but in such moderate quantities that it could not produce even slight intoxication with a man of normal health. While proceeding along Marine Parade he was temporarily blinded by dazzling headlights approaching him. Suddenly he found himself practically on top of the stationary car and promptly pushed both feet. The next thing he could remember was standing in front of his car in acute physical distress. He had some recollection of seeing Constable Baker. He did not completely regain his senses until he was in the Central Police Station. His neck was very stiff, he had a bruise on his head, and his legs were sore. Dr. Luke stated that he attended F. next morning. He had a large contusion on the forehead, the result of a blow, which was severe enough to cause slight concussion. A photograph of the car was produced, which showed distinctly that to the left of the steering wheel the windshield had four converging cracks, and at the point of convergence there was a round blurred mark which might have been caused by the skin of a man's forehead. The Court's attention was called to F.'s natural florid complexion. Counsel for F. mentioned to Dr. Luke all the symptoms detailed by Dr. Slater and asked whether they could be due to mild concussion, and the witness replied with a positive affirmative, except in regard to the smell of the breath. He was of opinion that, in view of the nature of the wound when he saw it, it would not be possible to say whether F.'s condition was due to mild concussion or

intoxication. Dr. Giesen corroborated this evidence with perhaps more emphasis. "There is no means known to the medical profession," he stated, "whereby mild concussion can be distinguished from intoxication." Excessive consumption of alcohol confuses the brain and a blow producing concussion does precisely the same.

The writer has had the opportunity of perusing an article in the *Medical Annual*, of 1928, by a Dr. Prentice, B.A., M.D., D.P.H., which strikingly supports the medical evidence for the defence. Dr. Prentice refers to the fact that the British Medical Association set up a Committee in 1925 to consider and report on the present tests for drunkenness with recommendations as to modification or improvement. The Committee consisted of well-known general practitioners, police surgeons, magistrates, scientists and others. Having arrived at an approved definition of the word "drunk" they concluded that the principles underlying all tests might be arranged in three groups, one of which is whether the state is due wholly or partially to a pathological condition, which causes symptoms similar to those of alcoholic intoxication. The report states that there is no single symptom due to the consumption of alcoholic liquor which may not be a sign of some other pathological condition. It then enumerates fifteen of such conditions, one of which is the result of head injury and another sudden nervous shock. Dr. Priestly says that the report leaves things "as you were." "Of all medico-legal subjects," he says, "testing for drunkenness is one of the most difficult, being beset with well known pitfalls on all sides. The day is long past of the 'chalked line' or the saying of such words as 'truly rural.' These simple tests were in connection with drunkenness in its infancy." After referring to the fact that the Committee's report suggests nothing fresh he says that each case must be judged on its merits after a careful clinical inspection and after taking into consideration all the evidence. In this way the final decision as to drunkenness may become one of the most difficult duties of a medical practitioner. A typical Yankee scheme has been propounded in America, viz., to collect the expired air of suspects in a bag and analyse it as to the amount of alcohol present! "It must be admitted," says Dr. Priestly, "that it is difficult to differentiate between 'drunks' and other pathological conditions. Injustice has been done in the past and will be repeated in the future unless the necessary care is taken by the medical practitioner. The day for extremist views has gone by and each case must be judged on its individual merits." He laconically observes: "The lawyers again come in financially." Referring specially to drunken motorists' tests he says that they are in the nature of a specialism of the main subject. The British Medical Association at its February meeting in 1927 shelved the question, and Dr. Priestly says wisely so "having regard to all available facts and medical (and other expert) opinions and views upon what is a very wide and not yet properly understood subject." His concluding words show that he is strongly against even moderate consumption of alcohol by motorists, though he says it has to be acknowledged that some drivers drive better after they have had a nerve steadier.

Dr. Luke referred, in the case mentioned, to the fact that men arrested for drunkenness have, in fact, been suffering purely from injuries to the skull, from which they have died in the cell. This fact was commented on by Dr. Taylor, the editor of Taylor's *Medical Jurisprudence* over fifty years ago.

The evidence in F's case indicates that a medical practitioner may perhaps fail to estimate the extent of a recent injury to the head, in which case a police constable would be more readily mistaken. It would therefore, appear to be a very desirable precaution with police officers, upon making arrests for drunkenness, to make an examination for head injuries not only upon arrest, but periodically during detention if return to normality appears to be protracted.

In the case before me the charge of being in charge of a motor car while intoxicated was withdrawn upon the defendant pleading guilty to negligent driving.

Annual Legal Conference.

Preliminary Arrangements.

Arrangements are now well in hand for the forthcoming Legal Conference at Auckland, in April. The dates originally chosen were the 23rd, 24th, and 25th of that month. It was pointed out, however, that the last of these dates fell on Anzac Day, and accordingly it has been decided to make an alteration and to hold the Conference on the 22nd, 23rd, and 24th of April.

A strong Executive Committee has been set up, and is receiving excellent support from practitioners in and around Auckland. It is hoped that it will be possible to maintain the high standard which was set by Christchurch and by Wellington.

The joint secretaries are Professor R. M. Algie and Mr. A. M. Goulding, whose address is C/o Messrs. Goulding & Rennie, Campbell's Building, High Street, Auckland. Practitioners throughout the Dominion are invited to communicate with the secretaries upon any question affecting the Conference as to which they would like information or assistance.

District Societies have been notified of the dates for the Conference, and it is hoped that those who desire to lay before the Conference any remits for discussion, will submit them at an early date.

Practitioners who contemplate attending the Conference and who seek information on the important matter of accommodation, would be well advised to communicate with the secretaries at an early date, as the question is a difficult one at Easter-time in Auckland.

"The profession stands nowadays—not as it used to, between the subject and the Bench—but between the subject and the executive and administrative power, which now opposes a danger to individual liberty through a stream of enactments and orders. The profession must stand together if it is to gain victory in this conflict."

—Mr. R. M. Montgomery, K.C.

London Letter.

Temple, London,
6th November, 1929.

My dear N.Z.,

The Judicial Committee of the Privy Council still sits in three Divisions, but all of them seem to be preoccupied now with Indian Appeals. I had to settle an Appellant's Case with Dunne, K.C., last week, who is a recognised leader in the Indian Appeals and who certainly impressed me more than favourably with his ability and industry. In parenthesis, is there higher appreciation a man can earn at the Bar, than a Junior's unqualified praise of a Leader? There is certainly no more formidable critic than is a Junior of a Leader, as I think you must agree. However that may be, Dunne told us that the sitting in three divisions was causing the most appalling inconvenience from a professional point of view, in that it necessitated the returning of countless briefs since cases now so frequently clash. As you well know, the retaining of counsel for Privy Council Appeals is almost always, as it works out, done a year before the hearing, so that we have not only very valuable time to become intimate with the case but also the occasion to get closely in touch with the views at least of our whole "side." Thus, whereas the returning of briefs at the last moment is always an invidious and tiresome affair, since the same knowledge and contact cannot possibly be achieved by the substitute, it is doubly and trebly tiresome in this instance; and apparently it is being so felt. There is the particularly unfortunate, and by no means infrequent, instance where the Far End of the side has made at the outset of matters an occasion to be in England and to get into complete sympathy with the Near End . . . . and the whole of that expedient may now prove fruitless and wasted, inasmuch as the Near End has to be changed at the last! It is an uncommon good wind that blows no one any ill! I know of no other matter of technical importance, of which I am under duty to inform you; let us turn to the gossip and enjoy ourselves in remarkably good company.

First, Merriman has gone to Palestine to appear for the Jewish community at, it is authoritatively rumoured, 20,000 guineas on his brief (paid up before he started) and 100 guineas a day refresher. What dint he will make on the tribunal, I do not know. Sir Walter Shaw, the President of it, I know well. He was Chief Justice in the Straits Settlements during the short period I was there: I was much before him as Public Prosecutor as a start and as Solicitor-General, appearing for a government with which the Courts were then firmly determined to quarrel all day and every day (for reasons I know not, but suspect to have been purely personal), and having much to do with Sir Walter in all branches of law—in Chancery, especially as appearing for the Attorney-General in Charity matters which were well worth the fighting out there, in Common Law, and in Criminal. I do not think I ever moved him an inch from the way he intended to go himself. I do not think any one else ever did. I do not think any one ever will. He is as, shall I say "firm" and avoid the other word, as they are made. My own view is that all participants in the controversy might just as well have saved their money and left the advocate at home . . . . though let me add I know of no man more set upon justice and more permanently aloof from any approach from the unjust than Sir Walter. Ascetic of appearance, he is ascetic of mind in this aspect: if I may speak a paradox, I know of many men with greater judicial qualities but I know of few men more qualified, as men, to be judge in this or any other wide issue. Whether or not his colleagues matter, I am sure I do not know.

Next, to "*The New Despotism.*" If the Press was the final judge in this matter, between our Lord Justice and me, then indeed it would be dirt I should now be eating. The book has been accepted with an unanimity, an outburst, a positive uproar of approval, in every paper you can think of. Hardly a one thinks there is any point in the crabbed criticism that a Lord Chief Justice ought not to be writing books at all, least of all books about other sides of the Permanent Service. A few, here and there, turn aside to comment upon the criticism for a moment, but only to observe that the critic is a worm and possibly not a disinterested worm . . . . I therefore, beg pardon. I thought it was rather a good point. If I have a right of reply and am expected to make use of it, then I have only this to say: it is of course the fact that the Lord Chief Justice is himself a pressman by origin, has never let diminish the happy association between himself and other pressmen, and was, in fact, dining with them, speaking kind things of them just about the time they were called upon to say what they thought about him . . . . And that, no doubt, loses me my case finally; your Lordships find for the Lord Chief Justice and order me to pay all the costs and the papers to be sent to the Director of Public Prosecutions, to see for how long I can be got rid of. Let me say, none the less, that it's a good book and, having read it, I'm thinking of buying a copy.

Last to India, itself. The so-called scandal developed its climax on Sunday last, November 3, and yesterday, November 5, the anti-climax began in the House of Lords, as it now transpires. However, at 1.35 p.m. yesterday it was not yet known what was going to happen, and the enthusiastic, among the Fools, predicted a terrible to-do and most evil consequences as to the unwarrantable insult, made by Lord Irwin's pronouncement and the Government's attitude towards it, to the Simon Commission. Affairs standing in this position, I and mine resorted (in the total number of three) to the Inner Temple Hall, where lunch was still to be had but the lunchers were thinning out. Arrived Sir John Simon himself; he sits down to lunch, at our otherwise empty table, with the three of us and told us much about it. The short and long of his expressions was regret that the fuss should ever be made and aired in Parliament. In a thousand years, he said, it might be that no one would know and no one would be able to find out who or what Baldwin or Benn ever was. But it would be known where India was and is and what its three hundred millions of population matter! I think that expressed the view of all of us. The truth is that Sir John Simon is, on the whole, the greatest man of our day of the Bar, and he is, moreover, the only, wholly, intellectually honest man of any public size in our politics: hence his failure to achieve, as a politician.

We passed on to other matters, at the end of our invaluable half-hour; but his opinion, on a long experience, of the chances of successful appeal to the House of Lords or the Privy Council will most interest

you. It is that the value of the first word is above the price of rubies: as soon as the Court has finished sharpening its pencil, settling into its seat and bending back the stiff cover of its book, then it is more readily capable of capture and indeed amenable to permanent persuasion, without hearing a word from the other side, than any tribunal in the world. I don't know whether I ought to say this; but you must let it go no further, and there is no doubt it will afford far more comfort than discomfiture, for it will encourage, as well as intending appellants, many a learned Judge and not a few learned counsel . . . . And there is this to be remembered for Sir John's summing up: it is founded upon so long and intimate an experience that it cannot reflect upon the personnel of the Ultimate Bench of our world, but must demonstrate a quality inherent in the tribunal, of whatever eminents composed.

Yours ever,

INNER TEMPLAR.

Land Transfer Act.

Amendment to Regulations as to Fees.

The Schedule of fees to the Regulations of 22nd January, 1914, has been amended by Order in Council dated 17th December, 1929, and published in the New Zealand Gazette of 19th December. The effect of the alterations made is as follows:—

CERTIFICATES OF TITLE.

No fee is now payable in respect of the issue of the following certificates of title:

(a) Any certificate of title in lieu of Crown grant issued for the land comprised in a road closed under the provisions of subsection (7) of section 12 of the Land Act, 1924, and disposed of otherwise than by way of sale as Crown land.

(b) Any certificate of title in lieu of Crown grant issued for any land granted under the provisions of section 99 of the Public Works Act, 1928.

(c) Any certificate of title in lieu of Crown grant issued for any land granted or given by the Crown pursuant to any contract for the exchange of land authorised by any Act.

For every leasehold certificate of title where the rent reserved by the lease does not exceed £20 per annum the fee is 10s.

OTHER DOCUMENTS.

For registering discharge of any charge not elsewhere provided for: 5s.

For registering any instrument varying the provisions of a mortgage in any manner provided for in section 104 of the Act: 5s.

"The mutual encroachments of the Legislature, the Judiciary and the Executive are, after all, of less importance at the present time than the encroachments of all three on individual liberty."

—Lord Eustace Percy.

The Last Word.

The Attorney-General's and Solicitor-General's Privilege.

The English Solicitor-General has announced in the House of Commons in reply to a question as to whether the Attorney-General "would take steps to withdraw the exceptional privilege of reply given to the Law Officers of the Crown when conducting a prosecution, so that the Law Officers of the Crown might be placed on an equal footing with other counsel as to the order of precedence in the final address to the jury," that although, since the privilege of reply was a prerogative right of the Crown, the Law Officers were not at liberty to abandon it, yet, as at present advised, neither the Attorney-General nor himself intended to exercise the right. The rule that a Law Officer of the Crown has the right to address the jury last in cases in which any other member of the Bar has no such right applies apparently to civil as well as to criminal cases—*Rowe v. Brenton* (1828, 3 Man. & Ry. 304); but in practice the point only arises in criminal cases of great importance in which either the Attorney-General or the Solicitor-General appears to prosecute. And, of course, it only arises then in cases in which the defence adduces either no evidence or no evidence beyond that of the accused. The right of the Crown to the last word being therefore dependent on the question of whether or not a Law Officer appears in person to prosecute, it has been generally felt that, except in the rarest cases, there was no justification for its continuance. But the privilege has very rarely been waived; the only case of recent years, which we remember, in which it has not been exercised was that of *Rex v. Vaquier* in 1924, when the then Attorney-General, Sir Patrick Hastings, waived it, on the ground that the accused being a foreigner he was anxious that he should feel that he had been treated with every possible fairness (Trial of Vaquier, *Notable British Trials*, p. 149). If, as is the opinion in England, the rule is out of date and opposed to present-day notions as to the way in which justice ought to be administered, a general declaration of intention on the part of the Law Officers would seem to be better than an *ad hoc* waiver whenever the occasion arises; and although the present Law Officers cannot, of course, bind their successors, probably the announcement marks the end of a privilege for which it is difficult to find any logical justification. So far as we in New Zealand are concerned the matter is one of academic rather than of practical importance. Here the Attorney-General now seldom appears at all in Court and the Solicitor-General appears in criminal matters only in the Court of Appeal.

"I believe it still is very difficult to get any criminal conviction against a motorist from a jury."

—Lord Justice Scrutton.

"Litigation, though in the literal sense of the word a dis-ease, is historically an alternative for much worse diseases."

—Professor E. Jenks.

Australian Notes.

By Wilfred Blacket, K.C.

Mr. Justice Harvey, C.J.Eq., New South Wales, in reviewing taxation in *Jones v. Buxton*, an originating summons, spoke some words that are of great import to members of the Bar of that State. Hitherto the unwritten rule followed by senior counsel has been to accept a minimum of thirty guineas in Banco and jury cases, and twenty guineas in other matters with proportionate refreshers. Acting on this practice the briefs for the defendant were marked twenty and thirteen guineas. The taxing officers disallowed the senior's fee and allowed the junior twelve guineas. Mr. Justice Harvey allowed a senior's fee of twelve guineas and laid down the rule that a senior might sometimes in an originating summons be briefed and his fee allowed out of the estate, but that no more than twelve guineas should be allowed. He expressly stated that such a senior might mark whatever fee the client agreed to but that it should be made clear to him that any excess above the fee limited, and even the whole fee in cases where a senior was not allowed, would have to be paid out of his own pocket. The decision undoubtedly will have considerable influence with taxing officers on the common law side and some of our forty-two King's Counsel are much perturbed thereat; but there are many others who would be glad of a reduced standard, for the thirty guinea minimum has been somewhat of a burden to them as the fees on hearing with senior counsel briefed now amount to fifty guineas, plus clerks' fees, but with a junior leading only amount to from twenty to twenty-five, and with a junior alone only to twelve or fifteen. Silk has been very easily obtained in recent years and has not blessed him who takes it in every instance.

Bakewell v. Bakewell, in divorce, at Sydney ran for thirty-three days and then tumbled down in the mud. Mrs. Bakewell, respondent, was formerly Mrs. Bruell: she obtained a decree *nisi* against her husband but the Crown Solicitor, acting as King's Proctor, intervened and the decree was set aside. Then her husband Bruell obtained a divorce on the ground of her adultery with Bakewell. She then married Bakewell and in the suit just concluded he sued for divorce on the grounds of her adultery with her former husband—morality in this case being not a matter of geography but of chronology—and with one Tobias. She had a cross petition for divorce on the grounds of his adultery with four ladies. Fortunately for all the legal gentlemen engaged in the case the petitioner was a man of ample means. Under the order of the Court he paid thirty guineas a day for his wife's costs for thirty-three days, and under the orders of counsel appearing for him paid them a good deal more than that. In giving judgment Owen, J., stated a considerable part of the opinions he had formed of the eight parties to the suit and their witnesses and in dismissing both petitions said: "The evidence has satisfied me that neither Bakewell nor his wife has in the past regarded the marriage tie binding upon them, and their conduct offers no guarantee that in the future either of them will lead decent lives. Bakewell's amours have been frequent and disreputable and there is no suggestion that he is now desirous of remarrying and there are no circumstances established which can be regarded as mitigating his offences; there are no persons connected with Bakewell whose interests have to be taken into consideration except Mrs. Bakewell and I cannot see that she deserves any assistance from the Court." He in accordance with these findings and comments dismissed both petitions. The case is a notable instance of the exercise of the discretion vested in a Judge in divorce and also illustrates the verity of the proverb that "the course of true love never did run smooth."

Long Innes, J., drew public attention to the hardship of the law relating to defendants in defamation arrested for default in payment of damages and costs for which they have become liable. In ordinary cases where a judgment debtor is arrested for his default he obtains release from custody by sequestrating his estate, but if defamation constituted the cause of action he cannot be released, except upon payment of the judgment debt, until he has endured twelve months imprisonment. Sequestration of his estate gives him no relief. His Honour pointed out that if defamation was to be deemed a crime punishable by twelve months imprisonment the poor man alone would suffer the penalty: the rich would escape. This injustice however, if it is one, is quite in line with the ordinary rule in cases where magistrates impose a fine, with an alternative of imprisonment, but His Honour was on much more solid ground in asserting that the law was *damnosa hereditas* from the ancient times when imprisonment for debt was sanctioned by the law. An amending Bill will, it is promised, be presently introduced by the Attorney-General, who upon strong representations as to the necessity for an amendment of the law by Long Innes, J., and by the Chief Justice twelve months ago, has during the intervening period had the matter under his close consideration; but no promise has been made as to another matter of much greater importance, i.e., the imprisonment of husbands for non-payment of arrears of money ordered to be paid for maintenance. These poor wretches have no chance of earning money while imprisoned so that, unless they have great expectations from relatives whose health is such as to be a cause of anxiety to their friends, it is of no benefit whatever to their wives to keep them in prison. Perhaps, however, it may be a cause of satisfaction to the deserted wives. This matter has recently become of much greater consequence than formerly for under the amending Divorce Act arrears of alimony are put, in all respects, on the same footing as arrears of maintenance.

December 20th will see "the rising of the Court"—the Supreme Court of New South Wales—in all its jurisdictions. For some time past there have been five jury Courts constantly sitting but there will be a long list of remands on the common law side and also in divorce. *Bakewell v. Bakewell* is largely responsible for the congestion in divorce, and the lengthy hearing in Admiralty of the Greycliffe–Tahiti case caused some delay in the determination of Common Law matters, but in the Equity, Bankruptcy and Criminal jurisdictions the Courts have been able to keep up with their work. The vacation will mean about eight weeks cessation to barristers, but the solicitors have no share in this holiday, which fact is said by barristers to be vivid illustration of the truth that "there is no rest for the wicked"—a saying that loses its point in the Dominion where you have so few 100% barristers and so many of the fifty-fifty kind. May I suggest that

your exceedingly energetic Law Society might give the question whether it is desirable that there should be "amalgams" their tensest attention. In Victoria some years ago there was a very lengthy inquiry which revealed some of the iniquities of the amalgam system, but that system was allowed to continue with the result that its abuses and the scandalous waste of time and money under the Judicature rules and practice have frightened litigants from the Courts. I have seen in a suburb of Melbourne a double fronted shop where you could get steak and oysters from a Greek at one counter and obtain advice as to rights in Equity from a "barrister and solicitor" at the other. This arrangement may have merit from a quick lunch point of view, but I think that "*timeo Danaos*" is a classic phrase that should have been honoured by observance, although it may well be urged that there is a natural affinity between the rule in *Shelley's case* and oysters. Our Acts and rules relating to legal practitioners and their division of labour work admirably in practice. The effect of those rules is precisely as follows: 1. Barristers, robed when their appearance is before a Judge in Court, cannot do any professional work except upon instructions by a solicitor. Their work is restricted to advocacy, opinions and drafting. (2) Solicitors have the right of audience in all Courts in their own cases, but may not compete with barristers in the acceptance of briefs and when appearing in their own cases may not brief themselves at their client's cost. (3) Barristers and solicitors alike may, by motion as of course, change over as often as they choose after seven years practice in either branch of the profession.

Lord Campbell's "Lives."

Lord Campbell is far and away the liveliest and most readable of the legal biographers; but it would seem that he achieved his effects by means ill-pleasing to those who in all matters will have the Truth and nothing but the Truth, as verified by full references to contemporary written authorities. But whatever may be said of Campbell's "Lives," they are entertaining and full of information. In the "Dictionary of National Biography," his "Lives" are described as "among the most censurable publications in our literature . . . . the tone of laborious research which pervades every volume is delusive . . . . no writer ever owed so much to the labours of others who acknowledged so little." In Gardiner and Mullinger's "Introduction to English History," the following uncomfortable words occur concerning Campbell's masterpiece: "The whole work is wanting in a due sense of the obligations imposed by such a task, is disfigured by unblushing plagiarisms, and, as the writer approaches his own times, by much unscrupulous misrepresentation." And, of course, his contemporaries did not suffer his lively portraits or caricatures without a protest. Lord St. Leonards published a pamphlet, "Misrepresentations in Campbell's Lives of Lyndhurst and Brougham, Corrected by St. Leonards," and Lord Denman, C.J., was so annoyed by what he believed to be references to himself that he was all against resigning the Chief Justiceship in Campbell's favour.

Nowadays, the cautious biographer waits till his man is dead and the sting of the law of libel is withdrawn. Autobiography is rife, but incredible.

—"Outlaw," in the "Law Journal."

Bench and Bar.

In the New Year Honours List, His Honour the Chief Justice becomes a Knight Commander of the Most Distinguished Order of St. Michael and St. George. The Hon. T. K. Sidey, Attorney-General, is made a Knight Bachelor.

His Honour Mr. Justice Reed has returned to New Zealand and has taken up his duties at Wellington. His Honour Mr. Justice MacGregor has been granted twelve months' leave of absence.

Mr. H. H. Cornish, M.A., LL.M., of the firm of Webb, Richmond, Cornish & Swan, Wellington, has been appointed Professor of English and New Zealand Law at Victoria University College. The appointment carries with it the right of private practice as a barrister.

Reference to the late Mr. T. F. Martin, of the firm of Martin and Martin, Wellington, was made last Friday in the Wellington Supreme Court. His Honour the Chief Justice and His Honour Mr. Justice Blair were on the Bench, and there was a large attendance of members of the profession.

Mr. C. G. White, president of the Wellington District Law Society, said that the late Mr. T. F. Martin was called to the English Bar in 1874, and came to New Zealand five years later. Since 1879, he had been in active practice in New Zealand, and 45 years of that time he had practised in Wellington. For 20 years he held the office of City Solicitor, and part of the time he also held the office of Town Clerk. It must have been of inestimable value to the city authorities to have had the counsel and advice of one so learned in the law, and at the same time so sound in judgment, and so just in all his dealings. He was a zealous guardian of the city's interests, and yet he did not over-ride the rights of its citizens. It was well known that he specialised in local government law, and his opinions in this branch of law were sought by his brother practitioners, and by municipal officers throughout the length and breadth of New Zealand. His reputation in this connection was so well recognised that in 1895 he was entrusted with the preparation of a Bill dealing with local government law, and the result of his labours fully justified the confidence reposed in him. Mr. Martin had made valuable contributions to the legal literature of the Dominion, his books on conveyancing and land laws, and local government law being widely read and quoted. He held office on the council of the Wellington District Law Society, and was elected president in 1901. In the practice of his profession Mr. Martin was always courteous and kindly, and his strict integrity and high ideals, earned the respect and esteem of all with whom he was brought into contact. He had left behind him no resentments and no enmity, but a memory of an unassuming manner and a modest personality, a memory of a man who had given long and valuable service in the profession of the law.

His Honour the Chief Justice said that those who had known the late Mr. Martin regarded him as a man

of the highest standing in the legal profession. He was one of the old school of conveyancers and real property lawyers, of whom, unfortunately, so few now remained. He was always held in the highest respect by the clients whom he served, and particularly by the local bodies. Not only was he esteemed by them, but also by all his brothers in the legal profession, who had the most complete confidence in him, and who knew that his word was always his bond.

Mr. P. J. O'Regan, Wellington, has admitted his son, Mr. C. J. O'Regan, LL.B., into partnership. The practice will be carried on under the style of O'Regan and Son.

Messrs. Ongley & O'Donovan, Wellington, have admitted into partnership Mr. C. H. Arndt, LL.B., who has been for some years on their staff. The firm will practise under the style of Ongley, O'Donovan and Arndt.

Mr. T. U. Ronayne, Wellington, has taken into partnership Mr. A. M. Hollings, LL.B., his managing clerk. The practice will be carried on under the name of Ronayne and A. M. Hollings.

Messrs. Fotheringham and Wily, practising at Auckland and Pukekohe, have dissolved partnership. Mr. H. J. Wily will carry on the practice under the same style as formerly.

Mr. W. Heine, M.A., LL.B., has commenced practice at Wellington. He was from 1921 until the firm's dissolution last year, a member of the staff of Messrs. Luke & Kennedy, and subsequently until the end of last year a member of the staff of Messrs. Luke, Cunningham & Clere. Prior to joining Messrs. Luke & Kennedy he was for some years in the employ of Sir Kenneth Douglas.

Mr. C. B. Walker, of the firm of Walker and Evans-Scott, Wellington, has retired from general public practice. The practice will be continued by Mr. C. Evans-Scott in his own name.

Mr. Ll. K. Wilson has left the Common Law staff of Messrs. Chapman, Tripp, Cooke and Watson, and is now practising as a barrister in Wellington.

Mr. R. E. Tripe, LL.B., lately associate to His Honour Mr. Justice Blair, has commenced practice on his own account at Wellington.

Mr. H. R. A. Vialoux, who has been for several years on the staff of Messrs. Earl, Kent, Massey and Northcroft, has commenced practice on his own account at Auckland.

Judicial Appointments.

Politics and the Bench.

The Lord Chancellor, Lord Sankey, in his speech at the Guildhall Banquet, replying to the toast of "The Lord Chancellor and Judges of the Bar," dealt in words with which all will agree with the subject of political appointments to judicial office. "One of the most difficult and delicate duties of a Lord Chancellor," he said, "is that of advising as to judgeships and making justices of the peace. In my view, politics should not enter into these appointments. I say with emphasis that the mere fact that a man belongs to the Labour Party or the Liberal Party or the Conservative Party is not a qualification for the High Court, County Court, or the Magisterial Bench, but I want to say with equal, if not more, emphasis that the mere fact that a man is a member of the Labour Party, Liberal Party, or the Conservative Party is not a disqualification. The truth is that you can find men in all these great parties with character and temperament admirably suited for judicial responsibility, and it is neither statesmanlike nor fair to forget this fact. Violent partisanship does not fit a man for judicial preferment, and is a real hindrance to the cause of justice."

Rules and Regulations.

Copyright Act, 1913.—Extension of provisions of Act to Portuguese Colonies and Spanish Colonies.—Gazette No. 2, 16th January, 1930.

Defence Act, 1909.—Amendments to General Regulations.—Gazette No. 85, 19th December, 1929.

Fruit Control Act, 1924.—Amendment of regulations *re* levy on fruit.—Gazette No. 85, 19th December, 1929.

Government Life Insurance Act, 1908.—Amended regulations *re* premiums.—Gazette No. 85, 19th December, 1929

Government Railways Act, 1926.—Alterations to scale of charges.—Gazette No. 85, 19th December, 1929.

Immigration Restriction Act, 1908.—Immigration Restriction Regulations.—Gazette No. 2, 16th January, 1930.

Land Transfer Act, 1915.—Amendments to regulations of 22nd January, 1915, *re* fees, etc.—Gazette No. 85, 19th December, 1929.

Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Act, 1929.—Rules made by Council of New Zealand Law Society.—Gazette No. 83, 12th December, 1929.

Marriage Act, 1908. Births and Deaths Registration Act, 1924. Abolition of existing marriage districts known as Tirau, Putaruru and Rotorua Districts, and constitution in lieu thereof of four new marriage districts, to be known as the Mamaku, Tirau, Putaruru, and Rotorua Districts.—Gazette No. 81, 5th December, 1929.

Naval Defence Act, 1913.—General regulations.—Gazette No. 82, 6th December, 1929.

Orchard and Garden Diseases Act, 1928.—Regulations relating to registration of orchards.—Gazette No. 83, 12th December, 1929.

Plumbers Registration Act, 1912.—Amended regulations.—Gazette No. 2, 16th January, 1930.

Public Trust Office Act, 1908.—Amended and additional regulations.—Gazette No. 85, 19th December, 1929.

Rural Intermediate Credit Act, 1927.—Additional regulations.—Gazette No. 2, 16th January, 1930.

Samoa Act, 1921.—Samoa Maintenance and Affiliation Amendment Order, 1929; Samoa Public Trust Office Amendment Order, 1929.—Gazette No. 83, 12th December, 1929. Samoa Seditious Organisations Regulations, 1930.—Gazette No. 2, 16th January, 1930.

Rural Intermediate Credit.

Amendments to Act and Regulations.

The following article dealing with the operations of the Rural Intermediate Credit Board and with the amending Act and amending regulations of last year has been supplied to this Journal by the Commissioner of Rural Intermediate Credit (Mr. J. W. Macdonald, C.M.G.) :—

"Under the provisions of the Rural Intermediate Credit Act of 1927, which established a system for granting short-term loans on mainly chattels securities being mortgages on live and dead stock, implements, crops and produce with, in suitable cases, collateral security in the form of mortgages over land, personal guarantees and the like, the maximum amount of loan which could be obtained by any farmer was fixed at £1,000, and the original idea was that loans granted should be liquidated by equal payments over a period of five years from the granting of the loan. It was found in practice that this limit, while adequate for the requirements of a dairy farmer in regard to the classes of securities which may be taken by the Rural Intermediate Credit Board, was not sufficient for the average sheep-farmer, grain-grower or mixed farmer. It was demonstrated to the Board that there was a substantial demand upon the part of these classes of farmers for financial accommodation of the description provided by the Board and, upon representations by the Board, the Government introduced legislation providing mainly for the increase of the limit for loans from £1,000 to £2,000. This legislation took effect as the Rural Intermediate Credit Amendment Act, 1929.

"In the Board's report for the year ended 30th June, 1929, reference was made to the fact that the majority of loans granted by the Board had been made to dairy farmers and one cause, apart from the lower limit which then obtained, was stated to arise from the fact that, whilst a fixed loan to be liquidated over a period of years is usually suited to the requirements of a dairy farmer who is able to pay his interest and the instalments of principal required by the Board by deductions from his milk cheques throughout the productive season, such a loan is not equally applicable to the circumstances of the sheep-farmer or grain-grower, whose indebtedness steadily increases during the major portion of the year and is then rapidly liquidated either in whole or in part during the productive season. Accordingly, with the increase of the limit for the individual loans making the system more suited to the needs of grain-growers and sheep-farmers the Board has considered the best means of providing for the credit requirements of these classes of farmers and has decided upon the following system :—

(a) It will fix limits for the individual farmers proportionate to the value of the security proffered in each case, whether by way of charges over stock, crops, land, or otherwise.

(b) Borrowers who have arranged for such limits will be entitled to draw up to the limits fixed in their cases as and when they require the moneys to meet current expenditure or other farming purposes generally :

(c) Interest will be charged by the Board at 6½ per cent. per annum only on amounts outstanding :

(d) The limits fixed will be subject to annual review by the Board :

"The main methods by which the Board is authorised to invest its funds in advances to farmers are the following :—

(a) By advances to farmers as members of a special class of limited liability company termed 'co-operative rural intermediate credit associations' (Part II of the Act).

(b) By advances to farmers individually, the loans being additionally secured by the partial or entire guarantee of a company or private individual (Part III of the Act).

"As it appears generally unlikely that sheep-farmers will have the same facilities at their disposal for obtaining guarantees of loans to enable the provisions of Part III of the Rural Intermediate Credit Act to be utilised as was the case with the dairy farmers whose dairy companies, both co-operative and proprietary, have in numerous instances assisted applications under the Act by giving the guarantee required by that part of the Act, it is probable that the bulk of the lending under this new system for 'limits' will be transacted through the medium of the co-operative rural intermediate credit associations referred to. It is interesting to learn, therefore, that twenty-eight associations have now been formed and are in operation in different parts of the Dominion, thus providing farmers with the opportunity of making an application to the Board for financial accommodation.

"The Regulations issued under the provisions of the Rural Intermediate Credit Act on the 21st December, 1927, and amended on the 17th September, 1928, control the administration of the Board's business in regard to matters of procedure and detail and, in addition, they prescribe the scale of legal charges for the preparation of securities taken by the Board or by co-operative rural intermediate credit associations. The new Regulations issued in the New Zealand Gazette of the 16th January, 1930, follow the scale generally, extending it to apply to the larger loans which may now be granted by the Board."

New Books and Publications.

Reminders for Companies' Secretaries. By F. J. Varley. (Effingham Wilson.) Price 4/6.

Smith's Summary of Company Law. Fourteenth Edition. By William Higgins. (Sweet & Maxwell Ltd.). Price 9/-.

Company Law and Precedents. Third Edition. (Two volumes). By A. Stiebel, M.A. (Sweet & Maxwell Ltd.) Price 92s. 6d.

The Secretarial Handbook. By E. Westby-Nunn, B.A., LL.B. (Solicitors' Law Stationery Society). Price 7s.

English Government and Politics. By Frederick Austin Ogg, Ph.D., LL.D. (MacMillan & Co. Ltd.). Price 21s.

Australia and the British Commonwealth. By the Hon. J. S. Latham, K.C., M.A., LL.B., Attorney-General of the Commonwealth of Australia. (MacMillan & Co. Ltd.). Price 9s.

New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"The traditions of the legal profession have never been better cultivated than they are to-day."
—Mr. Justice Luxmoore.

Vol. V. Tuesday, February 18, 1930 No. 24

Proof of Adultery.

In New Zealand where, as in other countries, the tide of divorce continues to advance, approximately one-fourth of the decrees granted are made upon the ground of adultery. Two recent decisions—one of the House of Lords and the other of our own Supreme Court—on this branch of the law are of considerable interest to the general practitioner.

Ross v. Ross, (1930) A.C. 1, deals with the proof of adultery. Adultery is, of course, generally a difficult matter to prove. Direct evidence is seldom obtainable: some text-writers say that it is apt to be disbelieved though there is no reported case of which we are aware going quite to that length. In nearly every case, however, recourse must of necessity be had to proof of circumstances from which by fair inference adultery can be inferred. *Hall v. Hall*, (1902) 21 N.Z.L.R. 251, is the leading decision in our own Courts. There the Court of Appeal laid it down that to prove adultery the evidence must be such that guilt *must* be inferred (per Stout, C.J., at p. 262), or, in other words, that the evidence must be incompatible with innocence and consistent only with adultery having been committed (per Williams, J., at p. 262; per Edwards, J. at p. 263). In *Ross v. Ross*, which will, in England, certainly come to be regarded as the leading case, Lord Buckmaster who delivered the principal judgment said (p. 7):—

> "Adultery is essentially an act which can rarely be proved by direct evidence. It is a matter of inference and circumstance. It is easy to suggest conditions which can leave no doubt that adultery has been committed, but the mere fact that people are thrown together in an environment which lends itself to the commission of the offence is not enough unless it can be shown by documents, e.g., letters and diaries, or antecedent conduct that the association of the parties was so intimate and their mutual passion so clear that adultery might *reasonably* be assumed as the result of an opportunity for its occurence.'

Lord Atkin states the law thus (p. 21):

> "From opportunities alone no inference of misconduct can fairly be drawn unless the conduct of the parties, prior, contemporaneous, or subsequent *justifies* the inference that such feelings existed between the parties that opportunities if given would be used for misconduct."

And Lord Thankerton tersely says: (p. 25):

> "The respondent must prove facts which are not reasonably capable of an innocent construction."

It would appear that a *reasonable* or a *justifiable* inference of adultery is, according to Lords Buckmaster and Atkin, sufficient and there would seem to be little difference between their view and that of Lord Thankerton. Viscount Dunedin, who alone of their Lordships found adultery proved, refers to a *necessary* inference but the phrase is not used in any of the other judgments. It may possibly be suggested, in view of this decision of the House of Lords, that the standard of proof required by *Hall v. Hall* is somewhat too stringent, though it seems that probably the better view is that the difference between our Court of Appeal and the House of Lords is one merely of words. But, be this as it may, *Hall v. Hall* remains, of course, law in this country until the Privy Council decides the contrary. The difficulty in every case will always lie, not in resolving any slight difference which there may be between such phrases as "reasonable inference," "justifiable inference," and "necessary inference," but in applying the law to the facts proved—a fact which is amply illustrated by the marked divergence of opinion in *Ross v. Ross* between the majority of the House (Lords Buckmaster, Warrington, Atkin, and Thankerton) on the one hand, and Viscount Dunedin and four Judges of the First Division of the Scottish Court of Session on the other.

Woolcott v. Woolcott, 5 N.Z.L.J. 5, the second of the decisions mentioned above, deals not with the quantum but with the mode of proof. In *Wilkie v. Wilkie*, (1928) N.Z.L.R. 406, Blair, J., had expressed the view that admissions, written or verbal, by respondents are not proof of adultery, but amount to no more than corroborative evidence of adultery when other facts tending to prove the act have been established. This was not, at the time, we believe, generally accepted as being a correct statement of the law and this view has now, with the entire concurrence of Blair, J., been disapproved by Myers, C.J., in *Woolcott v. Woolcott*. The learned Chief Justice reviews the authorities and says that while they show that admissions of misconduct unsupported by corroborative proof ought to be received with the utmost circumspection, caution and distrust, nevertheless if the Court is satisfied that the confession is a clear, distinct and unequivocal admission and is *bona fide*, that there is no doubt of its genuineness and sincerity, and that there is no reasonable ground to suspect collusion a decree ought to be granted even though there be no confirmatory proof.

Woolcott v. Woolcott is useful also for a very clear statement of the law on the subject of corroboration, and, it is hoped, will be regarded as settling that there is no absolute rule to the effect that the uncorroborated evidence of a petitioner should not be acted upon. Some early cases would seem to indicate that such a rule exists, and indeed even in modern text-books the requirements of the law as to corroboration are too strongly stated—see for instance *Rayden on Divorce*, 2nd Edn., 79, and *Brown and Watts on Divorce*, 10th Edn., 242. *Curtis v. Curtis*, 21 T.L.R. 676; *Riches v. Riches and Clinch*, 35 T.L.R. 141, and *Dunstall v. Dunstall and Williamson*, 32 N.Z.L.R. 669, are reported cases where the Court has acted upon a petitioner's evidence alone and, in the two cases first cited, entirely without corroboration. *Stack v. Stack*, 25 N.Z.L.R. 209, and *Allom v. Allom* (No. 2), 28 N.Z.L.R. 771, plainly recognise that there is no absolute rule requiring corroboration.

Supreme Court

Myers, C.J. December 11; 18, 1929.
Wellington.

KIERNAN v. DONOVAN.

Deaths by Accident Compensation Act—Damages Paid Into Court—Apportionment Between Widow and Children of Deceased—Basis of Division—Deaths by Accident Compensation Act, 1908, Ss. 5 and 6—Public Trust Office Amendment Act, 1913, S. 13 (2).

Motion by the plaintiff for apportionment of the sum of £2,500 damages and £75 costs paid into Court by the defendants in an action brought by her under the Deaths by Accident Compensation Act, 1908, in respect of the death of her husband. The plaintiff, who was 31 years of age, sued on her own behalf and on behalf of the children of the marriage. There were four children, all girls, whose ages were respectively 14 years, 8 years, 4 years, and 4 months. The youngest girl was born on 12th August, 1929, just two days before the accident which resulted in her father's death.

C. A. L. Treadwell for widow.

Parry for children.

MYERS, C.J., said that it was suggested by counsel that with the exception of a sum of £300 to be paid to the widow the whole of the money should be paid to a trustee to form one trust fund for the benefit of the plaintiff and the children. In His Honour's opinion that course was not justified by the provisions of the statute, and he could not therefore see his way to adopt it. His Honour after referring to **Public Trustee v. Brewer**, 32 N.Z.L.R. 239, and **Public Trustee v. The Taupiri Coal-Mines Company (Limited)**, 34 N.Z.L.R. 991, where Chapman, J., and Cooper, J., respectively followed the analogy of the Statutes of Distribution and ordered that one-third of the available fund should be paid to the widow for her own use and the residue retained by the Public Trustee in trust for the children, said that while he thought that the analogy afforded by the Statutes of Distribution might be taken as some guide to the Court in framing its order, the analogy was one that could be pressed too far. In the ordinary case under the Deaths by Accident Compensation Act, 1908, where it was necessary for the jury to award damages, Section 5 of the Act provided that the jury might give to the parties respectively for whom and for whose benefit the action was brought, such damages as they thought proportioned to the injury resulting from the death. Section 6 provided that the amount so recovered, after deducting the costs not recovered from the defendant, should be divided amongst the before-mentioned parties in such shares as the jury by their verdict should find and direct. In **Bulmer v. Bulmer**, 25 Ch. D. 409, 412, Chitty, J., after referring to the sections of the English Act corresponding with the sections to which His Honour had just referred said: "When the questions are before the jury, undoubtedly the right way for the jury to proceed is either to take the individual claims of the persons on whose behalf the action is brought and to adjudicate on them separately, or to fix on an aggregate sum and then to divide such sum among the persons entitled." Chitty, J., then considered whether in the case of money paid into Court, and where there was no verdict of a jury, he had jurisdiction to apportion the fund, and he held that he had. That decision had been followed in New Zealand. Chitty, J., then proceeded: "The apportionment, however, must be made on the same principle as it would have been if the matter had been before a jury, and they would require to be satisfied that injury had in fact resulted to the persons claiming damages. In this case the principle of distribution must not be one of equal division, but in proportion to the damage sustained by reason of the death." That seemed to His Honour the true principle to be applied by the Court.

His Honour had said that in his view, as in the view of Chapman, J., and Cooper, J., in the New Zealand cases already cited, the analogy of the Administration Act might be used as a guide, but His Honour thought only as a guide. But even applying that analogy to the extent that the widow might be awarded one-third of the fund and the children two-thirds, it by no means followed that the children should share equally in their portion of the fund. That was expressly recognised by Cooper, J., in his judgment in **Public Trustee v. Taupiri Coal-Mines Co. Ltd.** (*cit. sup.*). The truth was, as it seemed to His Honour, that if a fund had to be apportioned by a jury, all the circumstances would have to be taken into consideration and similarly, in His Honour's opinion, they must be taken into consideration by the Court when the Court had to apportion the fund.

In the present case the eldest girl was fourteen years of age and might be expected in a few years to be able to earn her own living. On the other hand the youngest child was but a few months old and required to be provided for for a very long period. It would be unreasonable in His Honour's opinion to say that those two children were to have equal shares in the fund. His Honour proposed in the first place to allow the widow the sum of £970. It was suggested at the Bar that her share should in some way be settled, but in His Honour's opinion that was not permissible without the widow's consent. There was no reason, however, why she should not, if she wished, create a voluntary trust in respect of her share, or leave her money, or so much thereof as she did not immediately require, in the hands of the Public Trustee to invest in the Common Fund of the Public Trust Office and pay from time to time as she might direct. So far as concerned the sum of £75 paid into Court for costs, that amount might be paid out to the plaintiff's solicitors. His Honour understood that that sum of £75 was sufficient to cover the plaintiff's costs as between solicitor and client. His Honour allowed the sum of £10 out of the general fund for the costs of the solicitor and counsel appointed to represent the children on the hearing of the present motion. There was left the sum of £1,520 for the benefit of the children. The order of the Court would be that that sum be paid to the Public Trustee under the provisions of Section 13 (2) of the Public Trust Office Amendment Act, 1913. Those moneys were to be retained by the Public Trustee for the present in the Common Fund of the Public Trust Office until the shares of the children were defined. When the shares were defined the capital for the time being of each share would be invested by the Public Trustee in the Common Fund and be disbursed by him for the maintenance and education, or otherwise for the benefit of the child entitled thereto. The Public Trustee in disbursing those several sums would pay out of the capital and income of each fund for the maintenance and education or otherwise for the benefit of the child to whom the particular fund belonged such sums, and by such periodic or other payments, as he should think fit, with power to vary such payments as to amount and time of payment as he should think proper and to pay the same, if he thought proper, to the mother of the child, or any person having the actual care of the child, without calling for an account of the disbursement thereof, and from time to time to vary such mode of disbursement in such manner as to him should seem best. His Honour had already said that having regard to the varying ages of the children, it was plain that their portion of the fund should not be divided into equal shares. His Honour felt, however, that there was not at present before him sufficient information to enable him to say how much of the fund should be apportioned to each child. All relevant information should be submitted to enable the Court to make a fair and just division. The Public Trustee should as soon as possible make inquiries into that aspect of the matter and report fully to the Court. In doing so it would be necessary for him to report *inter alia* as to whether any of the children by reason of any special consideration seemed likely to have suffered a greater loss by the father's death than the others. Subject to any such special consideration, His Honour suggested that the fund might perhaps be divided on the assumption that each child would in the normal course of events, had the father lived, have been maintained by him up to the age of say 17 or 18 years. The probable expense of maintaining a girl up to the assumed age, taking due account of the different amounts required during different stages—a point upon which the Public Trust Office might reasonably be expected to have considerable knowledge—should then be taken into consideration with the object, if any portion of the fund would remain at the end of the assumed age, of providing that as each child attained the assumed age each would have left as nearly as possible the same amount of capital. His Honour did not suppose that that result could be worked out with accuracy; but he apprehended that with actuarial assistance it could at least be worked out with reasonable approximation. If information were supplied to the Court on some such lines as those indicated it should be possible to make a fair and just division. Pending the further order of the Court defining the shares of the children the Public Trustee was authorised in his discretion to pay the interest of the whole fund to the widow for the support of the children. The Public Trustee would have liberty

to apply *ex parte* to the Court in case he should require advice or directions and all parties would have liberty to apply generally.

Solicitors for plaintiff: **Treadwell and Sons**, Wellington.
Solicitors for representative of infant children: **Buddle, Anderson, Kirkcaldie and Parry**, Wellington.

Ostler, J. December 9; 12, 1929.
Nelson.

NELSON CITY CORPORATION v. BUSBRIDGE.

Municipal Corporation—Gas—Electricity—No Power to Surcharge Overdue Accounts for Gas or Electricity Supplied—Municipal Corporations Act, 1920, Ss. 275, 277, 281.

Originating summons under the Declaratory Judgments Act, 1908, for a declaratory order determining (1) whether the plaintiff was entitled under S. 275 of the Municipal Corporations Act, 1920, to fix a uniform price at which gas should be supplied to all private consumers if paid within a fixed time, with a uniform proportionate increase or surcharge on such price if paid after the time so fixed; (2) whether the plaintiff was entitled under S. 281 of the said Act to do the same with regard to the supply of electricity.

Cheek for plaintiff.
Rout for defendant.

OSTLER, J., said that he assumed that the Borough Council had made contracts with suppliers embodying those terms. In such a case it had long been settled in equity that where in a contract a larger sum was agreed to be paid upon the non-payment of a certain sum on a certain date the creditor could not recover the larger sum so stipulated in the contract. He could recover only the fixed sum. The larger amount was not to be treated as liquidated damages but as a penalty. The authorities for that proposition were to be found in **White and Tudor's Leading Cases in Equity**, 8th Edn., Vol. 2, p. 273. Unless, therefore, borough councils had been given statutory power to make a surcharge on gas and electricity accounts not paid within a certain time, they had no power to do so.

S. 275 of the Municipal Corporations Act, 1920, provided that the Council might fix a uniform price at which gas might be supplied to all private consumers and the times when the same should be payable and might from time to time alter the same as it thought fit. S. 277 provided that all moneys receivable as the price of gas supplied should be deemed to be a separate rate and might be recovered accordingly. Those sections gave no power to a borough council either to make a surcharge without contract, or to make contracts with suppliers entitling them to surcharge. The gas must be supplied at a uniform price, and that price was recoverable as a special rate. With regard to the supply of electricity the plaintiff was licensed by an Order in Council dated 17th January, 1923, under the Public Works Act, 1911, to supply electricity to the citizens of Nelson. The terms of the license provided that the charges should not exceed one shilling per unit for lighting and sixpence per unit for power, provided that if accounts were paid within fourteen days after due date the charges should not exceed tenpence per unit for lighting and fivepence per unit for power. Those terms showed that it was contemplated that the Borough Council should give a discount for prompt payment but not that it could surcharge for delay in settlement. S. 281 of the Municipal Corporations Act, 1920, gave the Council power to supply electricity to the inhabitants of the borough and in so doing to exercise all the powers contained in Sections 267 to 280. It therefore gave the powers conferred by Sections 275 and 277, i.e., to supply electricity at a uniform rate and to recover the price as a special rate. In His Honour's opinion the Council had not been given statutory power to surcharge for delay in payment for either gas or electricity supplied. It could no doubt follow the uniform practice and give discounts for prompt payment, but before it could surcharge as it was trying to do it must have statutory authority to do so. It was said that the system of surcharging was more convenient because it saved unnecessary bookkeeping. His Honour saw no reason why borough councils should not be given the necessary power by statute. But as the law stood, they did not possess such power.

Solicitors for plaintiffs: **Pitt and Moore**, Nelson.
Solicitors for defendant: **Rout and Milner**, Nelson.

Ostler, J. November 6; 23, 1929.
Napier.

HAMILTON v. YATES.

By-law—County Council—Licensing of Hawkers—By-law Imposing Half-yearly License Fee of Five Pounds—Object to Restrain Hawking and Protect Ratepaying Shopkeepers—Amount of Fee Unreasonable—By-law Unreasonable and Void—Counties Act, 1920, S. 109, 2nd Schedule, Pars. 17, 18, and 19.

Appeal on point of law from a conviction of the appellant for a breach of the by-laws of the Waipawa County Council, in that he did on 8th June, 1928, trade as a hawker in the County without having obtained a hawker's license under the by-laws.

Wedde for appellant.

Strang for respondent.

OSTLER, J., said that by Section 109 of the Counties Act, 1920, and paragraphs 17, 18, and 19 of the Second Schedule to that Act, County Councils were given power to make by-laws "providing for the licensing of pedlars and hawkers and defining to what persons the by-laws under this paragraph shall apply; and fixing the sums payable to the County Fund for such licenses; prohibiting any persons trading as pedlars and hawkers, not being so licensed; regulating the conduct and providing against the misconduct of such licensed persons." Under those powers the Waipawa County Council joined with the other Hawke's Bay Counties in making joint by-laws, in which it was provided that hawkers trading within the County should pay a license fee of £5 for every half year. It was for a breach of that by-law that appellant was convicted and fined. The appeal was based solely on the ground that the by-law was void because unreasonable. It was claimed to be unreasonable upon two grounds: (1) that its object was to provide revenue for the County, and (2) that its object was to restrain hawkers carrying on a lawful business within the County, and that it was void as being in unlawful restraint of trade.

At the hearing of the information the County Clerk said that the by-law was made after a conference of the various County Councils concerned, and that the object of fixing the fee at £5 for every half-year was to discourage hawking and to protect ratepaying shopkeepers. However laudable such an object might be, a County Council had no power to make a by-law for that object. The trade of hawking was a lawful trade and County Councils had not been given any statutory powers to restrain such trade. The powers so given were given for the purpose of providing for the proper order and good government of the County. The County had not power either to make its by-laws in restraint of trade, or to impose license fees for revenue purposes: see **In re a By-law of the Auckland City Council**, (1924) N.Z.L.R. 907; **In re Invercargill By-law No. 6**, (1924) N.Z.L.R. 1142; **Re Robertson**, (1925) G.L.R. 14; **In re a By-law of the Hamilton Borough Council**, (1926) N.Z.L.R. 685. It was admitted that the fee was fixed as high as it was for the purpose of restricting the trade of hawkers in the County in favour of that of the local shopkeepers. The fee was so high that its effect was just what was intended. Its result was in effect prohibition, although the power given was not to prohibit but to regulate: see **Parker v. Bournemouth Corporation**, 86 L.T. 449; **Moorman v. Tordoff**, 98 L.T. 416. For that reason alone, in His Honour's opinion, the by-law was void for unreasonableness. Before a County Council could prohibit hawkers trading within its boundaries it would have to procure express statutory power to do so. The size of the fee also showed that its object was to obtain revenue. It was far more than necessary to pay the cost of preparing and issuing the license and the reasonable costs of supervision. For those reasons in His Honour's opinion the by-law was void for unreasonableness.

Appeal allowed.

Solicitors for appellant: **Wedde and Sandeman**, Waipawa.
Solicitors for respondent: **S. W. Strang**, Waipawa.

Blair, J. November 25; December 6, 1929.
Auckland.

TAYLOR v. MOUNT ALBERT BOROUGH.

Rating—Adoption in District of System of Rating on Unimproved Value in Lieu of System of Rating on Capital Value—New Valuation Roll Necessary—Rates Levied on Basis of Unimproved Value as Shown in Valuation Roll Prepared Before Adoption of System of Rating on Unimproved Value Irrecoverable—Injunction Restraining Recovery of Rates—Rating Act, 1925, Ss. 6, 47.

Action by plaintiff for injunction to restrain the defendant Corporation from demanding, suing for, or collecting from the plaintiff the rates levied by the defendant Corporation in respect of the year 1929–1930 on some 99 acres of land in the Borough of Mount Albert, owned by the plaintiff. As from 31st March, 1928, pursuant to a poll taken on 27th April, 1927, the system of rating on the unimproved value became effective in the Borough of Mount Albert. Previously the system of rating on the capital value had been adopted in the Borough. No valuation roll of the rateable property in the Borough had, since the adoption of the system of rating on the unimproved value, been prepared under Section 47 of the Rating Act, 1925, The rates for the years 1928–1929, and 1929–1930 had been levied on the basis of the unimproved values shown in a valuation roll prepared in 1926.

Stanton and Duthie for plaintiff.
Rogerson for defendant.

BLAIR, J., said that the question in issue between the plaintiff and the defendant depended upon the construction to be placed on S. 47 (1) of the Rating Act, 1925, which provided: "As soon as conveniently may be after an adopting proposal is carried in any district, a valuation roll of the rateable property in the district shall, for the purposes of rating on the unimproved value, be prepared and supplied by the Valuer-General as provided by section six hereof." His Honour did not find much difficulty in construing the above subsection in relation to the question in this action. A new roll was required and it was required "for the purposes of rating on the unimproved value." Surely the natural meaning of that was that in order to proceed on the new basis of rating a new roll was required, and how could a rating authority proceed to levy rates without such new roll? The roll was the very foundation of rating. The defendant answered that before the new system came into force it had a roll which had been prepared for the purpose of rating on another basis, and it happened that on that roll there were details of unimproved values; and defendant said that until it obtained the new roll it would make use of that old roll and take from it the particulars as to the unimproved values which it contained. The roll which the defendant Borough was using for that new system of rating was not a roll prepared and supplied as required by S. 47, and until such a roll was provided it appeared to His Honour that the Borough could not validly make a rate. If that were not the construction then ratepayers were deprived of the right of objection conferred by S. 47 (2).

That construction appeared to His Honour to be the natural construction, but it was consonant also with previous legislation. His Honour, after referring to Ss. 12 and 13 of the Rating on Unimproved Value Act, 1896, and S. 9 of the Government Valuation of Land Act, 1896, and to the re-enactment of those provisions in the Rating Acts of 1908 and 1925, said that the history of the legislation showed that it was clearly intended to give ratepayers a new roll and a right of objection when the new rating system was adopted, and the only alteration made in the law was a consequential alteration due to the fact that a new authority, namely the Valuer-General, had imposed on him the duty of preparing the valuation rolls which were theretofore prepared by the local authorities themselves. No local body would have been heard to say that it could have refused to prepare a new roll, and the defendant Borough was compelled to resort to the argument that because S. 6 of the Rating Act, 1925, was referred to in S. 47 of the same Act that reference had the effect of depriving ratepayers of the right to a new roll and the right of objection which they undoubtedly had had prior to the introduction of valuation by a Government department. S. 6 of the Rating Act provided that where the system of rating was on the capital or unimproved value the roll from time to time supplied by the Valuer-General under the Valuation of Land Act, 1925, should be the valuation roll for the district. That was followed by the proviso: "Provided that nothing in this act shall be held to be binding on the Valuer-General in so far as it limits the date for transmitting the roll to the local authority." The defendant submitted that the effect of that proviso was to defeat ratepayers' rights to a new roll if the Valuer-General did not see fit to supply a new roll. The contention involved the proposition that statutory rights of ratepayers were entirely dependent on the untrammelled discretion of the Valuer-General. It might be that the Valuer-General, notwithstanding the provisions of S. 6, could be compelled to supply a roll, but whether that were or were not the position, it did not affect the present case because the matter was one between a ratepayer and a rating authority. The rating authority was attempting to rate such ratepayer upon a roll which was not the roll required by the statute and it was the business of such rating authority to use a proper roll. It would appear to be the case that the want of that roll was due to the refusal of the Valuer-General to supply it, and that refusal might cause grave inconvenience to the defendant. That was a matter between the Valuer-General and the local authority, but it could not affect plaintiff's rights as a ratepayer. In the circumstances the case of **Broad v. County of Tauranga,** (1928) N.Z.L.R. 702, was ample authority for the issue of an injunction restraining the defendant Council from demanding, suing for, or collecting the rates in question from the plaintiff until further order of the Court or until a new valuation roll as provided by S. 47 of the Rating Act, 1925, had been duly prepared and supplied.

Solicitors for plaintiff: **Ready and Duthie,** Auckland.
Solicitors for defendant: **Nicholson, Gribbin, Rogerson and Nicholson,** Auckland.

Blair, J. November 25, December 7, 1929.
Auckland.

BROWN v. E. G. LAURIE LTD. (IN LIQUIDATION).

Wages Protection and Contractors' Liens—Company—Liquidation—Architect Claiming Lien for Fees Due in Respect of Professional Services—Architect a "Contractor" and Preparation of Plans and Specifications and Superintendence of Erection of Building "Work"—Semble Leave of Court Not Required to Action Claiming Lien Against Company in Liquidation—Proceedings Commenced Without Leave of Court Not Void—Power of Court to Grant Leave *nunc pro tunc*—Wages Protection and Contractors' Liens Act, 1908, Ss. 48, 49—Companies Act, 1908, S. 244.

Summons to set aside or stay proceedings issued in the Magistrate's Court by the plaintiff, an architect, who had prepared plans and specifications and supervised the re-erection of a building for the defendant company, claiming a lien under the Wages Protection and Contractors' Liens Act, 1908, for £109 4s. 6d. for professional fees for such services. By agreement between the parties the proceedings were removed into the Supreme Court. The defendant company at the time of commencement of proceedings was in liquidation. The defendant asked that the proceedings be struck out or stayed, and claimed that architects' professional fees for designing and supervising the carrying out of a building could not be the subject of lien proceedings because such services were not "work" within the meaning of S. 48 of the Act.

J. B. Johnston for plaintiff.
Towle for defendant.

BLAIR, J., said that S. 49 of the Wages Protection and Contractors' Liens Act, 1908, gave to a contractor, subcontractor or worker who did or procured to be done any work "upon or in connection with" any land or building on land a lien upon the employer's interest in such land. It was admitted that plaintiff was not a worker or subcontractor within the Act but it was claimed that he was a contractor. "Contractor" was defined in S. 48 as a person "who contracts directly with the employer for the performance of work for him"; and "work" was defined as including any "work or labour whether skilled or unskilled executed or done by any person of any occupation upon or in connection with . . . . the construction of any building." As originally framed the definition of "work" was limited to the meaning as above, but in 1914 the word "means" was amended to "includes." The result of that amendment was to retain the ordinary and natural meaning of the word "work" and to give it also the meaning defined in the statute: see upon that point **Watkins v. Scott,** (1928) N.Z.L.R. 628, 657; **Haynes v. McKillop,** 24 N.Z.L.R.

833. It would require courage if not temerity to suggest that to-day the word "work" was confined to manual labour only. An architect in designing and superintending the erection of a building unquestionably performed work although the result was attained mainly by the brain, and the manual element in it was negligible. The use of the words "work" or "labour" in the definition clearly contemplated work which was not manual. In many cases the contractor for a building confined the whole of his time in the execution of a building contract to supervision only but it had never yet been suggested that he was barred from the rights conferred by the Act. The defendant contended that an architect did not contract for the performance of work, but contracted that he himself would perform the work. That was not the case as it was well known that an architect kept a staff to assist him. But even if it were, the contention did not help defendant because by S. 49 a contractor's lien covered work done or procured to be done, in connection with any land. Nor could His Honour see any absurdity in an architectural draughtsman claiming a worker's lien for unpaid wages on professional fees owing to his employer for draughtsman's work on the plans for the building the subject-matter of such fees. There was no decision in New Zealand upon the question of an architect's right to claim a lien for his fees, but logically there was no reason why he should not be included. In **In re Williams, ex parte Official Assignee,** 17 N.Z.L.R. 712, the Court held that work in connection with a building could be done away from a building. If authority were needed to accord to architects the benefit of the Act there were several American authorities where under what appeared to be similar statutory provisions such claims were recognised. A number of such cases were mentioned in Volume 60 of the **American Law Reports Annotated,** p. 1257, *et seq.*

The remaining point arose under S. 244 of the Companies Act, 1908, wherein it was provided that no action or other proceeding should be commenced or proceeded with after liquidation of a company except with the leave of the Court. Those proceedings were taken after liquidation and no leave was applied for. The short and important question was whether that section had any application to proceedings under the Wages Protection and Contractors' Liens Act and if so whether it was competent for the Court to make an order ratifying proceedings actually commenced after liquidation without leave. In **In re Williams, ex parte Official Assignee,** (*cit. sup.*) the Court decided that the true meaning of the sections of the Act taken together was that the lien or charge was created by the Act and not by the notice creating the lien or charge, though until the notice was given the lien or charge was of a floating character and was liable to be defeated to the extent and in the manner provided by the Act. The fact that the Act conferred a statutory right liable to be defeated by failure to take the prescribed steps for its preservation was of importance because if it were the case that the discretion conferred upon the Court by S. 244 to grant or withhold leave to proceed, or impose terms, applied to proceedings to establish that right, then it followed that a statutory right was liable to destruction at the discretion of the Court. Moreover the right might be lost by inability to obtain leave owing to liquidation taking place during the Court's vacation, or it might easily happen that liquidation took place without any knowledge of the fact reaching the holder of a lien. In **In re Williams, ex parte Official Assignee** (*cit. sup.*) the Court held that S. 55 of the Bankruptcy Act, 1892, which had been re-enacted in S. 53 of the 1908 Act, had no application to a proceeding lawfully taken for the realisation of a contractor's lien. S. 53 provided for the vesting in the Official Assignee on adjudication of all property of a bankrupt, and that upon adjudication being advertised, all proceedings to recover any debt provable under the bankruptcy should be stayed. If adjudication in bankruptcy did not prevent the holder of a lien enforcing his rights there seemed no reason why a similar result should not follow in the case of liquidation of a company.

But even if that view were not sound it was clear that in a proceeding touching the establishing of a lien which was liable to defeat if not prosecuted within a fixed time, leave if required should be granted as a matter of course. Plaintiff submitted that proceedings commenced without leave were void and that it was not possible for this Court to grant leave *nunc pro tunc.* S. 244 made a distinction between proceedings by way of levying execution and other proceedings. The former it declared void. As to other proceedings the section merely forbad their commencement or prosecution without leave. His Honour did not think that the commencement of proceedings without leave made them void. Proceedings might be commenced in complete ignorance of the fact of liquidation. The Court could always administer the appropriate punishment whether by the imposition of costs or in a more drastic way in all cases where the section was disregarded. His Honour referred to **Gray v. Raper,** L.R. 1 C.P. 694, and **In re Wanzer Ltd.,** (1891), 1 Ch. 305. In **Stiebel's Australian and New Zealand Company Law,** 241, the learned author said, quoting a New South Wales case the report of which was not available, that where an action against a company had been commenced without leave, leave would in a proper case be given *nunc pro tunc.* If it were necessary His Honour would grant such leave.

Summons dismissed.

Solicitors for plaintiff: **Stewart, Johnston, Hough and Campbell,** Auckland.

Solicitors for defendant: **Towle and Cooper,** Auckland.

Smith, J. November 18; 20, 1929. Auckland.

IN RE TAKAPUNA WOMEN'S PROGRESSIVE LEAGUE (INCPTD.).

Religious, Educational and Charitable Trusts—Fund Raised by Voluntary Contribution—Impracticable to Carry Out Objects For Which Fund Raised—Application to Court for Approval of Scheme—Procedure for Obtaining Approval Prescribed in Part IV of Act—Application Under Part III Irregular—Application Dismissed—Religious Charitable and Educational Trusts Act, 1908, Sections 32, 33.

Motion for an order approving a scheme for the disposal of certain trust moneys. The Takapuna Women's Progressive League (Incorporated), a society incorporated under The Incorporated Societies Act, 1908, and the petitioner, Mrs. Gunn, stood possessed as trustees, of a trust fund totalling £695 5s. 8d. composed partly of contributions raised in the years 1921 to 1924 as the result of the activities of the League, and partly of accumulated interest thereon. The original purpose for which contributions were made was to establish a memorial to commemorate the patriotic and humanitarian efforts of women during the Great War. On 27th June, 1921, the League passed a resolution that the memorial should take the form of a Public Hospital, but that object was discouraged by the Auckland Hospital Board and the Department of Health, and it became impossible, owing to public apathy, to acquire sufficient money to secure a site. Accordingly, on 17th April, 1923, the executive committee of the League resolved that the purposes of the fund should be altered so that the memorial should take the form of a "community hall" with a room attached for a district nurse. At about this time, the League by a public advertisement notified subscribers that contributions to the fund might be reclaimed in view of the altered scheme. One contribution of £10 was reclaimed and repaid. A scheme for the disposal of the fund had since been formulated. The fund was to be used in erecting a women's community hall on land to be vested in trustees by Mrs. L. H. Wilson who had agreed to give land worth approximately £400, provided the scheme was approved by the Attorney-General and the Supreme Court. The scheme then provided for the use of the hall for the purposes of women's organisations (non-political and non-sectarian in their objects) and including particularly some six organisations, namely the St. John's Ambulance Association, the Plunket Society, the Girl Guides' Association, the League of Mothers, the Mayoress' Relief Committee of Takapuna, and the petitioning League.

Gould in support of motion.

Cocker for Auckland Hospital Board.

SMITH, J., said that the question whether the application of the trust fund to the purposes of all or any of those bodies would be an application for charitable purposes had not been argued, but for the purposes of the present application, His Honour assumed that the purposes of the aforesaid bodies were charitable, within the definition of "charitable purposes" either in Part III or in Part IV of the above-mentioned Act, as amended by Section 3 of the amending Act of 1928. Assuming then the purposes proposed to be charitable, the question arose as to the Part of the Act under which the scheme should be prepared. In His Honour's opinion, Part IV of the Act was the only Part which was applicable. Section 32 provided that Part IV was applicable to cases in which money had been raised by way of voluntary contribution. Section 33 provided that if it became impossible or impracticable or inexpedient, or the amount proved inadequate to carry out the charitable purpose, then the moneys raised might be appropriated to some other charitable purpose in the manner and sub-

ject to the provisions thereinafter mentioned. The remaining Sections set out the specific procedure to be followed. It was clear in the first place that the fund here in question was raised by way of voluntary contribution, and in the second place, in the very words of the petition, that it "became and still is impracticable to carry out the objects for which the said fund was raised." The application was then directly within Part IV of the Act, and as a specific procedure was provided under that Part to meet such a case, it must be followed. His Honour distinguished the case of **In re the Door of Hope, etc.,** 26 N.Z.L.R. 96, on the ground that Edwards, J., in that case assumed that the moneys paid over became as effectually part of the funds of the Auckland Women's Home as if they had been originally subscribed for that purpose and proceeded to deal with the matter under the statutory provisions then corresponding to Part III of the Act of 1908, whereas in the present case His Honour did not think that he was entitled to make any similar assumption. Accordingly, as the procedure of Part III and not of Part IV had been followed, the present application must be dismissed.

Solicitors for applicant: **Morpeth, Gould and Wilson,** Auckland.

Smith, J. September 6; November 25, 1929.
Masterton.

SOUTHERN MINES DEVELOPMENT LTD. v. HULME.

Company—Mining Company—Calls—Whether Contract One For Payment of Balance Unpaid on Shares by Calls or by Instalments—Whether Company a Mining Company— *Ultra vires* **and Not Substratum Proper Test—Companies Act, 1908, Ss. 352-361.**

Appeal in law from a decision of the Stipendiary Magistrate at Masterton, holding that the respondent was not liable to the company in respect of the amount claimed as owing by him upon his shares in the appellant company. The facts out of which the appeal arose were as follows. The appellant company was incorporated on 21st June, 1926, with a nominal capital of £125,000. The certificate of incorporation showed that the company was registered under the Companies Act, 1908. Underneath the words and figures "The Companies Act 1908" in the certificate was inscribed "Part XII." On 11th September, 1926, the respondent signed an application for shares in the appellant company addressed to the directors of the company in the following terms:—

"I hereby request you to allot me 100 shares of £1 each in the above-named Company, and I hereby agree to accept the same or any less number that may be allotted to me.

"I enclose herewith the sum of £10 being 2/- per share the amount payable on application for the said shares and I agree to pay the further sum of 2/- per share on allotment and the balance in instalments of 1/- per share payable on the first day of each month the first of such payments to fall due on the first day of the month next succeeding that in which allotment is made.

"And I request and authorise you to register me as the holder of the shares so allotted.

William Hulme."

The company, on 17th September, 1926, answered the application, informing the applicant that the directors had allotted him 100 shares and that the total amount payable on application and allotment was £20. The letter acknowledged the receipt of £10 on application, and said that the balance of £10 was due and must be paid to the secretary at the registered office of the company. The respondent duly paid the £10 due on allotment. Thereafter the directors of the appellant company by resolution made a series of calls of 1/- per share on the contributing shares in the appellant company. These were made at various times down to December, 1927, the due dates of the calls being November 15th, 1926, January 17th, March 2nd, April 29th, July 26th, September 5th, October 20th, November 21st, and December 21st, 1927. All such calls except the last were, therefore, payable at intervals exceeding one calendar month. On the respondent's shares, the amount of each call was £5. In respect of the first three calls, the respondent paid the sum of £5 on December 1st, 1926, February 17th and June 22nd, 1927, respectively. In 1928, the appellant company instead of making calls, purported to debit the respondent with an amount of £5 (being 1/- per share) as an instalment due on 1st March, 1928, pursuant to what it alleged was a contract entered into by the respondent with the appellant company as a condition of the allotment of the shares. It debited the respondent similarly with £5 on 1st April, 1928, on 1st June, 1928, and on 1st October, 1928. The respondent refused to pay any further call or instalments after the first three calls had been made on him. The appellant company then set up that the whole of the moneys payable on respondent's shares, other than the application and allotment moneys, were comprised of instalments of 1/- per share, the first of which was payable on October 1st, 1926, and the remainder on the 1st day of each succeeding calendar month, and it gave credit to the respondent for the sums collected from him by way of calls. On this basis, the company sued to recover the sum of £50 so alleged to be due up to 1st October, 1927. The respondent contended that no contract existed between himself and the company whereby he agreed to pay the amount of 1/- per share, the first of which was payable on 1st October, 1928, and the remainder on 1st day of each succeeding month thereafter. He contended that he was liable to pay the unpaid balance on his shares only by calls duly made by the directors, and that as the company was a mining company, and as calls remained unpaid and unrecovered contrary to the provisions of Part XII of the Companies Act, 1908, the shares had been forfeited, and he was not liable thereunder. The Magistrate decided in favour of the respondent, and the present appeal was brought from his decision.

C. S. Brown for appellant.
D. K. Logan for respondent.

SMITH, J., said that the first question concerned the true construction of the application for shares and the letter of allotment. In His Honour's opinion the two documents did not constitute a complete contract to pay by instalments. The time for payment of the first instalment was the only time which was fixed. The other instalments were merely "payable on the first day of each month." What "each month" was, required to be determined. If the offer had been to pay the balance by instalments of 1/- per share, the first of which was to fall due on the 1st day of the month next succeeding that in which allotment was made, and the remainder to fall due on the 1st day of each succeeding calendar month thereafter, the case for agreement to pay by instalments on defined dates might well have been established against the respondent. The letter of allotment did not, however, specifically refer to the terms of payment of the balance, and, in His Honour's opinion, in order to fix, at least, the commencing date for the payment of the next instalment after the first, it was necessary for the directors to take such action as was open to them to do so. They did that by making a call. It would appear that the directors also considered it necessary to fix what "each month" was, for they did not regard the phrase as meaning "each succeeding calendar month." When the respondent acquiesced in that construction of his offer by paying the first call, within 21 days after it became payable, he could not be heard to say that he had not agreed to take the shares upon the terms that the unpaid balance was payable as determined by calls. It was clear that the company, by commencing to make calls, and the respondent, by paying the first three, interpreted the contract as one pursuant to which the unpaid balance on the shares was to be paid by calls. Effect should be given to the interpretation placed by the parties upon their documents: See **Cranton v. Worthington,** 27 N.Z.L.R. 677. The next question was whether the company was a mining company. His Honour said that it was clear in the first place that the appellant company was formed both for mining purposes as defined by S. 340 of the Act, and for other purposes. The question then arose which was foreshadowed by Edwards, J., in **King Gold Mining Co. Ltd. v. Cock,** 31 N.Z.L.R. 1166, 1176, when he said, with reference to that case: "It is not necessary to consider the question, which will probably some day arise, and may prove difficult of determination, as to which parts of the Act apply to a company incorporated both for mining and for other purposes." That enquiry might have two aspects, namely whether Part XII of the Act applied to such a company, and also to what extent the provisions of the other parts of the Act affecting joint stock companies applied. As His Honour had held that the question of payment by instalments was not in issue, it was not necessary for him to consider whether shares in the company, if it were a mining company as defined, might be paid not only by calls, which would be subject to the provisions of Ss. 352 to 361 of the Act, but also by instalments which the shareholder had contracted to pay as part of the price of acquiring his status as a shareholder, and which would not be calls, and therefore not subject to the provisions of Ss. 352 to 361. As to that question, compare the remarks of Edwards, J., in **King Gold Mining Co. Ltd. v. Cock,** (*cit. sup.*) at pp. 1176, 1177, with those of Stout, C.J., in **Lysnar v. Mammoth Molybdemite Mines,** (1918) N.Z.L.R. 759, 761.

The only enquiry in the present case was whether Part XII of the Act applied to the appellant company. The mere fact that the Registrar had inserted the words and figures "Part XII" in the Certificate of Incorporation did not affect the legal position; for there was only one registration, and that was under the Companies Act, 1908. But, in His Honour's opinion, Part XII clearly applied to the appellant company. A mining company was defined by S. 340 as "a company . . . for mining purposes." "Mining purposes" were defined, and indicated, in effect, the purpose of obtaining any precious metal or precious stone of any kind from the earth. In His Honour's opinion, wherever "mining purposes" as defined might be pursued as the sole business of the company, notwithstanding that it had other objects, the company must be regarded as a "mining company." Such a test was based on the doctrine of *ultra vires*. His Honour did not venture to say that it was an exclusive test. But His Honour thought that it might legitimately be taken as a test, because the rights of creditors were affected by the character of the company. A creditor looking at the memorandum of association should be able to ascertain whether the shares in the company were liable to forfeiture or not by reason of the non-payment of a call for the period of 21 days after the due date for payment: S. 353. He would then know what credit, if any, he should give, and what other precautions, if any, he should take. To apply as the test whether "mining purposes" as defined, constituted the substratum of the company would, in His Honour's opinion, limit the test unduly. The substratum test might be fair from the point of view of the shareholder, for he had no doubt contributed his capital on the basis that the company would fulfil its main or dominant object or objects, but the substratum test would be unfair to the creditor, for his concern was not with the equities subsisting between the company and its shareholders, but with the lawful extent of the company's operations. His Honour's conclusion then was that one test of whether a company incorporated both for mining and for other purposes, was a "mining company" as defined, was as follows—that if, tested by the doctrine of *ultra vires*, the sole business of such a company might be operations for "mining purposes" as defined in Part XII, such a company was a mining company. Part XII then applied to it: **King Gold Mining Company Ltd. v. Cock** (*cit. sup.*). For the purposes of the test suggested, the sole business of the company might clearly be operations for "mining purposes" if such were one of the main or dominant objects of the company. So also such operations might be the sole business of the company if carried out pursuant to a specific object such as "mining purposes," as defined, if by the terms of the memorandum of association such a specific object were freed from the control of any other object. On any question of *ultra vires*, words requiring that objects specified in one paragraph should not be limited or restricted by reference to or inference from the terms of any other paragraph must be given their full effect: **Cotman v. Brougham,** (1918) A.C. 514. In the present case, both conditions were fulfilled. In the first place, the company had in paragraph 1 of the objects clause at least two main or dominant objects, namely: (a) that it might take over all or any of certain options (three out of the four being for "mining purposes" as defined) exercise them and itself carry out "mining purposes" as defined, and (b) that it might promote other companies to take over all or any of the options and to carry out "mining purposes" as defined, with or without finance provided by the appellant company. Apart from the provisions of paragraph 32 declaring that the objects of each paragraph should not be limited or restricted by reference to or inference from the terms of any other paragraph, it was clear that the fulfilment of one of those objects was not incidental to the fulfilment of the other. Each of those objects must then be regarded as a main or dominant object of the company. In the second place, paragraph 2 of the objects clause stated that a specific object of the company was "mining purposes" as defined in Part XII. By paragraph 32 that object was to be read without limit or restriction by reference to or inference from the terms of any other paragraph. It was clear, then, that whether the company did or did not carry on any business at all pursuant to paragraph 1 of the objects clause, the sole business of the company might at any time be operations for "mining purposes" as defined. The company was, therefore, in His Honour's opinion, a mining company, and Part XII applied to it.

It was clear, then, that as the company was a mining company subject to Part XII of the Act, and as it made a call on the respondent's shares which remained unpaid at the expiration of 21 days after the due date for payment, the respondent's shares became absolutely forfeited, pursuant to S. 353 of the Act. It followed that the company could not succeed in its claim.

Appeal dismissed.

Solicitors for appellant: **C. P. and C. S. Brown,** Wanganui.
Solicitor for respondent: **D. E. Logan,** Masterton.

Kennedy, J. October 22, December 5, 1929.
Dunedin.

A. J. ALLEN LTD. v. SHIP "ORETI."

Ship—Maritime Lien—Claim for Lien for Moneys Advanced to Master for Wages and for Moneys Paid to Harbour Board for Berthage and Dock Dues—No Lien in Respect of Moneys Paid to Harbour Board—Moneys Advanced to Master in Reliance Not on Ship but on Managing Agents or Owner of Ship—No Lien on Ship for Such Advances.

Claim by the plaintiff, A. J. Allen Ltd., as agents for the Oreti Shipping Co. Ltd., to recover the sum of £456 19s. 3d. of which sum £233 12s. 8d. was stated to be for wages to January, 1929, paid for and on behalf of the Oreti Shipping Co. Ltd., and the balance, namely £222 16s. 7d., was stated to have been owing for necessaries supplied by it to the ship "Oreti" from 1st January, 1929, to 28th February, 1929. The ship "Oreti" was owned by the Oreti Shipping Co. Ltd., and was subject to a first mortgage to one Alexander Dunn securing approximately £700 and to a second mortgage securing a large amount. The Oreti Shipping Co. Ltd. went into liquidation on 4th March, 1929, and the "Oreti" was, on 6th March, 1929, arrested on the plaintiff's application and, later, on the application of the liquidator of the company, and with the consent of the first mortgagee, the ship was sold. The contest was as to the right of the plaintiff on the one hand, and of the first mortgagee on the other, to part of the proceeds of the sale.

Hay for plaintiff.
Lascelles for liquidator.
Sinclair for mortgagee.

KENNEDY, J., said that at the hearing it was admitted by counsel for the plaintiff that it could not properly be contended that the plaintiff had any maritime lien for necessaries supplied by it to the ship and the plaintiff's claim was confined to a claim to a maritime lien for £167 1s. 8d. alleged to be money advanced to the master for his own wages and for the wages of the crew and for the sums of £4 16s. 0d. and £38 11s. 0d. berthage and dock dues paid by the plaintiff to the Otago Harbour Board. For the latter charges no maritime lien arose. The agent did not, on payment to the Otago Harbour Board, become entitled to any maritime lien entitling it to a claim to the proceeds of the sale of the ship in priority to the claim of the mortgagee or to that of the liquidator.

The question, then, arising for decision was whether, in the circumstances, the plaintiff was entitled to the benefit of a maritime lien for the sum of £167 1s. 8d. paid to the master of the ship. It was contended that the master was entitled to a lien for this sum and that the plaintiff, having advanced the money to the master, should stand in his shoes and be entitled to his lien. The ship "Oreti" was chartered in 1924 for the Marlborough Shipping Co. Ltd. by Mr. D. Reece, who was intimately associated with the management of the plaintiff company and with Reece Brothers and later with Reece and Co. Ltd. Mr. D. Reece was a director of the plaintiff company and also a director of the Oreti Shipping Co. Ltd. in which company the plaintiff held shares. His colleagues, however, on the directorate of the plaintiff company were content to leave all matters relating to the Oreti Shipping Co. Ltd. in his hands and to rely on him. They looked to him to keep them in touch with the conduct of affairs with the Oreti Shipping Co. Ltd. and he always assured them, so Mr. Allen said, that everything was all right. Advances were made in the same way as payments for what were necessaries for the ship. Necessaries supplied to a ship were *prima facie* presumed to be supplied on the credit of the ship and not solely on the personal credit of the owner, but the form in which accounts were rendered by an agent, who had supplied or paid for necessaries, to his principal, was evidence to rebut that *prima facie* presumption: **Foong Tai Co. v. Buchheister and Co.,** (1908) A.C. 458, 469. Advances for wages were only a part of the payments the plaintiff company regularly made. Although no actual advance for wages was made until the master notified the amount required, and although the master signed a receipt for the amount advanced, yet all the circumstances showed that the advance was really to the managing agents or the owner for whom the plaintiff was the agent. The heading "Oreti" in the accounts was a matter of bookkeeping practice and did not alter the

substantial nature of the arrangement, which was that the plaintiff was the Dunedin agent and made advances as required and, in case the freights received were not sufficient, looked to the managing agent or to the owner to be reimbursed, receiving for remuneration as such agent a percentage on freight and a two guinea fee in respect of each inward trip. The advances or payments sued for did not differ from advances and payments made every time the ship was in the local port, and even when the ship was not in the local port, except in this, that all previous advances or payments had on request been promptly reimbursed by the Oreti Shipping Co. Ltd. The proper inference to draw from the evidence, in His Honour's opinion, was that the master did not, in receiving the advance, incur a liability on account of the ship and that the plaintiff did not make the advance in reliance on the ship as the source of payment but made it in reliance on the managing agents or on the owner. As the indorsement of the plaintiff's writ stated, the advances were made to the master "for and on behalf of the Oreti Shipping Co. Ltd." The course of dealing between the parties, the actual accounts rendered and the accompanying correspondence and the admissions made in cross-examination showed, in His Honour's opinion, that the advances were properly to be taken to be made on the request of the Oreti Shipping Co. Ltd. or the managing agents under promise of reimbursement when the monthly statement was sent of any excess over and above the amount of freight received. The accounts produced showed continuous and substantial payments by the plaintiff for which it could not in any event claim a maritime lien. His Honour did not think that some of these payments were made in reliance on the managing agents or on the owner and that others were made in reliance, not on the managing agents or on the owner, but in reliance on the ship. What the plaintiff did was to institute the present action to recover the balance of a general account and then to abandon all items but certain particular and selected items and to claim a lien for them. His Honour found in fact that the payment for wages was not made in reliance upon the ship but in reliance on the managing agents or on the owner, and it consequently followed, as pointed out by all the Judges in **Clark v. Bowring**, 10 Ct. of Sess. (5th Ser.) 1168, that in such circumstances the plaintiff never acquired a maritime lien. The plaintiff had failed to establish its claim and there would be formal judgment against the plaintiff.

Solicitors for plaintiff: **Duncan and MacGregor**, Dunedin.

Solicitors for liquidator and mortgagee: **Aspinall and Sim**, Dunedin.

Rules and Regulations.

Dairy Industry Act, 1908: Amended regulations relating to the inspection and registration of Dairies.—Gazette, No. 9, 6th February, 1930.

Judicature Act, 1908: Amendment of Table of Sheriff's fees.—Gazette No. 9, 6th February, 1930.

Native Townships Act, 1910: Amended regulations regarding the disposal of lands acquired by the Crown.—Gazette No. 5, 30th January, 1930.

Compared with those of recent years, the new statute-book shows a marked decrease both in number of Acts and in size. The latter is due in part to the cessation of those bulky but useful measures of consolidation which have been a feature of the statute-book, from a lawyer's point of view, for the last four years, but which have come to an end with the death of the late Mr. E. Y. Redward, Compiler of Statutes, and the non-appointment of any successor to the post. One matter worthy of comment is the number of short titles that cannot in any sense be called short. Names like "The Local Authorities Empowering (Relief of Unemployment) Extension Act, 1929," "The Native Land Amendment and Native Land Claims Adjustment Act, 1929,"—both previous offenders,—"The Local Authorities Empowering (Aviation Encouragement) Act, 1929," and "The Law Practitioners Amendment (Solicitors' Fidelity Guarantee Fund) Act, 1929," will cause endless inconvenience in citation. They ignore the primary purpose of a short title, that of being a handy nickname.

The Onus of Proof.

A Divergence of Opinion in Two Recent Australian Cases.

By H. F. von Haast, M.A., LL.B.

The law as to the amount of proof required from him on whom the burden of proof rests is concisely stated thus in *Powell on Evidence*, 9th Edn. 163: "It is not necessary for him to prove his case up to the hilt. He need not give all the evidence which it is possible for him to procure. It is sufficient if he has made out a *prima facie* case. The burden of proof will then shift to the other party. And very little affirmative evidence will be sufficient where the facts lie almost entirely within the knowledge of the other side. But where the party on whom the onus lies of proving an allegation gives us evidence which is as consistent with one view of the case as with the other, he fails in his proof." Sir James Stephen in his *Digest of the Law of Evidence*, 9th Edn., 111, Art. 96, expresses the rule thus: "In considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively."

The principle is simple enough. It is in the application of it to any particular set of facts that the difficulty begins. Two recent Australian cases illustrate the divergence of opinion that can exist among experienced judges in applying the rule to the facts.

In *Houston v. Wittner's Proprietary Limited*, 41 C.L.R. 107, upon the hearing of an information against the defendant for selling milk which did not comply with the required standard, the summons describing the defendant as Wittner's Proprietary Ltd. of Belmore Road, Balwyn, the informant gave evidence that on the date in question he saw in the street a milk cart with the name Wittner's Pty. Ltd. and the address Belmore Rd., Balwyn thereon; that he spoke to the driver of the cart and purchased some milk from him and that such milk was adulterated. The defendant appeared to the summons but offered no evidence. It was held by four of the Judges of the High Court of Australia that the evidence was insufficient to establish even *prima facie*, that the milk-cart was the cart of the defendant or was used in its business or that there was any relationship between the driver of the cart and the defendant, and that, therefore, the information should have been dismissed. This majority held that the evidence was consistent with different conclusions and if anyone were to suffer from deficiency in evidence at the trial it must be the person on whom the burden of proof lay.

Isaacs, J., however, in a long and ably reasoned judgment in the course of which he examined the authorities from *Joyce v. Capel and Slaughter*, 8 C. & P. 370, to *Timaru Borough v. Squire*, (1919) N.Z.L.R. 151, came to the opposite conclusion. He held that the case raised a distinct question of law, whether in the proved and uncontroverted circumstances, the tribunal of fact—i.e., the Justices in Petty Sessions—were lawfully entitled to draw the inferences they drew as to (1) the ownership of the milk-cart and (2) the employment of the driver. The Court had to say whether the evidence

fell short of the required standard of law and that standard must be capable of expression. The test, in his view, was whether the evidence was sufficient to enable the magistrates as a jury, that is as fair and reasonable men with a knowledge of the common events of business and of life generally, and guided by their experience as citizens, in *the absence of any contradiction or explanation by the defendant showing some exceptional circumstance*, to draw the inference that the defendant was the owner of the milk-cart and that Bambury was its driver and in charge of the cart and the milk. He had not the least doubt on the matter.

Among other matters that weighed with Isaacs, J., were the facts that the offence was one of those which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty, that Courts, like individuals, act upon a balance of probabilities and that there was a balance of probability that the milk-cart belonged to the company and that the driver was in its employ, that the defendant was a limited company and that there could not be two limited companies with an identical name, and that the Police Offences Act made it an offence to drive a cart in a public place without having the name and residence of the owner painted in a legible manner on the cart; and that if the milk-cart belonging to the defendant company was openly used and controlled by a man apparently as the employee of somebody and as selling milk from the cart in the usual way of such business, that should, if unexplained, be *prima facie* evidence that the person is in the defendant's employ.

A study of the case will, I think, impress the reader with the soundness of the conclusions of the dissenting Judge.

Morgan v. Babcock and Wilcox Ltd., (1929) Argus L.R. 313, was a case in which the High Court of Australia reversed the decision of the Supreme Court of New South Wales, (1929) N.S.W. S.R. 256, and confirmed the conviction of the respondent company. The respondent company, an English company registered and carrying on business in New South Wales, was charged under the Secret Commissions Act, 1919, with having given Maling, an agent of the Municipal Council of Sydney, a bribe of £10,600 for having recommended his principal to accept the company's tender for plant. Maling, in 1926, told Arnot, the attorney and general manager of the company, that he would have to pay £10,000 if he wanted to secure a certain order and indicated that the money was to go to certain aldermen. Arnot replied that he would have to recommend his managing director or directors to pay the blackmail. The company's tender was accepted, and after the contract was signed Arnot told Maling that the latter would have to nominate somebody to receive payment, and that Arnot would pass the name on to Sir James Kemnal, his managing director in England, who no doubt would pay it. Maling arranged for the money to go to the account of Buckle, in the E.S. and A. Bank, Sydney, and told Arnot this and that he would want £600 more for expenses. Arnot wrote to Kemnal, giving reasons for the payment of the money, £10,600, and supplying him with the name of Buckle and his bank. He also stated that payment to Buckle would be sufficient discharge for the payment. The letter was in manuscript, marked "Confidential," and did not go through the company's files in Sydney. On 7th September, 1926, Buckle's account in the E.S. and A. Bank, Sydney, was credited with the sum of £10,600 on the authority of some document purporting to come from the bank's head office in London, and the money was passed on to Maling. The company was convicted and fined £1,000, and ordered to pay to the Municipal Council of Sydney the sum of £10,600.

The main arguments for the appellant on an application for prohibition were: (1) There was no evidence that an offence was committed in N.S.W. The case for the prosecution left open a hypothesis of innocence, viz., that the premium on the money passed from the company in England. (2) There was no proof of authority in the managing director to make this payment, and the company would not be liable for his act unless it were established that he was authorised to do the particular act complained of. For the respondent, the contentions were: (1) That the course of business was for all negotiations to be conducted through Sir James Kemnal and therefore a presumption was raised that the company authorised him to conduct private negotiations as in this case. (2) On an examination of all the proved facts there was found a concurrence of circumstances, all pointing one way and reasonably entitling the Magistrate to hold that a *prima facie* case had been established, and that the onus was upon the company to explain the circumstances which, standing unexplained, pointed to its guilt.

Ferguson, A.C.J.; and James, J., considered that the transaction could not be put higher than this: Maling asked the company to pay him £10,600, somebody thereupon paid him that sum, also it was possible that Kemnal not the company paid the money, it was consistent with the facts that even if the board paid the money they did so without any knowledge that it was not part of the ordinary legitimate expenses of the Sydney office. Halse Rogers, J., dissented on the grounds: (a) that there was an irresistible inference that the £10,600 came into Buckle's account through the instrumentality of Kemnal. (b) That the hypothesis that Kemnal paid his own money was fanciful, and not a possibility reasonably to be inferred from the facts proved. (c) That the hypothesis that he paid the company's money without authority and deceived his fellow-directors as to the facts connected with the payment was a fanciful and remote conjecture. (d) That it was clearly open to the Magistrate to find that the money in accordance with the agreement between Arnot and Maling was paid by the company to Maling in N.S.W. and consequently the offence was committed in N.S.W.

In the High Court of Australia, (1929) Argus L.R. 313, Knox, C.J., Isaacs and Dixon, JJ., found no difficulty in reversing the decision of the Supreme Court. Starke, J., dissented: seeing that Sir James Kemnal was dead, that the payment to the credit of Buckle at the E.S. and A. Bank in Sydney was the only evidence in support of Arnot's story, and that it failed to identify the party paying the money, he considered that the impression left on his mind by the evidence was one of doubt and uncertainty and that it would be unsafe to convict anyone of gross dishonesty and corruption upon it.

The way in which the evidence appealed to Knox, C.J., and Dixon, J., was thus stated by them (p. 315): "The question involved largely depends upon the degree to which coincidence of events and circum-

stances warrant a belief in their causal connection. An examination of hypotheses logically consistent with proved facts is the received method of testing their sufficiency to establish the conclusion. In the end, however, the reasonableness or the probability of such hypotheses determines their admissibility, and when coincidence of fact and concurrence of time are relied upon the sufficiency of the circumstances must inevitably be judged by considering whether general human experience would be contradicted, if the proved facts were unaccompanied by the fact sought to be proved. In our opinion it would be so astonishing if the crediting of £10,600 to Buckle's account were not the result of Sir James Kemnal receiving the letter which counselled him to pay that sum to that account, that, in the absence of further evidence, it may be inferred that Kemnal caused the credit to be made." They found that in paying the bribe he acted in the course of his authority and that the arrangement that payment should be accomplished by crediting the money at the bank in Sydney was a completion and commission of the offence within the jurisdiction.

Isaacs, J., was of opinion that, estimating the evidence according to its own intrinsic force, there was not only sufficient, but in the absence of any explanation or exculpatory testimony on the part of the company most convincing, proof of the company's guilt. He quoted the observation of Lord Mansfield in *Blatch v. Archer*, 1 Cowp. 65: "All evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted," and continued: "Here the prosecution could not possibly have produced stronger evidence, but it was in the power of the defence to have repelled the inference that arises from the evidence as it stands. Consequently, since the affirmative evidence in the case raises, to say the least, a strong probability that it was the company that paid, or caused to be paid, the bribe demanded by Maling, the silence of the company and its failure to explain materially weakens any attempt to suggest in its favour possible hypotheses of innocence."

The Right to Lie.

We have recently had a somewhat lurid case from across the Channel of the "right to kill." Now we are treated to a novelty from that country of novelties, the United States of America—"the right to lie" in the witness-box. "A woman," said Judge Marcus Kavanaugh, of Chicago, "is entitled to lie if she thus protects her honour and her name." And at a later stage the same learned Judge laid down that "there are circumstances when a woman does not have to tell the truth," particularly "where a falsehood materially hurts nobody else." This is surely carrying the chivalrous instincts of man somewhat far. But perhaps we are doing the learned Judge an injustice. May there not be times when a man "is entitled to lie" if he thus protects his honour and his name? It may perhaps be hopeless to test the question in a country which has a Slander of Women Act without any equivalent statutory provision for men; but perhaps some unselfish male reader will benefit his kind by testing, within the jurisdiction of Judge Marcus Kavanaugh, whether that learned Judge's chivalrous instincts are or are not confined to women.

—*The Solicitors' Journal.*

A Retrospection.

By W. E. Leicester.

Recently, while glancing through the pages of Hocken's "Bibliography" in search for some material dealing with early criminal history in New Zealand, I found recorded in this arid legal desert a lecture delivered to the Otago Law Clerks' Association on the 6th December, 1871. Its author, James Macassey, is probably best known to the present generation of lawyers as the compiler of Macassey's "Reports" which cover the cases heard in the District of Otago and Southland and on appeal from there to the Court of Appeal during the years 1861–1872; but in that hectic period, when the glory of the gold-fields had not passed away, Dunedin was the headquarters of the most important judicial district of the Colony, and Macassey, although a young man, became, a short time after his admission, the leader of its Bar. Indeed, until the last few years, a lengthy residency in Dunedin seemed a condition precedent to election to the Bench, but Wellington as the winner of the last five tests must now be regarded as the holder of the judicial "ashes".

It may not be amiss, in dealing with this interesting pamphlet[1] to give a brief summary of the career of one whom Sir Frederick Chapman, in 1895, described as "the most distinguished lawyer we ever had"—an opinion that he was careful to add was not "merely fanciful." James Livingston Macassey was born at Carrickfergus, in the County of Antrim, Ireland, on the 24th day of September, 1841, and was placed through the influence of some friends in Christ's Hospital, known as the Blue Coat School, London, where, it will be remembered, Charles Lamb, Leigh Hunt, and Coleridge all received their early education. A mere boy, he went to Adelaide where he eventually became articled to Mr. Gwynne (later Mr. Justice Gwynne) and then went to Melbourne, his articles being transferred to Mr. J. W. Stephen (afterwards Mr. Justice Stephen). On his arrival in Otago during the gold-fields rush of 1862, he joined the firm of Messrs. Richmond & Gillies, both of whom took a seat on the Bench, and while employed there as a common-law clerk his marked ability so attracted the commendation of Mr. Justice Gresson that he resolved to commence in practice for himself, prompted in a measure, no doubt, by the unfortunate habit of his employers of forsaking him for the judiciary. Called to the Bar in 1865, his success was immediate and from that time until 1880, when he died in his thirty-ninth year, he was unexcelled in New Zealand as a "Banco" advocate and received Court of Appeal briefs from all parts of the Colony. On the criminal side his appearances were not so numerous, but he successfully defended two murderers from neither of whom would he accept any fee as he regarded money paid by a person on trial for his life as "blood-money." Such an attitude is in marked contrast to that taken up by the late Sir Edward Marshall Hall in his defence of George Joseph Smith, an addict to the practice of murdering his wives in the bath, whose publicity value was so great that certain newspapers contracted to find his counsel's fees if the accused assigned to them the copyright of his outpourings—

1. *A Lecture delivered to the Otago Law Clerks' Association* by James Macassey, Esq., in the Supreme Court House, Dunedin, 27 pp. Henry Wise, Dunedin, 1872.

an arrangement which suited the penurious Smith admirably but which, much to the disgust of Marshall Hall, the Home Secretary, (then Sir John Simon) vetoed as contrary to public policy.[2]

It is with Simon that Macassey would have sided, for both in the legal and the political arena he did not hesitate to advocate measures just and equitable in in his view but incomprehensible or obnoxious to the majority. He begins his lecture by dwelling upon the encouraging prospects of the law, its strong traditions and its inducements of influence and distinction for those who seek to enrol under its banners. Many of our most eminent lawyers, he points out, have been essentially self-made men. A hairdresser was the father of Lord St. Leonards regarded as the greatest real property lawyer of his time. Lord Tenterden was the son of a barber. Lord Cairns, a Chancellor of England and Attorney-General during Lord Derby's government, had an origin almost as humble as that of the present Prime Minister, Ramsay MacDonald. Another Attorney-General, Sir John Rolt, who became a Lord Justice of Appeal was entirely self-educated, being at one time an usher in the Prerogative Court during the presidency of Dr. Lushington. Sir Frederick Pollock, Chief Baron of the Court of Exchequer, was the son of a London saddler who, one may imagine, used his leather with admirable discretion in the upbringing of his children, for one of Sir Frederick's brothers, Sir David Pollock, became Chief Justice of Bombay, while another, Sir George Pollock, rose to be a Field-Marshal and Constable of the Tower.[3]

It is, however, with the union of the two branches of the profession that the lecturer mainly concerns himself, and seeing in this unity the prospect of a lengthy continuance he considers both its advantages and its drawbacks. He admits that the unity tends to elevate the standard of practising solicitors, since instead of running to a counsel for a consultation on every question of more than average importance, they have in a great measure to rely upon their own resources, the client in this way being the gainer in point of expense. On the other hand, he observes:—

> "While I am inclined to think that, upon the whole, the unity of the profession is beneficial in its operation upon those who have been trained, and who practice as solicitors, it is, I am convinced, prejudicial to the tone and influence of the Bar. To one who is engaged the best part of every day in the dull and dreary routine of a solicitor's office, the opportunity of adding to the already acquired store of knowledge (especially on the subjects of general importance) must be rare indeed. And the more one becomes immersed in the petty details of an extensive practice, the less competent he must feel himself daily becoming to grasp in a large and comprehensive manner, with the important questions which occasionally call for adjudication in a court of justice."

He then proceeds to remind the students of the duty which the members of the profession owe to each other and to the Court. The advocate who abuses the privilege which the law allows him by bullying witnesses, insulting jurors or engaging in personal rencontres with the Court or his brethren at the Bar is, in his opinion, a poor creature. Even then, almost sixty years ago, these methods were fast disappearing, and he deplored any endeavour to implant in our soil the traditions of the Old Bailey. At the same time, though he disapproved strongly of the sort of scenes that turn the Court into a bear garden and lower the tone of the profession, he commends the advocate who takes, when occasion demands, an unflinching stand on behalf of his client, and instances Erskine's attitude to Mr. Justice Buller in the Dean of St. Asaph's case. The incident is too long to quote, but anyone interested to read it will find the record in Campbell's "Lives of the Chancellors," Volume 8, page 277. Curran was another advocate who refused to accept insult with meekness:—

> "Curran (to Judge Robinson): 'I do not find the law so stated in any book in my library.'
>
> "Judge Robinson: 'Your law library, I suspect, is rather contracted.'
>
> "Curran: 'My books may be few but the title pages give me the writers' names; my shelf is not disgraced by any of such rank absurdity that their very authors are ashamed to own them.'
>
> "Judge Robinson: 'If you say another word I'll commit you.'
>
> "Curran: 'Then, my lord, it will be the best thing you have committed.'"[4]

The Judge refers to Curran's poverty which was well known, as were Robinson's political pamphlets for their extreme scurrility.

Yet the scene that appears to me the most remarkable of any was that which took place between John Clerk, then appearing in the Justiciary Court as counsel for the ill-famed Deacon Brodie, and the Justice-Clerk, Lord Braxfield. The latter, quite properly, admitted the evidence of the informers, whereupon Clerk in his address to the jury maintained that such testimony should not have been received as the jury were themselves the judges of the admissibility as well as the credibility of witnesses. When Braxfield declared this to be nonsense, Clerk refused to continue his speech and sulkily sat down; but as His Lordship began to charge the jury, Clerk jumped up, shook his fist at the Judge and said, "Hang my client if ye daur, my Lord, without hearing me in his defence!" After the Justice-Clerk had consulted with his brother judges and intimated that counsel might "gang on" with his address, the incident closed;[5] and it is upon the forbearance shown by Braxfield in this instance that his supporters rely in their endeavours to show that his nickname of the Scotch "Jeffreys" was unjustified. Certainly, as we have seen, judges may be tried as well as trying, but the real solution may be found in the adoption of the words of Mr. Justice Coleridge in his farewell address to the Bar:—

> "We can well afford to bear with broad pleasantries, but we cannot afford that our professional standard of honour should be questioned, or that it should be said that we would do as advocates in Court what, as gentlemen, we should scorn to do."

2. *The Life of Sir Edward Marshall Hall* by Edward Marjoribanks, M.P. Victor Gollancz Ltd., London, 1929.

3. *Lord Chief Baron Pollock, a Memoir*, by Lord Hanworth. Murray, 1929.

4. O'Flanaghan's "*Lives of the Irish Chancellors*," Volume II, 149.

5. *With Braxfield on the Bench* by William Roughead. 1918 Juridical Review 16.

Administrative Law.

Views of President of Liverpool Law Society.

The subject of administrative law is at present, and has been now for some time, attracting the earnest attention of lawyers in all parts of the British Empire; the question is without doubt one of the most important of the day so far as concerns the profession of the law. The President of the Liverpool Law Society (Mr. A. E. Chevalier), at the recent annual meeting of that body, devoted the greater part of his presidential address to a consideration of the whole subject, and we reprint his observations below.

"I now turn for a brief space to a somewhat kindred subject which looms large to-day, by reason of the strong views expressed upon it, both in their speeches at important functions and in publications, by such distinguished men as Lord Hewart and Lord Sankey, and by the late Dr. F. J. Port, a Doctor of Laws of, and who, I believe, held the responsible office of Superintendent of Examinations in, the University of, London in his recent book entitled "Administrative Law." I refer to what was aptly described, in a paper read at the recent Provincial Meeting of the Law Society of Bournemouth, as "The Rise of Bureaucracy or the growing interference of the Government Official with the liberty of the subject," and has been even more tersely defined by the Lord Chief Justice in his book just published, as "The New Despotism."

The system objected to has also been briefly, yet accurately, described as the gradual and progressive transfer of an extensive jurisdiction in matters intimately affecting the rights of the private citizen from the courts of law to the officials of executive government departments. We must all admit, even if reluctantly; that sections of Acts of Parliament are often expressed in very involved language, difficult to construe and, not infrequently, requiring the assistance of the courts to elucidate their exact meaning. The responsibility for much of this obscurity must I think, be placed on the members of both Houses of Parliament. In the course of discussion on a Bill, amendments, or, more correctly speaking, revisions, in particular clauses are frequently made, sometimes without proper regard to other provisions in the Bill, with the result that clauses become twisted and distorted from the clear meaning which the parliamentary draftsman had been originally instructed to convey and in which, at the outset, he had been successful. But Lord Hewart goes further and expresses, as his considered opinion, the view that, on occasions, the ambiguity in drafting would appear to be not wholly unintentional and may sometimes come from a fixed and settled determination not to set out the matter clearly and completely, for—to use his own words—'to be intelligible is to be found out and to be found out is to be defeated.' In Lord Hewart's view, the aim of the departmental official, on occasions, is to induce Parliament to provide the mere skeleton of the project and to leave the official to clothe it and give it his own outlook, with power to instil into it obedience to his decisions and to shut out any sort of appeal to the regular courts of law. In a Foreword by the present Lord Chancellor (then Lord Justice Sankey) to Dr. Port's interesting book, which deals exhaustively with the history of such procedure from mediæval times, the Lord Justice expresses the view that the time is now ripe for considering to what extent, if at all, the system should be continued and under what procedure. He very fairly, however, points out what we all know, namely, that many of the questions and situations which arise under Acts of Parliament, relative to our present-day affairs, are of a purely administrative character, and he specially instances those which are concerned with unemployment and sickness insurance. Instances which will also readily come to mind, amongst numerous others, are matters under the control of the Board of Education, the Ministry of Health, the Ministry of Labour, the Electricity Commissioners, the Insurance Commissioners, the Income Tax Commissioners, the Controller General of Patents and Designs, the Superintendent of the Board of Trade and even the General Medical Council. These administrative bodies or persons all exercise certain judicial functions with, in some cases, little or no legal or judicial training. Dr. Port discusses in his book the relation of administrative bodies to judicial power and compares the English method of what was until recently, uncontrolled law, with administrative controlled law in America, established by the imposition of certain constitutional standards, without provision for any Crown prerogative, but with the opportunity, though not the necessity, of securing a proper hearing, the chance to be present during the taking of evidence, and the right to know of what the evidence of the other party consists and to offer refuting evidence. He also deals very fully with the corresponding French Droit Administratif, consisting, to-day, of a uniform system of administrative tribunals coupled—in bygone days, though not, of course, to-day—with a very powerful Crown prerogative. There appears to be no satisfactory equivalent in English for the expression 'Droit Administratif,' but its principal object is very largely the protection of the citizen against the encroachment of the authorities. It is, moreover, a regular system of law, applicable to all disputes between the Government or its servants on the one hand and private citizens on the other hand.

In the course of a review of Lord Hewart's book, *The Times* remarks in this connexion: 'Attempts have been made to compare the arbitrary power of the departmental official with the administrative law of France and with other Continental systems, but they break down at every turn. These systems are indeed incompatible with what we, in this country, have for centuries regarded as fundamental principles of liberty and justice. But they are at least systems of law with established courts, regulations and precedents and they are administered by trained lawyers who state and record the reasons for their decisions. The practice of some of our British departments under their statutory power is no rule at all.' In a leading article, in the same issue, the editor reminds us that, at the Lord Mayor of London's banquet to the Judges in July last, the Lord Chancellor drew attention in very pointed fashion to the 'growing tendency to transfer decisions on points of law or fact from the Law Courts to the Minister of some Government department,' and to the general agreement both within and without the profession that it is a matter which requires further and careful investigation.

The writer of the paper read at Bournemouth averred that to such an extent had the custom of 'Legislation by Department' grown that, in 1920, eighty-two Acts

of Parliament were passed, and no less than 2,473 Statutory Rules and Orders were made and issued. In 1927, we are told, there were forty-three public Acts of Parliament and more than 1,400 of these Orders, Rules and Regulations registered in that year, while in the Rating and Valuation Act, 1925, s. 67 (1) the Minister is even given power to 'modify the provisions of this Act so far as may appear to him necessary or expedient'—truly a far-reaching provision which might easily become oppressive. George Bernard Shaw, in a serious vein, during one of his recent broadcastings, thus summed up rather neatly the point at issue. 'We cannot govern ourselves yet if we entrust the immense powers and revenues which are necessary to an effective modern government, to an absolute monarch or dictator he goes more or less mad, unless he is a quite extraordinary and therefore very seldom obtainable person. Besides, it is not a one-man job; it is too big for that. If we resort to a committee or parliament of superior persons they will set up an oligarchy and abuse their power for their own benefit. Our dilemma is that men in the lump cannot govern themselves and yet, as William Morris put it, no man is good enough to be another man's master. We need to be governed and yet control our governors.'

This many-sided and ever-increasing evil of Bureaucracy is no new invention. So far back as 1912, our then President, Mr. Robert Norris, referred to two subjects which, he said, were at that time causing anxiety, namely, first, the attempts by the executive to interfere with the judiciary, and, secondly, the increase of officialism. In the following year, we find his successor, Mr. Bromfield, reminding us of the same evils and pointing out the increasing seriousness of the practice, on the part of the Legislature, of empowering a Department of State or a specially constituted body or even a public official, to make and issue rules, having the force of statute, regulating, and even extending, the application of the Act to which the rules relate and to determine, without appeal or, in fact, without recourse to the courts, questions arising under a particular enactment. In his view, supported as it was at that time by the public utterances of the late Viscount Alverstone, the increase, even then, of the bureaucratic element in the government of this country, threatened to become so serious a menace to the liberty of the subject that it behoved all who were interested in the nation's welfare to take every means in their power to warn the public of the impending danger.

Lord Hewart thus describes the situation created through the decision of important points being left to some official in a particular department. He says: 'One of the parties is absent; there is no hearing; the decision is given by the opposite party; and there is no appeal,' and in suggesting remedies for what he regards as a deplorable and un-English state of things, he asks: 'Is it too much to hope, in the first place, that the worst of the offending sections in Acts of Parliament may be repealed or amended? And in the second place, is it not comparatively easy to prevent similar sections from being enacted in future? To this end, what is necessary is simply a particular state of public opinion and in order that that state of public opinion may be brought into existence what is requisite is simply a knowledge of the facts.' In this, as in other fields, 'prevention is better than cure.' It would be presumptuous on my part to appear to differ from the conclusions thus stated by the Lord Chief Justice. I feel, however, I must remind myself and you all that, although public opinion in this country may move very quickly on occasions, yet, generally speaking, it is difficult to arouse. Public support to what are regarded even as popular proposals is not easy to obtain and usually involves, as a preliminary measure, a thorough preparation of the ground. How much more difficult is it in the present case, when the ordinary citizen knows and hears so little of administrative law—and cares still less about it—to arouse in him or her any real enthusiasm for reform in such a matter!

It has been said that, in England, we have a legislature which is so powerful that it can 'do anything but make a woman a man and a man a woman,' but which, in practice, finds itself unable to perform half the work which falls within its own peculiar sphere' Consequently the real defence for the 'new despotism' is necessity. Modern legislation is so complex and intricate in many of its subjects that it would be impossible to deal with every small point of difficulty arising out of it except by some administrative system such as now obtains in practically every important government department. I venture, however, to urge that, in almost every such case, an appeal to an independent and, at the same time, a judicial body should not be denied, under proper safeguards, to any aggrieved person. The permanency of the administrative staff and its flexibility are its chief virtues as compared with a judicial tribunal which cannot possess the special knowledge acquired—often out of a long experience—by departmental administrators, many of whom may themselves be trained lawyers. But what should be aimed at, in my submission, is:—

(*a*) The reduction of the risk of administrative authorities being, as often now occurs, judges in their own cause.

(*b*) That questions of law, as distinct from those of fact, as well as questions of mixed law and fact be never left wholly, without appeal, in the discretion of an administrative authority.

(*c*) That every effort should be made to reduce to a mimimum the possibility of bureaucratic influence over administrative jurisdiction; and

(*d*) That all formal tribunals set up, under statute, for particular purposes should come under the supervision of the Lord Chancellor and not under that of the government department concerned.

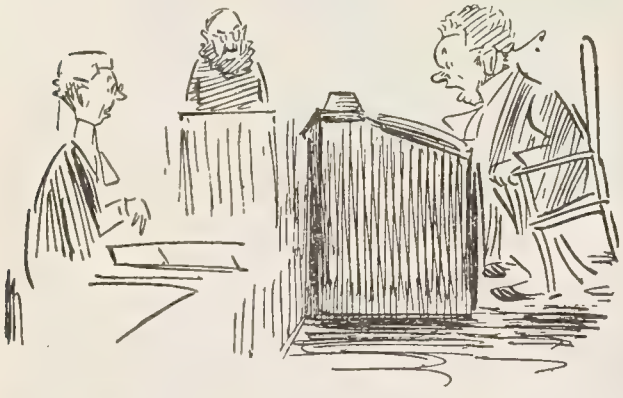
The legal newspapers have recently, and under the heading, in one of them, of 'Powers of the Bureaucracy' announced that the Lord Chancellor, after consultation with the Prime Minister and the Chancellor of the Exchequer has appointed a select committee under the chairmanship of the Earl of Donoughmore, K.P., and consisting of six Members of Parliament, two being women, several King's Counsel and other prominent men, including Sir Roger Gregory, the Vice-President of the Law Society, 'to consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (*a*) delegated legislation, and (*b*) judicial or quasi-judicial decisions; and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the law.'

May we venture to express the fervent hope that the deliberations of this committee will indeed result in all desirable or necessary safeguards being ultimately imposed by statute."

Forensic Fables.

THE BEGINNER WHO THOUGHT HE WOULD DO IT HIMSELF.

A Beginner, in the Temporary Absence of his Leader, Found himself Opposed to a Big Pot in the Commercial Court. Though Greatly Alarmed, the Beginner Bore himself Bravely. To his Surprise and Delight the Beginner Managed to Cross-Examine the Big Pot's Principal Witness with Such Effect that he Needed a Good Deal of Rehabilitation. Rising to Re-Examine, the Big Pot Airily Observed to the Principal Witness: "I suppose What You Meant by Your Last Answer was this," and Proceeded to Tell the Principal Witness



Quite Clearly what he Meant. When the Beginner made a Dignified Protest the Judge Smilingly Suggested that the Big Pot might Shape his Question rather Differently. The Next Day the Beginner was in a County Court. The Plaintiff (for whom the Beginner Appeared) having Made an Awkward Admission to his Learned Friend on the Other Side, the Beginner Thought he would Employ the Excellent Formula of the Big Pot. He Did so. The Scene that Followed Beggars Description. The County Court Judge in a Voice of Thunder Ordered the Beginner to Sit Down. He then Rebuked the Beginner for his Gross Misconduct and Discussed the Question whether he would Commit him for Contempt, or Merely Report him to the General Council of the Bar. Finally he Expressed the Hope that the Incident would be a Lesson to the Beginner and Directed that the Case should be re-Heard on a Later Date before a Fresh Jury.

MORAL: *Wait till You're a Big Pot.*

"It is our duty as members of the legal profession to watch the trend of modern legislation and to take steps to ensure that nothing shall be done to infringe the inalienable right of the citizens of this realm to have recourse to the Courts of justice."

—Mr. S. C. Davis, President of the Plymouth Law Society.

"To permit a law to be modified at discretion is to leave the community without law."

—Dr. Johnson.

The Bicycle in Law.

The motor-car or automobile, which in otherwise stagnant times has kept the Common Law Courts going on issues of fact in "running-down" cases, is from a purely legal point of view a thing of no importance as compared with the push bicycle in its early days. The rapidity and legal simplicity of the motor has not prevented legislation and litigation in plenty, with a full promise for 1930 of more and greater; but it has not and never will perplex the judicial and legal mind as the bicycle did for thirty years or more.

For example, in *Williams v. Ellis*, 5 Q.B.D., 175, Lush and Bowen, JJ., after much anxious thought, came to the conclusion that the words "every carriage of whatever description and for whatscever purpose which should be drawn or impelled or set or kept in motion by steam or any other power or agency than being drawn by any horse or horses or other beast or beasts of draft," were not wide enough to include a bicycle. Twenty years later that view was shaken by Bigham and Phillimore, JJ., in *Cannan v. Earl of Abingdon*, (1900) 2 Q.B. 66. They held that a bicycle was covered by the words "every coach, chariot, berlin, hearse, chaise, chair, calash, wagon, wain, dray, cart, car or other carriage whatsoever." In Phillimore's view, a "carriage" was "any mechanical contrivance which carries people or weights over the ground, carrying the weights or taking people off their own feet, so that the foot of man and the body and trunk of man do not support his own weight or the weight of the burden carried."

Three years later Halsbury, L.C., blew out the candle so lit by Phillimore, J., and contributed his own light to the legal darkness surrounding the revolutionary machine. In *Simpson v. Spaldon Bridge Co.* he disapproved of Phillimore's analytical method, "analysing the different functions and objects of each machine." A bicycle, he declared, was not "a carriage hung on springs. . . . The true principle was to ascertain what would, in any ordinary intendment be considered to be a carriage as contemplated by the Legislature." But obviously, there might be difficulty in the "ordinary intendment" theory where the Legislature never dreamt of such a thing. Moreover, the House of Lords, by the mouth of the same Lord Halsbury, had earlier, in *Plymouth, etc., Tramways Company v. General Tolls Company*, 14 T.L.R. 531, laid down a somewhat different canon of interpretation: "The first thing, looking at the statute itself, one has to do is to see whether there is any word in the list which would within its generality include the vehicle under debate." Vaughan Williams, L.J., once found himself faced with the difficulty of selecting which of the two canons he should adopt. He had to assume that the House of Lords could not err, and that both canons of construction were consistent, each with each, and binding upon him. He solved the problem by holding that while the facts before him most closely resembled those in the *Plymouth* case, he preferred the judgment of the Lord Chancellor in *Simpson's* case.

"Outlaw," in the "*Law Journal.*"

"It is a common delusion that when the opinion of counsel is taken he encourages litigation."

—Lord Haldane.

Bench and Bar.

At a special meeting of the Executive Council held on the 8th inst., His Honour the Chief Justice was sworn in as Administrator of the Government by His Honour Mr. Justice Reed.

Mr. D. G. A. Cooper has resigned from the office of Chairman of the War Pensions Board. His successor is Mr. T. E. Y. Seddon, of the firm of Hannan and Seddon, Greymouth.

Messrs. Callan and Galloway, Dunedin, have admitted into partnership Mr. G. M. Lloyd, LL.B.

Crown Departments and Crown Proceedings.

The Lord Chancellor holds the views apparently of the profession both in England and here on the subject of the powers of Government Departments as well as on the vexed question of Crown proceedings. A possibility of reforms being made in England in both directions is indicated in his Guildhall speech. "My Lord Mayor," he said, "the anxiety which has been felt both inside and outside the profession on the subject of what has been described as 'a growing tendency to transfer decisions on points of law or fact from the Law Courts to the Minister of some Government Department' is certainly on the increase. It is cause for congratulation that attention has recently been drawn to it, and I hope that the Committee set up last week to consider the subject will find for us some solution of a really pressing public problem. Another matter which engaged the attention of a strong Committee appointed by my predecessor, Lord Cave, is the question of civil proceedings in which the Crown is a party. That Committee has framed a draft Bill which has been before the various departments. It is in an advanced state of preparation, and I hope that it will be introduced in the House of Lords in the very near future."

Reserved Defences.

Views of Mr. Justice Rowlatt.

An *obiter dictum* by Mr. Justice Rowlatt in the *Goddard* action should be noted by all who practise advocacy in criminal Courts :—

"There is nothing better for an innocent man—and this is seldom appreciated by an innocent man—than for him to give at the very first moment a full explanation of everything that can possibly be said against him. It is considered to be more clever by innocent people to reserve their defences. On the other hand, not saying anything at the time is not affirmative evidence against a man. I do not believe in reserved defences."

Legal Literature.

Butterworth's Annotations of New Zealand Statutes Supplement, 1929.

(pp. 449 : Butterworth & Co. (Aus.) Ltd.)

With commendable but necessary promptitude the first annual *Supplement* to *Butterworth's Annotations of New Zealand Statutes*, a work which, in the opinion of this reviewer, takes pride of place among our New Zealand legal publications to date, has appeared ; it is in every way a credit to the parent work. So far as concerns Volume I, the annotations of cases, the *Supplement* proceeds along the same lines as the now well-understood Supplements to *Halsbury's Laws of England*. It contains all the cases in which provisions of our Statutes have been considered by the Courts since the issue of the 1841-1928 volume, up to and including the December number of the New Zealand Law Reports and Part XXV of the Gazette Law Reports for last year. A new feature introduced in the *Supplement* is the inclusion after each annotation of a brief note indicative of the general nature of the decision. This is a good plan and one facilitating research, and the publishers, we understand, intend adopting it throughout when Volume I comes to be reprinted. Another innovation which should be of assistance to those who practise in the Magistrates' Court, is the inclusion of references to cases decided in that Court : printed in smaller type, they are readily distinguishable from the decisions of the higher Courts. Turning over to that part of the *Supplement* which deals with Volume II—Tables III and IV and V of the main volume remain unaffected by the year's legislation, and there is very little supplementary matter that has required to be added to Tables I and II. The portion of the *Supplement* dealing with Table VI contains an alphabetical table to the local and personal Statutes for 1929, and shows all amendments, etc., of the local and personal Acts from 1847 to 1928 arising out of last year's legislation. Table VII of the main volume is entirely superseded by Table VII of the *Supplement*, and we have here a complete alphabetical table of the Dominion's public Acts from 1841 to 1929 showing as well how each Act has been affected by subsequent legislation. This table will be brought up-to-date and entirely reprinted each year. Similarly Table VIII of the main volume is entirely superseded by the corresponding portion of the *Supplement*, giving a complete chronological table of our legislation from 1841-1929, and a complete and detailed annotation of all amendments, etc., and of all rules made under the provisions of the Statutes. This table again will be entirely reprinted each year. As can readily be done when a work is kept up to date by periodic supplements the opportunity has been taken of correcting a few typographical and other errors in the main volume, thus ensuring an otherwise unattainable standard of accuracy. Perhaps it is advisable to add, though the fact seems to be generally understood, that each annual supplement will supersede its predecessor ; it will be at no time necessary to consult more than the latest of the supplements.

Requiring only the mimimum of labour, the practitioner now has an absolutely accurate and up-to-date guide through the maze of our statute law and of its judicial interpretation.

Changes in Company Law.

By P. J. Sykes, M.A.
(pp. xiv; 128: Butterworth & Co. (Publishers) Ltd.)

The Companies Act, 1929 (Eng.) is a consolidation of all the English statutes dealing with companies including, of course, the very important amending Act of 1928. We, in New Zealand, are not, at present at all events, concerned much with the changes in the law recently made in England for no corresponding alterations have yet been made here. Nevertheless a work indicating concisely and plainly the value of these alterations is of considerable assistance to the Dominion practitioner, particularly when he is considering the application to the New Zealand law of the English decisions under the Act of 1929. For this purpose this reviewer can confidently recommend Mr. Syke's book. The work sets out, in alphabetical order of subject-matter, all the alterations: the amendments on any particular point are thus accessible literally at a glance. Added to the work are some comparative tables of the sections of the various Acts which should be found a useful guide by anyone engaged in a detailed research. For its purpose the work is in every respect an ideal one.

New Books and Publications.

The Law Relating to Contract of Sale of Goods. Six Lectures by W. Willis. Third Edition. Edited by W. E. Hibbert. (Sweet & Maxwell Ltd.). Price 12s.

A Digest of the Law of Partnership. Twelfth Edition. By Rt. Hon. Sir Frederick Pollock, Bart, K.C., D.C.L. (Stevens & Sons Ltd.). Price 18s.

Palmer's Shareholders, Directors and Voluntary Liquidators' Legal Companion. By A. F. Topham and A. M. H. Topham. (Stevens & Sons Ltd.). Price 5s.

Where to Look for Your Law. Fourth Edition. (Stevens & Sons Ltd.). Price 1s. 6d.

Essays and Excursions in Law. By F. A. A. Russell. (Sweet & Maxwell Ltd.). Price 8s.

A First Book of Jurisprudence for Students in Common Law. By Rt. Hon. Sir Frederick Pollock, Bart. (MacMillan & Co. Ltd.). Price 9s.

The English Courts of Law and Their Constitution, Jurisdiction and Procedure. (Extracted from Odger's Common Law). (Sweet & Maxwell Ltd.). Price 4s. 6d.

Laws of Ceylon. By The Hon. Mr. K. Balasingham. Volume I, Law of Persons. (To be completed in five volumes). (Sweet & Maxwell Ltd.). Price 37s.

The Dominions and Diplomacy. The Canadian Constitution. (Two volumes). By A. Gordon Dewey. (Longmans Green). Price 50s.

The Economic Development of India. By Vera Austey. (Longmans Green). Price 29s.

The Bloody Assizes (Notable British Trials). Edited by J. G. Muddiman. (Butterworth & Co. (Aus.) Ltd.) Price 9s.

Sheriffs' Fees.

Amendment of Provisions as to Poundage.

His Honour the Chief Justice, in exercise of his powers under S. 40 of the Judicature Act, 1908, has revoked the existing provisions as to poundage to be paid and taken by Sheriffs, and substituted the provisions following.—N.Z. Gazette, 1930, p. 357. The new provisions came into force on February 1st.

Poundage on Writs of Execution other than Writs of Possession.

On the sum levied or for which the body shall be taken in execution:— s. d.

	s.	d.
For every 20s. of such sum up to and including £200 ..	1	0
For every 20s. over and above £200	0	6

In the case of execution against goods, land, or estate, the poundage is to be calculated on the gross proceeds of the execution, but not exceeding the amount to be levied under the writ, together with all fees and expenses in connection with or incidental to the issue and execution of such writ. Where the property is subject to mortgage or other security the value of such security shall not be included in computing the gross proceeds aforesaid.

Poundage on Writs of Possession.

On delivery of goods and chattels:—	s.	d.
For every 20s. of the total market value thereof up to and including £200	1	0
For every 20s. over and above £200	0	6
On delivery of land:—		
For every 20s. of the capital value thereof as determined by the Government valuation, less the amount owing in respect thereof under any registered mortgage thereon, up to and including £200	1	0
For every 20s. of the value as so ascertained over and above £200	0	6

Provided that the total poundage on delivery of land shall not be less than £10 nor more than £25 in respect of any one writ.

Provided, further, that where under a writ of possession, possession of land is given to a mortgagee thereof or to an immediate purchaser from such mortgagee, the poundage shall be £10 in respect of any one writ.

Rating and Valuation (Apportionment) Act, 1928 (Eng.)

At the recent Provincial Meeting of the English Law Society, the President, Mr. W. H. Foster, dealt in the course of his address with the recent English legislation dealing with local government and rating, and he quoted the following lines, written, he said, by some unknown humourist after a meeting of an assessment committee sitting to deal with objections under the Act of 1928:—

"O hear the sad, sad story of a man pursued by Nemesis.
For trying to reduce the rates upon his business premises.
He read the Act of '25, that famous Valuation Act
(Which now he WILL refer to as 'The Lawyers' Sustentation Act'),
And then the Act of '28, called 'Rating and Apportionment'
(Which now he calls the 'Statute of Additional Extortionment'),
And duly made objection, with his Counsel and Solicitors,
The Committee of Assessment sitting round like Grand Inquisition;
Heard Counsel each submitting to the other side, 'with deference,'
That this or that contention was entitled to the preference;
It appeared of vast importance if his factory was 'contiguous'
(A point on which it seems the Act is just a bit ambiguous).
They argued that its user was not primal but 'ancillary,'
And they asked him lots of questions (which he said was like the pillory).
Unfortunately in the end his careful schemes all went awry,
And now he uses language which is quite unparliamentary;
Calls the Valuation Acts a blanky swindle (—it's been said before—)
For now his rates are just exactly double what he paid before."

VANDERBILT LAW SCHOOL
APR 17 1968
LIBRARY

3 0081 012 877 928

VANDERBILT LAW SCHOOL
APR 17 1968
LIBRARY

Per.
New Zealand Law Journal
Vol. 5, 1929-30

3 0081 012 877 928